

FINDINGS AND DECISION
in a
PRELIMINARY OBJECTION
raised by the Employer
in a grievance dispute
between

UNITED STEELWORKERS OF AMERICA, LOCAL 9508
(hereinafter called the "Union")
and

VALE NEWFOUNDLAND & LABRADOR Ltd.
(hereinafter called the "Company")

Grievors: Mr. Sandy Earle, Mr. Herman McLean

For the Union:

Presenter Mr. Boyd Bussey, Staff Representative
Advisor/Witness Mr. Darren Cove, President, Local 9508

For the Employer:

Presenter Mr. Denis Mahoney
Advisor: Ms. Jackie Lamonthe, Manager Human Resources
Arbitrator: Mr. John A. Scott

The statements of grievance #s 02-26-11-02 & 02-26-11-01 are identical, and read: Grievor contends that discipline was unjust and of a harassing nature.

Settlements requested read: Harassment cease and record be made clean and whole.

Agreement Violation reads: Article 3, Article 4RTW Protocol and any other Article that may apply.

The hearing was held at Happy Valley - Goose Bay on September 29, 2011.

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had 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;
- 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 was an objection raised by the Employer as to arbitrability;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within ninety (90) calendar days they will be referred to the Arbitrator for resolution;
- the Arbitrator will remain seised of the matter for period of ninety (90) calendar days after its publication should issues of interpretation of the Award arise;
- witnesses would be excluded until their testimony was heard.

ITEMS TAKEN INTO EVIDENCE:

- Exhibit #1 Collective Agreement between the Parties expiring January 31, 2016
- Consent #1 Memorandum of Agreement between the Parties
 - " #2 Grievance of Mr. Sandy Earle
 - " #3 Grievance of Mr. Herman McLean
 - " #4 March 3, 2011 Letter: Ms. Lamothe to Mr. Cove
 - " #5 September 17, 2009 Letter of Suspension to Mr. Earle
 - " #6 September 17, 2009 Letter of Suspension to Mr. McLean
 - " #7 March 14, 2011 email exchange: Ms. Lamothe & Mr. Cove
- DC #1 February 26, 2011 email: Mr. Cove to Mr. Pittman

COLLECTIVE AGREEMENT ARTICLES DIRECTLY CONSIDERED

Article 3 - No Discrimination or Harassment

- 3.01 Both the Employer, employees and the Union agree to be bound by the Newfoundland and Labrador Human Rights Code, which protects against discrimination on such prohibited grounds as age, race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, physical disability or mental disability.
- 3.02 There shall be no discrimination by the Company or the Union or its members against any employee because of membership or non-membership in any lawful union, or because the employee has exercised or failed to exercise any right specifically provided under this Agreement.

Article 4 - Management Rights

4.01 The Union agrees that the Company has the full and exclusive right and power to operate and manage its business and direct the working forces, which includes, but is not limited to the right to maintain order, discipline and performance; hire, promote, transfer, demote, assign, determine qualifications and competencies; issue, enforce, change policies and standards; determine the number of employees to perform the work, decide methods, processes and means of operation; and determine work schedules, hours, and work assignments, except as specifically abridged or modified by the express provisions of this Agreement. The Company agrees that any exercise of its rights and powers in conflict with any of the provisions of this Agreement are subject to the provisions of the grievance procedure.

Article 6 - Discipline and Discharge

6.03 Any written warning, suspension or discharge given to any employee shall be given in writing, in duplicate, within seven (7) working days (being the working days of the employee in question) of it being determined by the Company that there has been an infraction warranting discipline. A copy will be forwarded thereafter to the Union.

Article 7 - Grievance Procedure

- 7.01 Any matter relating to or involving the interpretation, application, or administration of any provision of this Collective Agreement, or a violation or alleged violation of this Agreement, may be the subject of a grievance.
- 7.03 The employee shall discuss with his/her on site supervisor the nature and subject matter of the complaint within six (6) days of the occurrence of the event giving rise to the complaint, with a shop steward if requested by the employee. The supervisor shall give a decision within four (4) days of the matter being raised.
- 7.08 The Union shall have the right to initiate a policy or grievance of a general nature; a grievance may also be filed by the Company. Such grievances shall be filed at the General Manager's level (Local Union President in the case of a Company grievance) and all provisions of the Grievance and Arbitration Procedures shall apply to such grievances.

Article 8 - Arbitration

- 8.01 When either Party to this Agreement requests that a grievance be submitted for Arbitration, it shall make such request in writing addressed to the other Party to this Agreement.
- 8.02 All correspondence between the parties with respect to grievances and arbitration shall be delivered in person, by mail or facsimile, and/or to an agreed upon designated email address.

- 8.03 The arbitrator shall endeavour to commence hearing the grievance within thirty (30) calendar days of his appointment and shall endeavour to issue the award within thirty (30) calendar days of hearing completion.
- 8.04 The decision of the arbitrator on the matter at issue shall be final, binding and enforceable on both Parties.
- 8.05 The arbitrator shall not have the power to change this Agreement or to alter, modify or amend any of its provisions in any respect or make any decision inconsistent with this Agreement.

