

ref.#

Hours of Work
Preliminary Objections
Time limits

FINDINGS AND DECISION
IN TWO PRELIMINARY OBJECTIONS
brought by the Employer
IN A DISPUTE
between

THE TERRA NOVA EMPLOYERS' ORGANIZATION
("the Employer")
and

COMMUNICATIONS ENERGY AND PAPERWORKERS UNION OF CANADA
LOCAL 60N
("the Union")

Group Grievance

APPEARANCES:

For the Employer:

Presenter: Mr. Robert Simmons, HR Business Advisor
Advisor: Mr. Gary Vokey, Operations and Engineering Manager
Witnesses: Mr. Shawn Lewis, Local Vice-President
Mr. Gary Vokey

For the Union:

Presenter: Mr. John J. Harris, QC
Advisor: Mr. Charles Shewfelt, National Representative, CEP
Witness: Mr. Peter Tilley, Alternate Shop Steward (Production Group)

Arbitrator: Mr. John Scott

The grievance was heard in St. John's, Newfoundland on April 7 & 8, 2008.

The Statements of Grievance read:

(Consent #2, July 12, 2006) "The Collective Agreement between TNEO and CEP Local 60N has been violated by TNEO under Article 15 - Hours of Work, and Article 21- Heliport but not limited too (*sic*). Cont' on attachment. (Provisional list of grievors)."

(Consent #3, July 22, 2006 re-submission) reads identically to Consent #1, but the attachment describes "Nature of Group Grievance" as follows:

The Collective Agreement between TNEO and CEP Local 60N has been violated under Article 15-Hours of Work; Article 21-Heliport, but not limited too. TNEO has changed the terms and conditions of the Collective Agreement without the proper notifications nor express consent of Local 60N. Local 60N Members are now expected to travel to and from the FPSO on their scheduled time off above and beyond the normal expectations of the Collective Agreement without CTO compensation for work beyond 21/21 day on/off work schedule. Local 60N members are now expected to report for their first day of work two days prior to their regular work schedule. The offshore rotation for regular full time and part time employees will be a 21 day on/off work schedule commencing on the employee's scheduled departure date from the shorebase. It has previously been stated by Petro-Canada TNEO that St.John's, Newfoundland is the shorebase for the TNFPSO employees therefore the employees are entitled to be paid for the CTO's. This grievance pertains to the bargaining unit members traveling from St. John's to Rotterdam and return from Rotterdam to St. John's.

The Settlement desired in both versions of the Grievance reads: "Full redress"

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 were either properly observed or are waived;
- issues of quantum, if any, would be considered separately and if the parties do not reach agreement within thirty (30) calendar days they will be referred to the Arbitrator for resolution;
- the Arbitrator will remain seised of the matter for period of thirty (30) calendar days after its publication should issues of interpretation of the Award arise.

ITEMS TAKEN INTO EVIDENCE:

- Consent #1 The Collective Agreement ending September 30, 2008
- " #2 Grievance #64230, July 12, 2006
- " #3 Copy of Consent #2 resubmitted July 22, 2006
- " #4 Letter - Eric O'Brien to Peter Tilly, July 20, 2006
- " #5 Letter - Eric O'Brien to Peter Tilly, July 27, 2006
- " #6 Letter - Charles Shewfelt to Michele Farrell, August 17, 2006
- " #7 Letter - Gary Vokey to Charles Shewfelt, August 18, 2006
- " #8 Letter - Shawn Lewis to Mr. Gary Vokey, 21 August 2006
- " #9 Letter - Gary Vokey to Shawn Lewis, August 28, 2006
- " #10 Letter - Charles Shewfelt to Michele Farrell, 26 September 2006

- Consent #11 Letter - Robert Simmons to Charles Shewfelt, October 2, 2006
- " #12 Letter - John Harris to John Scott, October 13, 2006
- " #13 Current Grievor List
- " #14 Terra Nova Personnel Schedule, July to December 2006
- " #15 Integrated version of Consent #s 13 & 14
- " #16 Calendar for year 2006
- SL #1 E-mail - Shawn Lewis to Gary Vokey, cc. Shewfelt, August 18, 2006
- " #2 E-mail - Mr. Vokey to Shawn Lewis, cc. Michele Farrell, August 18, 2006
- " #3 E-mail - Shawn Lewis to Gary Vokey, August 18, 2006, re grievance 64230

ARTICLES FROM THE COLLECTIVE AGREEMENT CONSIDERED

ARTICLE 5 - DEFINITIONS

The terms outlined below shall have the following definitions for the purpose of this agreement:

- 5.03 **Grievance** - Difference between the parties to this agreement or bound by the agreement which arises out of the interpretation, application, administration or alleged violation of this collective agreement.

ARTICLE 8 - UNION REPRESENTATION

- 8.01 The TNEO agrees to recognize and the Union agrees to notify TNEO in writing, with the names, or any changes thereof, of its duly designated members of:

- (a) Local Union Executive and Shop Stewards;
- (b) Union/Management Committee, Bargaining Committee and any other committee agreed to by the parties;
- (c) Its National Representative.

- 8.03 **Shop Stewards**

- (a) TNEO agrees to recognize six (6) designated shop stewards one (1) of whom shall be a chief shop steward. In addition, there shall be three (3) alternate shop stewards to act as a replacement in the event a designated shop steward is unavailable. Three (3) shop stewards shall be elected from each department: Vessel, Maintenance, Production.
- (b) A shop steward from one department may substitute in another department if there is no shop steward on board for the relevant department.

ARTICLE 11- GRIEVANCE AND ARBITRATION PROCEDURE

- 11.01 If an employee believes that he has been unjustly treated by his Employer or that any of the provisions of this collective agreement affecting the employee have not been properly complied with, the employee shall take up the matter directly with the immediate supervisor. If the matter is not resolved the employee may request the presence of a Shop Steward. If the matter is still unresolved, any grievance arising from it shall be handled in the following manner:

STEP 1:

If, following discussion with the employee's Supervisor, the employee feels the matter has not been resolved to his satisfaction, the employee, assisted by the Shop Steward, shall submit the matter in writing to the employee's Supervisor within ten (10) working days of the circumstance giving rise to the grievance or the date the employee was aware or reasonably could have been aware of those circumstances. The grievance

shall state specifically in what respect the collective agreement has been violated and the nature of the relief or remedy sought. The employee's Supervisor shall, within ten (10) working days after the day of receipt of the written grievance, give a written response to the grievor with a copy to the Shop Steward.

Employees have the right to decline Union representation at this Step, and must notify the Union of that decision in writing.

STEP 2:

If the employee or the Union is not satisfied with the response to the grievance at Step 1, the employee, with the assistance of the Shop Steward may, within ten (10) working days after the day of receipt of the decision at Step 1, present the grievance to the FPSO Offshore Installation Manager who will give a decision in writing to the grievor and a copy to the Shop Steward within ten (10) working days after the day he received the grievance.

All Union, group and policy grievances must be submitted in writing at Step 2.

STEP 3:

If the employee or the Union is not satisfied with the decision at Step 2, the grievance may, within ten (10) working days after the day of receipt of the decision at Step 2, be presented to the Petro-Canada Operations Manager who will give a decision in writing to the grievor with a copy to the Shop Steward within fourteen (14) calendar days after the day he received the grievance.

For the purpose of this provision, "working days" means the working days of the grievor.

- 11.03 The time limits for the disposition of grievances as set forth in this Article may only be amended by mutual written agreement of the parties.
- 11.05 The TNEO Employer(s) or the Union may, within thirty (30) calendar days from the receipt of the Petro-Canada Operations Manager's decision under Step 3 of the Grievance Procedure, submit the matter for final settlement to an arbitrator.
- 11.09 The arbitrator shall not be authorized to make any decision inconsistent with the terms of this Agreement, nor to alter or modify any portion of this collective agreement.
- 11.10 Where the grievance is not progressed through the Grievance and Arbitration procedure within the specified time limits, the grievance will be considered abandoned.
- 11.11 In the event that the grievance is not responded to within the specified time limits outlined in this grievance and arbitration procedure, the grievance may be advanced to the next step in the grievance and arbitration procedure.

11.14 All correspondence between the parties with respect to grievances and arbitration shall be my (*sic*) mail or facsimile.

OPENING STATEMENTS

FOR THE UNION, Mr. Harris noted that while this is a group grievance, it is not clear exactly how many comprise the group. Approximately ninety members of the bargaining unit are seeking 6 days pay resulting from the Employer's refusal to pay the employees travel time to Rotterdam and back.