Article 29 - Complete Agreement

- 29.01 This Agreement is the complete and entire agreement between the Parties and supersedes or replaces any past practices contrary to the terms of this Agreement.
- 29.02 Wherever the masculine gender appears in this Agreement, it shall also mean the feminine gender, unless the context requires otherwise.

Article 30 - Duration

- 30.01 This agreement shall be effective from date of ratification and remain in force until January 31, 2016.

OPENING STATEMENTS – THE PRELIMINARY OBJECTION FOR THE EMPLOYER, Mr. Mahoney described the Employer’s preliminary objection on the arbitrability of these matters. In the Employer’s view, the matter is set out in Ms. Lamothe’s March 3, 2011 letter to Mr. Cove (Consent #4):

Mr. Darren Cove
USW President Local 9508
RE: USW Grievance Reports 02-26-11-01 (H. McLean) and 02-26-11-02 (S. Earle)

Darren,
Via an email that you sent to Larry Pittman on Saturday, February 26th, 2011, I have received the above noted Grievance Reports pertaining to suspensions issued to Herman MacLean and Sandy Earle on September 17th, 2009.

The incidents and subsequent disciplinary actions involving Herman MacLean and Sandy Earle occurred during the strike by USW Local 9508. There was no collective agreement in effect at that time. Because these matters occurred absent a collective agreement, there is no ability for the employees to grieve via formal grievance process

outlined in the new Collective Agreement ratified January 31st, 2011. These matters are outside the jurisdiction of an arbitrator.

The Grievance Reports also refer to Article 3 and Article 4 of the Return to Work Protocol. The Return to Work Agreement does not form part of the collective bargaining agreement, therefore disputes associated with the RTWA are not subject to the grievance process.

Should USW Local 9508 decide to proceed with these two separate matters to arbitration, VNL intends to raise a preliminary objection regarding the arbitrability of these grievances.

Regards,
Jackie Lamothe
Manager, Human Resources
Vale Newfoundland and Labrador

Mr. Mahoney described the background to events giving rise to this letter. There was a strike ongoing at the time of the suspensions on September 17, 2009. There was no Collective Agreement in effect at that time, in view of the strike. On January 31, 2011 the employees returned to work under a new, non-retroactive, Collective Agreement. Article 30.01 of the Memorandum of Settlement (Consent #1) makes this clear. It says:

"This Agreement shall be effective from date of ratification and remain in force to January 31, 2016."

There is no recourse to any collective agreement available to the employees, and no grievance and arbitration procedure possible, over disciplines imposed during the period in question.

Further, the Union and the employees have now returned to work under Return to Work Agreement. That agreement does not form part of the new Collective Agreement. Therefore there is no right to grieve a violation of that return to work protocol.

Thus, there are no grounds on which an arbitrator might properly be seized of these matters.

FOR THE UNION, Mr. Bussey pointed to the second paragraph of Ms. Lamothe's letter to Mr. Cove (Consent #4) and noted that the "incidents" to which she refers were assumptions based on allegations brought by a third party.

These grievances were re-issued during the term of the current Collective Agreement and are subject to the Union's filing them on February 26, 2011.

During the bargaining, as noted in the Memorandum of Settlement (Consent #1), all outstanding issues were settled between the Company and the Union. The Union negotiated the Memorandum of Settlement in good faith. Mr. Bussey drew the Arbitrator's attention to the fourth "whereas" (p. 1 of the Return to Work Agreement, p. 27 of the Memorandum of Settlement Consent #1), which reads:

AND WHEREAS the Company and the Union wish to agree to a procedure for the orderly return to work of returning employees and the resolution of all issues between the Company and the Union related to the strike and its conclusion;

The Union indicated it would lead evidence to show that the Employer had raised no discussion of these outstanding issues. Mr. Bussey pointed out that S. 12 of the Return to Work Agreement (Consent #1, p. 31) reads as follows:

The Union agrees that it, its officers, executives and members shall not condone or engage in any intimidation, reprisal, threats, violence or differential treatment of any kind against any person who performed work for or on behalf of Vale, contractor or other third party in relation to the Voisey's Bay site during the strike or any employee or contractor who returned to work during the strike.

He also noted Section 13, which reads:

The Company agrees that it, its officers, supervisors and agents shall not condone or engage in any intimidation, reprisals, threats, violence

or differential treatment against any Union representative or employee because of the employee's participation in the strike.

And Section 14, which reads:

It is understood that the application of clause 12 and 13 of this Return to Work Memorandum will apply for the duration of the New Collective Bargaining Agreement.

In the Union's view, the return to work protocol clearly led into the new Collective Agreement. After the strike there was no mention of these disciplines being carried out. The Company broke that agreement and showed bad faith in carrying out these suspensions.

In the alternative, the Union will argue that the Conservation Officer is estopped from acting as it did because it failed to bring this up at the table.