The normal rotation procedure is that the employees show up at the heliport and are paid from that point for 21 days on, followed by 21 days off. But when the *Floating Production Storage and Offloading* petroleum production platform (FPSO) was in Rotterdam, the Employer required all the FPSO employees to show up at Rotterdam. The employees were not paid for their travel time to and from Rotterdam. This was, basically, two days; but in some cases it was up to six days. It is a clear violation of the Collective Agreement.

When the grievance was submitted there were some questions about precisely whose who belonged in the group involved. The grievance has significance to the members, and it should be heard on its merits. In the Union's view, the grievance should not be dismissed out of hand on a technicality which it appears the Employer proposes to raise by way of a preliminary objection.

Mr. Harris was aware of the Employer's objection on time limits governing the transition from Step 2 to Step 3. However, the Union was informed just a few days before this hearing that the Employer has a second preliminary objection on time limits governing reference to an Arbitrator.

Neither objection has relevance, in the Union's view. The time limits have either been met or effectively waived by the Employer. The substantial issue that must be addressed here is the proper interpretation of the Collective Agreement.

FOR THE EMPLOYER, Mr. Simmons explained that the Parties are the Terra Nova Employers' Organization (TNEO) and CEP Local 60N, which comprises employees of 7 different companies including Petro-Canada, which services the Agreement. The Employer has 2 preliminary objections.

The first objection relates to the mandatory time limit governing movement to Step 3. That time limit was missed. The case law and the Collective Agreement both tell us that failure to meet the time limit ends the matter. There is very strict language in the Collective Agreement.

The second objection arises because the matter was referred to the Arbitrator outside the thirty day limit. Articles 11.03, 11.09, and 11.10 all apply as do other articles as well.

EVIDENCE ON THE EMPLOYER'S PRELIMINARY OBJECTIONS

THE FIRST EMPLOYER WITNESS, appearing under subpoena, was Mr. Shawn Lewis. Mr. Lewis testified that he is disabled at the moment due to a vehicle accident which occurred in 2005, but that in 2006 he had shore duties "with the telecommunications branch." He had worked offshore with Petro-Canada since July 1, 2001. In August and September of 2006 he was Vice-President of Local 60N. Asked whether he had been involved in the filing of Consents #2 & 3, Mr. Lewis said:

When it was initially filed I received expressions of concern from members to put together the grievance. I advised Peter Tilley and the group that I would help put together the language of the grievance; but, no, I did not advise Peter Tilley to file it.

Mr. Lewis confirmed that, as Vice-President, he had received a copy of Mr. Eric O'Brien's letter to Peter Tilly dated July 20, 2006 (Consent #4) seeking clarification of the Consent #2 version of the grievance. Asked whether he had been surprised by the request for clarification, Mr. Lewis said:

As VP of Local 60N we'd attended Union/Management meetings, and I'd requested a list of members as per Article 9 which requires that TNEO provide a list. So when we did up the basic original list we used the basic information available. I had hoped to clear it up by addressing the issue of the intent of the grievance, not the exact language. I probably called or e-mailed people when I got Consent #4, and I advised him, yes.

Mr. Lewis confirmed that even though Mr. O'Brien's July 27 letter to Mr. Tilley (Consent #5) refers to the matter as a "policy grievance," it was really a "group grievance". Asked if Mr. Shewfelt's August 17, 2006 letter to Ms. Farrell (Consent #6) is the Step 3 referral, Mr. Lewis said, "I believe so."

Mr. Lewis was asked to comment on Mr. Gary Vokey's letter to Mr. Shewfelt (Consent #7) in which Mr. Vokey, the Operations and Engineering Managers writes:

"... Dear Charles:

Re: Grievance #64230

I acknowledge receipt on August 17, 2006 of your Policy Grievance at Step 3 of the grievance procedure and your request for a meeting to discuss the matter.

I would note, however, that the TNEO Step 2 response to this grievance was provided on July 27, 2006. Clause 11.01 provides ten (10) working days for referral of this grievance to Step 3. As that time limit has passed, we deem this grievance to be abandoned in accordance with the provisions of clause 11.10. ..."