THE HEARING

The Employer chose to proceed by way of argument. The Union led evidence.

EVIDENCE

The only Union Witness was Mr. Darren Cove, the President of Local 9508, employed by Vale Newfoundland and Labrador as a Warehouse Technician since April, 2005. He participated in the bargaining process, and is familiar with the Memorandum of Settlement (Consent #1). "The first part is the changes for the present Collective Agreement to be incorporated into it." He confirmed that Appendix "C" is expressly excluded from the new Collective Agreement by Section 5 on p. 2 of the Memorandum which reads:

The Company will deliver to the Union at the time of execution of the Collective Bargaining Agreement the Letters annexed hereto as "Appendix C" which do not form part of the Collective Bargaining Agreement.

He also testified that Appendix "B", which deals with the Retirement Savings Program actually "will be amended to incorporate the changes" and that Appendix "D", the "Return to Work Agreement" is also treated differently from Appendix "C", as is made clear by Section 6 on p. 2 of the Memorandum, which reads:

The parties agree to abide by the terms of the Return to Work Agreement annexed hereto as "Appendix D".

Asked to explain his understanding of what was meant by "all issues" in the 4th "Whereas" introducing the Return to Work Agreement, Mr. Cove said:

This was agreed by both Parties. We wanted to leave "all issues" behind us, and develop a process to return all workers to the work site.

Asked if there had been any mention made of these two grievances. Mr. Cove said, "At no time do I recall any mention of Sandy's grievance or discipline."

Return to Work Agreement, Section 2 reads:

All employees will be eligible to return to work as quickly as is reasonably possible throughout the maximum seven (7) week period following the date of ratification of the Memorandum of Settlement (Referred to as the "Return to Work Period").

Mr. Cove testified:

There was an agreement made that it would take seven weeks to return all the employees to work and recycle into rotation. There was no discussion of Mr. Earle or Mr. McLean... They started up for the orientation and were given letters – there was one issued by Larry Pittman. It told them that the suspensions were to be carried out at the time of the return to work.

Mr. Cove's attention was directed to Ss. 12 & 13 of Consent #1, which read:

12. The Union agrees that it, its officers, executives and members shall not condone or engage in any intimidation, reprisal, threats, violence or differential treatment of any kind against any person who performed work for or on behalf of Vale, contractor or other third party in relation to the Voisey's Bay site during the strike or any employee or contractor who returned to work during the strike.

13. The Company agrees that it, its officers, supervisors and agents shall not condone or engage in any intimidation, reprisals, threats, violence or differential treatment against any Union representative or employee because of the employee's participation in the strike.

He testified that he understood these sections to

... mean that, on return to work, we'd go back in a respectful manner, and that there would be no reprisals ... We'd put it behind us.

He also agreed that Ss 18 & 19 spell out the details:

18. The Union and the Company consent to the withdrawal of the Applications to the Labour Relations Board in Board File Numbers 5263 and 5284 and agrees (*sic*) that it (*sic*) will not re-file any further applications before the Board or in the Supreme Court of Newfoundland and Labrador in respect of those Board Files or make any application which make the same or similar allegations as those contained in the applications noted above with respect to these negotiations.

19. The Company agrees to discontinue all actions related to the strike currently before the Courts, which are listed in Schedule "A" to this Agreement, without costs and shall instruct its Counsel to consent to the dismissal of the said actions without costs.

Asked whether he had any discussions with the Company about the Union's views of proceeding with these suspensions, Mr. Cove said:

I did have informal conversations with Mr. Pittman about the relations between the Union and the Company; and also on submitting these grievances, I noted that I hoped this would not be the pattern moving forward. I was concerned about relations moving forward. DC # 1 is the email I sent Mr Pittman as a cover letter for the two grievances. My concern was they were initiating these disciplines. My second concern was that, after an 18 month strike, we were not getting off to a good start. Not doing anything for relations between the Company and the Union.

On Cross Examination, Mr. Cove testified he had been in Union leadership for about five years, and had served on the bargaining committee for the first Agree-

ment. He became local President in 2007, early in the life of that Agreement. He has some responsibility with regard to filing grievances, and had some training in that regard. He attended local union officer training in 2007, and Shop Steward training in 2008. He was not Chief Negotiator for either round of bargaining.

"Boyd Bussey was Chief Negotiator. He does negotiations for us on Voisey Bay."

He testified that the strike started on August 1, 2009, and confirmed that the Grievors were part of the group that went on strike, and that the discipline letters were issued in September 2009, while the strike was ongoing. The strike ended on January 26, 2011, and the tentative Agreement was ratified on January 31, 2011. Mr. Cove testified that, as Local President, his responsibility during the strike was "to oversee the picket line, coordinate picketing action, assign duties to Local Officers and Picket Captains" while continuing as a member of the bargaining committee. He had been made aware of the suspensions when the Grievors were disciplined. Asked who in the Union decides when a grievance is filed, Mr. Cove answered, "It would be the Shop Steward where available", but acknowledged that the Local Union has the authority to file grievances.