Mr. Lewis said:

I remember this very specifically. My initial reaction was to note that TNEO said the

grievance was abandoned. I was not the Grievor; Peter was, and Peter's work rotations had not expired under Article 11.10.

Asked if the list of names listed in Consent #13 are the grievors in this matter, Mr. Lewis said, "Yes, they look like it." He also confirmed that SL #1 is a copy of an e-mail message he sent Mr. Vokey, copied to Mr. Shewfelt, on August 18, 2006 acknowledging Mr. Vokey's August 18 letter (Consent #7) and reconfirming that:

"... Local 60N retains that policy grievance 64230 is still an active Policy Grievance based on several employees listed on the Policy Grievance 64230 that are still within the ten working days limitation as stated within the Collective Agreement between TNEO and 60N; Article 11.01. Further more; it is our stance that this grievance required Local 60N to contact each member of the grievance to ensure the progression to Step 3 was warranted. Local 60N does not deem Policy Grievance 64230 to be abandoned."

Asked about the claim (in the penultimate line of SL #1) that the Union felt it must "contact each member of the grievance", Mr. Lewis said:

... the Grievors' ten working day cycle had ended. Peter had not passed his ten working days. The Company's argument is not accurate, and we had a large number of Grievors who would say their 10 working days was still a go... Somewhere between 50 and 90 employees who rotated to Rotterdam are the employees I'm referring to.

Mr. Lewis also identified as SL #2 an August 18 e-mail from Mr. Vokey reconfirming the TNEO position as stated in Consent #7. He commented:

Again I had an issue with it. I did not think that the original list was accurate. I believed the list was not paramount to the actual substance of the grievance, and I had a problem with that.

Asked whether he had, at any point, requested an extension of time limits, Mr. Lewis said: "No, I don't recall doing so. No."

Mr. Lewis also identified as SL #3 an August 18 e-mail he sent Mr. Vokey, in which the final sentence reads:

"... The Union has in the past extended various courtesies on extending time limits to TNEO and I feel as if the same courtesy should be received by the Union."

Asked whether, in writing this, he is requesting an extension of time limits, Mr. Lewis said:

No. We were batting words around, and the grievance was not being addressed. You were trying to back out of the grievance, and I was trying to bridge a communication gap. As a Union we have extended courtesies, and I was looking for the same

courtesy. We still believed we were within our time limits, and were trying to bridge bad communications between the Union and TNEO. We feel this is a good grievance.

Mr. Lewis confirmed that Consent #8 acknowledges the Employer's "response to the group grievance 64230", and also pointed out that...

Peter had to get a consensus from his membership on the FPSO, and I wanted to ensure proper progress of the grievance.

He also acknowledged that Article 8.03(b) does allow shop stewards to step in if any particular shop steward is not available. "Yes, in normal circumstances; but it depends on the level of information each has."

Mr. Lewis testified he had received Mr. Vokey's August 28, 2006 letter (Consent #9), and that he was aware TNEO continued to regard the grievance as abandoned and if the matter were to go to arbitration... "the TNEO will raise a preliminary objection regarding the arbitrability of the matter."

Mr. Lewis also confirmed that Consent #10 is the Union's September 26 referral to arbitration, and said, "I acknowledge thirty days for referral to arbitration, yes." Article 11.05 specifies:

The TNEO Employer(s) or the Union may, within thirty (30) calendar days from the receipt of the Petro-Canada Operations Manager's decision under Step 3 of the Grievance Procedure, submit the matter for final settlement to an arbitrator.

Mr. Lewis also confirmed that, when calculated from the Employer's August 18 decision under Step 3, (Consent #7), "thirty calendar days" expires before the September 26 referral to arbitration, (Consent #10). Asked whether there had been any agreement to extend time limits, Mr. Lewis said: "No. Nor did I feel any was warranted; but that's my opinion."

ON CROSS EXAMINATION Mr. Lewis testified that the Collective Agreement came into effect on August 1, 2005 and that the issues raised in the instant grievance occurred "in the early days" of the instant Collective Agreement. Asked whether he is a professional trained in labour relations, or has legal training, Mr. Lewis answered, "No." Mr. Lewis agreed that Article 8.03 says shop stewards are to be elected, and also confirmed he is not a shop steward. Mr. Lewis could not recall who the chief shop steward was at the time, "but it could have been Mr. Ben Lewis, if there was one at the time."

Mr. Lewis was on shore at the time, not in Rotterdam, and is not a member of the group represented in this grievance. Mr Lewis explained why he was copied on Consent #6 and #7.

I was elected for the Terra Nova only by the membership... I had been trying to convince Mr. Vokey that the matter of the specific list was not an issue... I felt the

communications were very poor. The FPSO was not on station. It was in Rotterdam, and that strained the communications within the bargaining unit so as to frustrate it. I'd given my own two cents worth as to what I thought the interpretation was, which I felt was correct. I was trying to mediate between the Local Union and Mr. Vokey.

Asked his own view of the time limits issue on which the Employer is raising an objection, Mr. Lewis said:

On August 28 the communication ended as indicated in Mr. Vokey's letter (Consent #9) where he says 'The TNEO deem this grievance to be abandoned.'... My own attempts (SL #1 and SL #2) did not work... We seemed to be wrapped up in a technical issue, and I thought I'd enlighten him as to what I saw was the fact.

Asked when, in his view, the Step 3 response was actually completed, Mr. Lewis answered, "On August 28 " (Consent #9). Mr. Lewis also confirmed his own view that, based on August 28 as the final decision by the Employer at Step 3 the reference to arbitration dated September 26 (Consent #10), stands within the thirty day time limits set out at Article 11.05. He acknowledged that this calculation, based on August 28 would, if read in the context of, invalidate the Employer's objection based on thirty days allowed for submission to arbitration under Article 11.01.

Mr. Lewis confirmed that grievances are handled offshore. Asked what happens during the 3 weeks crews are onshore, and whether the pattern of 3 weeks on/ 3 weeks off creates problems for the Union, Mr. Lewis answered:

I don't know what Petro-Canada expects, but that is my three weeks for myself... Yes, 350 kilometres offshore causes problems in itself. We had asked several times to make the conversation efficient .. asked TNEO to use the e-mail, but all our requests were denied. So we had to rely on Union bargaining unit members to hand-deliver documents, either at my home or at the office in the Scotia Centre. So communication was difficult, and all the more so when the employees were in Rotterdam.

Asked when Mr. Lewis had first learned of the Employer's objection on referral to arbitration, Mr. Lewis answered, "Today." Asked whether Mr. Simmons had raised the issue earlier, Mr. Lewis answered, "No." Asked if it is a fact that the "10 days" required under Article 11.05 had not expired since Mr Tilley had not completed 10 days at work, Mr. Lewis said:

That is correct. Were they expecting him to come in while he was not working for them? Mr. Tilley had not expected that ten day working clause.

ON REDIRECT EXAMINATION Mr. Lewis testified he had used e-mail to communicate with Mr. Vokey. "Yes. I tried to keep it infrequent." He also confirmed he had been on shore for the entire

period involved. Asked whether he is certain he and Mr. Simmons had not talked about this matter, Mr. Lewis answered:

I felt as a Union officer that we did have a discussion, but my interest was in dealing with the problem.

THE SECOND EMPLOYER WITNESS was Mr. Gary Vokey, Operations and Engineering Manager at the time of the grievance, and the author of Consent #7 which Mr. Vokey confirmed was the Step 3 response to Mr. Shewfelt's letter, Consent #6.

Asked about SL #s 1, 2, 3 and Consent #8, Mr. Vokey said:

Shawn did not agree that the 10 days had expired... He was the VP. Admittedly, he was not offshore, but he was intimately familiar with it... The August 28 letter, (Consent #9) was a restatement and reiteration of Consent #7, which was the Step 3 response. The period between August 18 and August 28 was occupied with correspondence. So I reiterated Consent #7, and reiterated our position.

Mr. Vokey said he had not had any other direct or indirect conversation with any other Union officer, but did have a number with Mr. Lewis: "He was working on the same floor."

There was no cross or redirect examination.

THE FIRST UNION WITNESS, Mr. Peter Tilley, testified that he has worked with Petro-Canada since July 2001 as a regular employee with three weeks (21 days) on and three weeks (21 days) off. Mr. Tilley is Alternate Shop Steward for the production group.