I saw a copy (of the grievances). I can't confirm if I received (witness' emphasis) a copy at that time. There were also legal charges pending at that time. They may have gone to Legal Counsel provided by Steelworkers...

Mr. Cove confirmed that the ratification date was January 31, 2011, and that the Duration Clause (Article 30 on p. 15 of Consent 1) reads:

This Agreement shall be effective from date of ratification and remain in force to January 31, 2016.

Mr. Cove confirmed his testimony on direct examination that he does not recall any discussion about Mr. Earle or discipline concerning a supervisor, or charges.

Asked whether he recalls that there were Labour Board issues ongoing between the Parties, and that they expressly (Mr. Mahoney's emphasis) concerned para. 18 of the Memorandum of Settlement (Consent #1, p. 31), Mr. Cove said "Yes." Pressed again on whether the discussions "expressly" dealt with para. 18, he said, "Correct", and confirmed that court related matters were also discussed, as reflected in para. 19. Asked whether any of the discussion on these court matters had touched on Mr. Earle and Mr. McLean, Mr. Cove answered, "Not specifically on them in regard to para.19, no." He testified that he was aware of the suspensions and of civil charges.

Mr. Cove was asked if he recalls any discussion of Mr. Earle or Mr. McLean with respect to para. 13. He answered "No, I do not." Asked whether his recollection is that in the discussions both the Employer and the Union had been completely silent on Mr. McLean and Mr. Earle, Mr. Cove said:

Yes. I have no reason to believe otherwise.... Neither party, including the Union, made any comment (about the Grievors).

Asked if he would agree it would be reasonable to expect the Union to give notice if it had intended to represent the Grievors in matters arising from their discipline, he said, "We had no reason to after the 'no reprisal' agreement."

Asked if he would agree that the Union would be responsible to name the issue if they were going to continue to represent the Grievors, Mr. Cove said:

Yes... If there had been a concern, I would have raised it. But I did not (witness' emphasis) raise it, No.

On Redirect Examination, Mr. Cove testified that the last Collective Agreement expired at midnight on July 31, 2009. He also testified there were no court issues (as referenced in para. 18 or 19) outstanding. Asked why the grievances had not been raised with the Company, he said:

I had no reason to believe there were any further actions against Mr. Earle and Mr. McLean from the point the Return to Work Agreement was concluded. Their court cases had been withdrawn. We felt they were cleared of all allegations.. That's why we did not raise it, yes.

Asked about the costs of legal representation for the Grievors, Mr. Cove said:

They were on strike. They could not afford their own counsel. They got our counsel, and we took care of the charges. They were on strike.

ARGUMENT

For the Employer, Mr. Mahoney reviewed legislation and arbitral jurisprudence bearing on the instant matter. Citing the *Labour Relations Act* RSNL 1990 c. L-1 at Ss 84 & 86 he argued that an Agreement must be in place to be effective in settling "differences between the parties to or persons *bound by the agreement*" (Mr. Mahoney's emphasis). Duration is key. S. 84 reads:

- (1) A collective agreement is binding upon
 - (a) the bargaining agent and the employees in the unit of employees that the bargaining agent represents; and
 - (b) an employers' organization and employer who has entered into the agreement or on whose behalf the agreement has been entered into.

- (2) A collective agreement, where it is for a term of less than a year, shall be considered to be for a term of 1 year from the date upon which it came into operation or, where it is for an indeterminate term, shall be considered to be for a term of at least 1 year from the date it came into operation and shall not, except as provided in section 50 or with the consent of the board, be terminated by the parties within a period of 1 year from that date.

- (3) The parties to a collective agreement may, by written consent while the agreement is in force, vary, cancel or substitute other provisions for a provision in the agreement other than the provision relating to the term of the agreement.

S. 86.1 reads:

A collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the agreement or a question as to whether a matter is arbitrable.

And S. 86.4 reads:

A party to and a person bound by a collective agreement and a person on whose behalf the agreement was entered into shall comply with the provision for final settlement contained in the agreement or in subsection (2) and shall comply with a decision of an arbitrator or board of arbitrators appointed in accordance with that provision and do or abstain from doing anything required by that decision.

Jointly, Ss. 84 and 86 provide an arbitrator the jurisdiction required to make a determination of any allegation that a Collective Agreement has been violated. An arbitrator's jurisdiction derives from the provisions of the agreement, and an arbitrator has no powers outside that agreement in respect of a matter, as in the present case, that arose when no Collective Agreement was in place.

The Union objected to this line of argument pointing out that the grievances were filed under the new Collective Agreement currently in effect.

The Employer argued that the current Collective Agreement has no bearing with respect to questions relating to the substance of the grievances. The events at issue took place when there was no Collective Agreement between the parties. The Arbitrator directed the Employer to continue with the Employer argument.