Asked to describe his normal status during his 21 days off and his status during the Rotterdam experience, Mr. Tilley answered:

I'm on my own time.... We had to leave two days prior to the first day at work. The first rotation left from Torbay, but the second rotation we had to fly to Halifax... Some people did not come straight back. Some went on vacation in Europe.

Mr. Tilley confirmed he filed Consents #2 & 3. "The list was sent to me by Shawn Lewis, actually. I attached the list to Consent #2." Mr. Tilley confirmed he is, himself, on the list of Grievors. Asked why he had written "for Shawn Lewis" on the grievance form, Mr. Tilley said: "I was using Shawn as my advisor."

Asked about the Employer's request for clarification (Consent #4), and why he had resubmitted the grievance, Mr. Tilley said:

It was a group grievance, not a policy grievance. Eric called me in and went through this. I scratched off a couple of temporary names, who were really not part of the

bargaining unit... Yes, we did (resubmit it). We worded the group grievance as an attachment. It was a redefinition. It wasn't on the first grievance. The statement of grievance was attached as a letter in Consent #2. It was like Consent #3, but it did not contain the same last sentence of the Consent #3 attachment.

Mr. Tilley confirmed that, in his view, Consent #5 was a response to the grievance.

Asked what training he has had as a Shop Steward, Mr. Tilley answered: "None. I missed the training that was put off due to other commitments." Asked to explain the final line of Article 11.01, which reads, "For the purpose of this provision, 'working days' means the working days of the grievor." Mr. Tilley answered:

My shift was ending on the 27, and I still had five or six days of my working days. By the term set out here, they were working days. I was due to return on August 22. I was not working.

Mr. Tilley confirmed that he was not only the Shop Steward who signed the grievance form, but was also one of the Grievors as listed in Consent #s 2 & 13. He was working ...

.. for 4 days after that. I got back from Europe on the 27. My working days would take me to the 26th of August. The referral to Step #3 (Consent #6) was dated before my return to work.

Mr. Tilley testified he had not received a copy of Consent #6.

No. The first time I saw it was today ... and today was the first time I saw Consent #9. I never saw SL #1, 2 or 3 before today.

Asked when he had first learned that the Employer had a time limit problem concerning the referral to arbitration, Mr. Tilley answered: "I never heard that, about time limits, before."

ON CROSS EXAMINATION Mr. Tilley confirmed he had never been told the Employer had any problem with time limits. He also confirmed he was both a Shop Steward and a Grievor in the instant matter, but that he was not the only Grievor.

Consent #13 is the list, but there are likely others, more people than there... Oh for sure, more than fifty employees involved. I was the Shop Steward and the Grievor who put the grievance in for a group of Grievors... I was on personal leave from October 2006 until April 2007... I used Mr. Lewis as my advisor but did not use others like the National Representative... I was the only Shop Steward on board at that time.

Mr. Tilley said he did not know why the referral to Step 3 (Consent #6) was not copied to him, and agreed that the referral appeared to have gone forward without his notice. "Yes, it looked like it."

Mr. Tilley also confirmed that he had not previously seen Consent #7 or Consent #9. He had

only seen Consent #5 previously, and had not been privy to any discussion about time limits. "This is the first time I saw these letters."

ON REDIRECT EXAMINATION Mr. Tilley confirmed he was an Alternate Shop Steward and had been on personal leave after these events.

ARGUMENT

FOR THE EMPLOYER Mr. Simmons argued that in matters like these, the grievance procedure starts at Step 2 as set out in Article 11.01 at the conclusion of Step 2: "All Union, group and policy grievances must be submitted in writing at Step 2." Thus the analysis begins with consideration of Step 2 and the progress to Step 3, followed by the referral to arbitration. It turns particularly on the operation of the "working day" as it appears in Article 11.01 at Step 2.

This provides the focus for the first of the Employer's two preliminary objections dealing with time limits: the one that claims the Union failed to meet the time limits governing the referral to Step 3. The second preliminary objection has to do with the referral to arbitration, itself. That is covered by Article 11.05.

The Employer has led evidence to show that on July 27 the Union received the Employer's response (Consent #5) to the grievance (submitted at Step 2, as required). This was confirmed in testimony, and documented in Mr. Lewis' August 21 e-mail (Consent #8), at lines 6 & 7.