Mr. Mahoney pointed to Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para: 4:1620 (on p 4-36) which reads, in part, as follows:

... A determination that an agreement has expired or terminated is, of course, a critical finding, since there can be no breach if the

agreement is not operative. Again, however, it must be recognized that the legislative provisions ... may extend the operation of the agreement beyond its term, or possibly relieve against time-limits set out in the collective agreement as to notice to bargain. As well, the parties may agree that the terms of a predecessor agreement remain in effect until a new one is signed... And it has held that an ancillary memorandum, which gave rise to an estoppel, survived the expiry of the collective agreement under which it was negotiated. However, where the collective agreement had expired and the business had been sold, it was held that the provisions of what is now s. 86 of the Act were not applicable, although a contrary result has been reached under the Canada Labour Code...

Mr. Mahoney directed the Arbitrator's attention to *Re Precious Plate Ltd. and Communications & Electrical Workers of Canada*, J.D. O'Shea Q.C., 1987 (cited in Brown and Beatty at para 4:1620) as standing for the principle, as set out in the head note, that when a collective agreement is not in operation, "an arbitrator has no jurisdiction to hear" a grievance. Mr. Mahoney asked the Arbitrator to pay particular attention to this case as the fact situation resembles the instant matter in many respects.

The entire matter was addressed and the discipline clearly set out in the letters of discipline (Consent #^s 5 & 6). The Grievor's knew what was going to happen. Since there was no Collective Agreement in effect, nothing remained to be decided.

There is no grievance, first because of the strike and the consequent absence of any operative Collective Agreement. The Union acknowledged it was aware of the Letters of Discipline when they were issued. At the time the Return to Work Agreement was signed, the Union was aware of the suspensions issued and of the civil court action.

The duration of the current agreement is specified clearly in Section 30 of the Memorandum of Settlement (Consent #1). The new Collective Agreement came into effect on January 31, fourteen months after the discipline was imposed. There are no provisions in that Memorandum of Settlement that reserve to the Union the right to grieve these disciplines in any way.

In *Re Precious Plate*, Arbitrator O'Shea said he did not have the authority to make the Collective Agreement retroactive, and was satisfied that the evidence showed the parties knew any such authority to do so would be required under a subsequent Agreement. The same facts obtain in the instant matter.

The new Collective Agreement (Exhibit #1) is not pertinent to the Union's attempt to persuade the Arbitrator to accept jurisdiction in these matters. In fact, the Arbitrator might well consider that the new Agreement, at Articles 7.01 and 7.03, actually confirm this aspect of the grievance procedure. Article 29 of the new Collective Agreement confirms the duration provision, as set out in Section 30 of the Memorandum of Settlement (Consent #1).

The Union can not successfully cling to its claim to be able to provide the Arbitrator jurisdiction under the new Collective Agreement. If the Union wanted to secure such jurisdiction, it was required to do so under the Memorandum of Settlement (Consent #1). The fourth "Whereas" at the opening of the Return to Work Agreement (p. 27 of the Memorandum of Settlement) does nothing to change this fact. If the Union wanted to make this an issue, it should have done so in bargaining Sections 18 & 19 of the Return to Work Agreement, when it had effective knowledge of the disciplines. The Parties put their minds to the disputes between them, and made this agreement. Arbitrator O'Shea makes this principle clear in *Re Precious Plate*.

The Union decided not to raise this issue. The Company is free to claim in good faith that it is surprised by the Union's grieving this matter. If the Union wanted to protect the Grievors' right to grieve, it should have captured that by agreement of the Parties as to how to deal with it.

Mr. Mahoney also advised the Arbitrator not to rely on extrinsic evidence. Sections 13 & 14 of the Return to Work Agreement are irrelevant. These provisions are designed to function on a prospective basis, and say that we will not look back. Both sides agreed not to look back. The Company did nothing beyond issuing Consent #s 5 & 6, and is not required to do anything further. These letters of discipline are the full story.

There is no evidence of any "differential treatment" (Section #s 12 & 13) relating to "participation in the strike" (Section #13), as the letters of discipline make clear. The case law says that a Company can act against employees misconduct during a strike. No unfair labour practice complaint was filed. The Company directed the Arbitrator's attention to three further cases drawn from the Arbitral Jurisprudence: *Re Commemorative Services of Ontario and S.I.E.U., Local 204 (Uthayakumar)* G.J. Brandt, J.D. McManus, & A. Reistetter, 1997, 69 L.A.C. (4th)11; *Re Maple Leaf Sports & Entertainment and Teamsters Local 847*, 2005, 145 L.A.C. (4th) 177; *Re Int'l Chemical Workers, Local 412 and Penick Canada Ltd.*, 17 L.A.C. 296.

For these reasons, as supported by the Arbitral Jurisprudence, the evidence and the terms of the Collective Agreement itself, there are no grounds on which an arbitrator can have jurisdiction in the instant matters, since there was no Collective Agreement in effect at the time the disciplines were imposed. The Union has failed to show otherwise.

For the Union, Mr. Bussey pointed out that the Union does not deny there was no Collective Agreement in place when the disciplines were handed out. However, in the Union's view, the return to work is a different situation. Grievances are not forgotten once there is a Collective Agreement in place. The problem lies in the carryover of the discipline into the new Collective Agreement . If the Grievors had been discharged, we would not be here. But here we have Return to Work Agreement that says there will be no reprisals.

That Agreement set out the conditions for an orderly return to work of the various rotations over a seven week period. The disciplines were not handed out immediately. We had an 18 month strike and then the Grievors had an extra two months. The Union was taken by surprise. This had all been taken care of, and there was no mention of the disciplines to the Union. We were dealing with the court matter, and the Court dismissed the case against the Grievors. The Union assumed the Company had no further interest in pursuing the disciplines when they relied on the court to provide the disciplines. Yes, there was no Collective Agreement in place; but it is not good labour relations when disciplines are not discussed with the Union.

It was not discussed in bargaining. We had court proceedings when the Company laid charges against the Union. The Union knew the court charges were dropped on the Grievors seven or eight months before we concluded the Collective Agreement . There is no indication in the Return to Work Agreement that these disciplines were excluded. The Union did not file grievances when the disciplines were handed out. If the Company had refused in bargaining, it would have been before the Labour Relations Board. But the Company carried them over.

The Arbitrator must feel justified, in these circumstances, to hear the case on its merits. The Memorandum of Settlement (Consent #1) is a series of documents that come together to form the new Collective Agreement. It is legal and binding, comprising as it does, the old Collective Agreement plus the provisions set out in the Memorandum. Section #2 of the first page of Memorandum of Settlement (Consent #1) says that. Everything except Appendix "C" is part of the new Collective Agreement. That is why the 4th "Whereas" in Consent #1 is centrally relevant to this case. It says that the agreement sets out the "resolution of all issues (Mr. Bussey's emphasis) between the Company and the Union related to the strike and its conclusion." It does not mention any exceptions or exclusions.

Perhaps the Union could have brought up the two disciplines; but the Company had it in their mind to impose the disciplines on the two Grievors, out of 130 employees who had already suffered enough, based on an allegation (Mr. Bussey's emphasis) dating back to the first month of the strike. This must be recognised as intimidation, and an attempt to spread fear, or a reprisal, to keep these Grievors out in the cold for two additional months. In any case, the additional seven weeks suspensions violates the Return to Work period that was agreed between the Parties. That applied to "all" employees. There were no exceptions noted, and no mention of those suspended. That is what the Union thought it bargained. There was a lot of ill will going around.

The Company and the Union came up with Sections 12 & 13 & 14 of the agreement to limit both the Company and the Union within mutually binding limits. So too Sections 18 & 19. In the Union's view there was no reason to pursue matters that had already been settled in court. These disciplines and the issues listed on p 33 of the Memorandum of Settlement (Consent #1) were the

remaining big issues. But the Grievors' cases were already settled and out of court.

As Mr. Cove's email (DC #1) shows, it was very important to rebuild relations between the Union and the Company. He was surprised the Company was trying to carry these disciplines forward. The documents that make up the Memorandum of Settlement (Consent #1) are all one document and constitute the basis for the new Collective Agreement. The Company can not now say that the Return to Work Agreement Agreement is not part of that Collective Agreement. The grievances were filed on February 26, under the new Collective Agreement, and it gives the Arbitrator jurisdiction to hear the merits.

The Arbitral Jurisprudence that the Company relies on all deals with discipline. But this is not about discipline. It is about reprisal, which the Company promised not to do. They made a bargain and broke that bargain. Mr. Bussey provided the Arbitrator with four cases drawn from the Arbitral Jurisprudence, including: *Re Community Living Oakville and O.P.S.E.U.*, 2003, K. Whitaker, 121 L.A.C. (4th) 374; *Re Inergi LP and Society of Energy Professionals*, 2007, O.V. Gray, 166 L.A.C. (4th) 200; *Re Toronto District School Board and O.S.S.T.F.* , 2006, G. Brent, V. Corbett, M. Riddell, 147 L.A.C. (4th) 433; *Re Mississauga Hydro Commission and the International Brotherhood of Electrical Workers, Local 636*, 1984, P.C. Picher, J.K.A. Hayes, P. Hurd 17 L.A.C. (3d) 299.

The Union requests the Arbitrator proceed to hear the merits of the cases.

In Rebuttal Argument for the Employer, Mr. Mahoney noted what he described as the "themes" evident in the Union's argument. The Union argument proposes nothing to rebut the authorities advanced by the Employer, all of whom agree that the Arbitrator can not accept jurisdiction. In this regard, therefore the Employer's authorities trump the Union's authorities.

The only case that the Union seeks to establish is that the grievances were actually filed under the new Collective Agreement, and that this timing of the filing of the grievances provides the Arbitrator with grounds to accept jurisdiction. But that is not what determines the Arbitrator's jurisdiction. The Union relies on Article 6.03, which reads:

Any written warning, suspension or discharge given to any employee shall be given in writing, in duplicate, within seven (7) working days (being the working days of the employee in question) of it being determined by the Company that there has been an infraction warranting discipline. A copy will be forwarded thereafter to the Union.

That provision was, by the Union's own admission, not in effect during the strike, and there is no retroactivity in the new Collective Agreement. The Union claims the Union was not informed of the disciplines according to the time line this Article requires. But the Company cannot violate an agreement that was not in effect. The Union's position should be dismissed. If the Arbitrator assumes jurisdiction as of February 2011, an absurd result follows. This shows why the Union's position can not prevail.

The Union suggested that if the Grievors had been discharged, we would not be here. But that does not work. Dismissal and suspension implicate the same principles. Employers should not be encouraged to discharge employees.

Further there is simply no evidence to ground the Union's claim that the Company had relied on the courts to discipline the Grievors. It is evidence that provides grounds for a determination, not assertions.

The second of the Union's themes is the claim that the Return to Work Agreement makes a part of the Collective Agreement. That is the single thing the Union is relying on: since the Return to Work Agreement is in the Collective

Agreement , therefore an Arbitrator can assume jurisdiction. The argument does not survive examination. Section 2, p. 1 of the Memorandum of Settlement (Consent #1) is the clear answer to the Union's claim. There is incorporation of Appendix "A" by reference, but none of the other appendices are incorporated. Appendix "A" is the only inclusion. All other appendices are standalones, and not parts of the Collective Agreement. The issues addressed elsewhere in Consent #1 are external to the Collective Agreement on their face.

The Union's concerns about the seven weeks provided, in Consent #1, for the completion of the return to work is dealt with in para. #3(c) on p. 28 of the Memorandum of Settlement. That clarifies the meaning of para. #2 in respect of any grievances. But these grievances are outside the Agreement in any case.

The third of the Union's themes is the "complete agreement" theme as expressed in Article 29.01 of the new Collective Agreement. This Article is, in fact, expressly grounded in Section #2 on p.1 of the Memorandum of Settlement (Consent #1). There is no relief available to the Union against the limitations of the new Collective Agreement.

The key lies in the fact that the Union knew of the disciplines. There was nothing left for the Employer to do. It was for the Union to raise the matter at bargaining for the Return to Work Agreement. The allegation that the disciplines are a reprisal is baseless. There is no evidence to support it.

Finally, in the Employer's view, the claim that the Employer has broken its agreement and sucker punched the Union in respect of its action is unjustified. In September, 2009 the Grievors were told what was going to happen. The suspensions were to be served "... upon settlement of the current labour dispute and resumption of normal operations." (Consent #s 5 & 6). Everything was out in the

open. The Union could have fought for the grievance rights of the two Grievors. The onus was on the Union to seek that agreement.

The Employer submits that the Employer's objection must be sustained.

CONSIDERATIONS

At issue between the Parties is the Employer's Preliminary Objection to the Arbitrator taking jurisdiction in matters grieved.

The onus to establish its position lies with the Employer.

Procedure: The Employer chose to rely on evidence provided through the Union's witness and to present its own case by way of argument only.

Positions of the Parties:

The Employer argued that the Arbitrator was without jurisdiction in these matters, since the disciplines were imposed during an ongoing strike when there was no Collective Agreement in effect between the Parties.

The Union presented evidence and argument to show that the Return to Work Agreement negotiated by the Parties forms an integral part of the current Collective Agreement, under which the instant grievances were actually filed. Thus, the Grievors are entitled to have the merits of the grievances heard.

Review of the evidence: The evidence, provided by Mr. Cove, confirms that the grievances were indeed filed as dated, on February 26, 2011, weeks after the new Collective Agreement came into effect on January 31, 2011 (*cf.*, Section 30 on p. 15 of Consent 1) and well over a year after the September 17, 2009 letters of discipline (Consent #^s 5 & 6).

Mr. Cove detailed in his testimony various provisions set out in the Return to Work Agreement which, in the Union's view, form part of the Collective Agreement now in place, and which, the Union claims, the Employer violated by

its decision to implement the suspensions it imposed at the beginning of the strike. The evidence shows that neither Party raised these grievances in bargaining the Return to Work Agreement and the new Collective Agreement.

Mr. Cove testified he had seen a copy (of the grievances), but could not "confirm if I received (witness' emphasis) a copy at that time". He testified he was also aware of civil action that had been brought, and that the court had dismissed charges laid against the Grievors.

Review of the Arbitral Jurisprudence & Findings:

Based on the evidence and Arbitral Jurisprudence presented, I find the Employer's position more persuasive. I note that the Province's *Labour Relations Act* RSNL at S. 84(3) imposes a binding term on parties to a Collective Agreement. Mr. Cove's evidence on redirect examination makes it clear that the prior Agreement had run its term on July 31, 2009, and the new Agreement came into effect on January 31, 2011.

I also note that The *Labour Relations Act* S. 2(2) of Newfoundland & Labrador provides that:

A person does not stop being an employee within the meaning of this *Act* by reason only of his or her stopping work as the result of a lock-out or strike or by reason only of dismissal contrary to this *Act*.

Arbitral Jurisprudence also makes it clear that, during periods when a strike is under way, striking workers remain employees of the employer even though the Collective Agreement is not in force, and that the only rights that continue in effect through such a time are "the common law and statutory rights of the" Grievors as employees (*cf.*, *Re Precious Plate* at p 335). I also note Arbitrator O'Shea's comments in *Re Precious Plate* (at p. 339-341):

... Once an employee ceases to work for an employer because of a lawful strike, there are no terms or conditions of employment since

there is no active employment even though the employee retains the status of an employee by virtue of s.1(2) of the *Act*.

The evidence shows there was no other agreement made between the Parties to protect the Grievors' grievance rights. Thus, the September 26, 2009 disciplines occurred when there was no Collective Agreement in force to provide the Grievors (who were among the group on strike at the time) the Grievance and Arbitration protections by which an arbitrator might acquire jurisdiction. I note that *Re Precious Plate* is invoked with approval, and its reasoning applied, *mutatis mutandis*, by the Board in *Re Commemorative Services of Ontario and S.I.E.U., Local 204 (Uthayakumar)* at pp 18-20. I note, finally, that the general principle that "there can be no breach if the agreement is not operative" is also endorsed by Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para.4:1620 (*Cf.*, n.14p. 4-38). *Retroactive protection?* The Union argued that the new Collective Agreement was, in effect, made retroactive in that it accommodates principles and commitments set out in the Return to Work Agreement contained in the Memorandum of Settlement (Consent #1). In the Union's view, the documents that make up the Memorandum of Settlement (Consent #1) constitute the basis for the new Collective Agreement, so that the Company can not now argue that the Return to Work Agreement is not part of the new Collective Agreement. Since the grievances were filed under the new Collective Agreement, the Union argues that the new Collective Agreement gives the Arbitrator jurisdiction to hear the merits of these grievances, particularly those relating to what the Union sees as the Company's violations of the agreed principles and commitments set out on pp 27 & 31 of the Memorandum of Settlement. (I also note that some of the Union's argument, and much of its Arbitral Jurisprudence, address its claim that the Employer's decision to proceed with the disciplines was a "reprisal" and in violation of the Return to Work Agreement.)

With respect, I am not persuaded by this line of reasoning. Addressing first the Union's claim based on the "no-reprisals" agreement, I note the comment of Arbitrator Whitaker in *Re Community Living Oakville and O.P.S.E.U.* (at p. 380):

... in the absence of such an agreement in the Collective Agreement (my emphasis), an Arbitrator acting within a jurisdiction determined by a collective agreement does not have the power to inquire into those matters..."

On the question of whether the new Collective Agreement accommodates provisions set out in the Memorandum of Settlement (Consent #1), I note that Article 29 clearly states that the agreement is the "Complete Agreement":

This Agreement is the complete and entire agreement between the Parties and supersedes or replaces any past practices contrary to the terms of this Agreement.

Thus, I find no grounds for accommodating the prior documents, on which the Union relies, into the new Collective Agreement. In making this finding I am aware of the very different fact situations addressed in *Re Inergi LP and Society of Energy Professionals*, 2007, O.V. Gray, 166 L.A.C. (4th) 200, and in *Re Mississauga Hydro Commission and the International Brotherhood of Electrical Workers, Local 636*, 1984, P.C. Picher, J.K.A. Hayes, P. Hurd 17 L.A.C. (3d) 299.

On the basic question of retroactivity in general, I note that *Re Commemorative Services* provides helpful direction (at p. 20) where the Board holds that:

The onus of establishing retroactive application of the agreement rests with the union as part of establishing the 'basic ingredients' of the case. The question is whether or not the duration article... can be reasonably interpreted as providing that the agreement is to be fully retroactive.

I note Article 30.01, the duration article in the new Collective Agreement, reads:

This agreement shall be effective from date of ratification and remain in force until January 31, 2016.

Mr. Cove testified that the date of ratification was January 31, 2011. Thus, I find that the Union has failed to discharge its "onus of establishing retroactive application of the agreement."

In summary, based on the foregoing considerations of the evidence and argument presented, I find I do not have jurisdiction to hear the grievances.

In making this finding, I take support also from the reasoning of Arbitrator Shime in *Re Artistic Woodwork Co and C.T.C.U.* (1974), 5 L.A.C. (2d) at p 133 - 134 as quoted in *Re Toronto District School Board and O.S.S.T.F.* , 2006, G. Brent, V. Corbett, M. Riddell, 147 L.A.C. (4th) at p. 444 f. where the parties had created a situation that expressly protected the Grievors' right in such circumstances, a situation that does not obtain in the matters before me.

DECISION

In view of the foregoing considerations I find that:

**THE EMPLOYER'S OBJECTION IS SUSTAINED. I DO NOT HAVE
JURISDICTION TO HEAR THE GRIEVANCES.**

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Ph.D.
Arbitrator

December 20, 2011