Then on August 17 the Union referred the matter to Step 3 (Consent #6). In the Employer's view, the 10 day time limit set in Article 11.01 for moving to Step 3 has passed by August 17 as the Consent #7 evidence shows. (Consent #7 was copied to Mr. Lewis.) The Employer's position is that the Union abandoned the matter. The time limits were missed, and the effect is spelled out in paragraph 2 of Mr. Vokey's response (Consent #7), citing Article 11.10 which reads:

Where the grievance is not progressed through the Grievance and Arbitration procedure within the specified time limits, the grievance will be considered abandoned.

But the question then becomes, What constitutes a working day for a group of Grievors? Article 11:01 provides at Step 3 that "For the purpose of this provision, 'working days' means the working days of the grievor." So does the Collective Agreement require that, in order to carry a grievance, the "10 working days" is still not exhausted so long as any one of the Grievors in the group has worked fewer than 10 working days?

It is obvious, there must be someone on board to carry the grievance. Article 8.03(b) provides for the substitution of a Shop Steward. Consent #13 is the current list of grievors. Consent #14 shows the actual work schedule for those named in Consent #13 who were involved between July 27 and August 17, 2006. In the Employer's view, if any of these grievors had completed the 10 working days then the time limit had expired. As shown Consent #14, several of the Grievors meet this criterion. Thus, the "working days of the grievor" specification has been satisfied.

The assertion that Mr. Peter Tilley was carrying the grievance and was therefore, "the Grievor", and that only his days should be the days counted, and therefore that the limit had not been reached because he had not worked ten days, is not reasonable. This is a group grievance, and Mr. Tilley signed it. He is nowhere identified as an individual grievor or designated as the one to carry it. He is the Shop Steward. Consent #15 lists the Grievors for this hearing.

It is also clear on the evidence that Mr. Tilley had no dealings with the matter after Step 2. This is not the behaviour of someone who is carrying the matter for the Grievors. In fact, Mr. Tilley testified that he knew nothing of the time limits problem. This does not suggest that he has carriage of the matter. From Step 2 on Mr. Tilley had nothing to do with it. The Union has the responsibility to carry the matter in a timely fashion. The Collective Agreement language is strict in this respect. The reference to Step 3 should have been made no later than August 6. That did not happen.

The Employer's second time limit issue has to do with 11.05 which provides 30 calendar days from Mr. Vokey's August 18 letter (Consent #7). But Mr Shewfelt's referral letter (Consent #10) is dated September 26. Any calculation shows that the reference to arbitration had to be completed no later than September 17. It is not magic. This is an ordinary calendar calculation.

Mr. Vokey was very clear in his response at Step 3 and then reiterated in subsequent correspondence as acknowledged by Mr Lewis in Consent #8. It is clear from Consent #8 that the Union knew the time limits were ticking. There seems to be some suggestion that the thirty days for referral to arbitration would not start until after the 14 days at Step 3 had elapsed. But Article 11.05 is very clear. The Union is trying to assert another interpretation than the words allow, and it is certainly one that cannot be regarded as better than the Employer's interpretation. Therefore the Employer's is to be preferred.

It is clear that Mr. Lewis, himself, viewed the August 18th response (Consent #7) as the official response. There is only one official response. There wasn't another official response on August 28th as is suggested by Mr. Lewis. The response occurred on August 18. The e-mails do not affect that fact, and do not amount to any extension of time limits. The irony is that on August 28 there was still time to refer the matter to arbitration, but that was not done. The process is very clear. There is no ambiguity. Nor is there anything covert.

Mr. Simmons then cited a number of cases drawn from jurisprudence for my instruction, as follows: *Resource Development Trades Council of Newfoundland and Labrador and Voisey's Bay Employers Association Inc.* Grievor: Edgar O'Dell, W.J. Clarke (Arbitrator) July 30, 2004; *Union Carbide Canada Ltd. V. Weiler et al.* 70 D.L.R. (2d) 333 (Reversing 65 D.L.R. (2d) 417 Supreme Court of Canada, Cartwright, C.J.C., Martland, Judson, Ritchie and Spence, JJ. October 1, 1968; *Re GenAlta Recycling Inc. and United Steelworkers of America, Local 5220* 124 L.A.C. (4th) 331 (Summarized in C.L.A.S. 124) R.I. Hornung, Q. C, K. Turcotte and B. Waldvogel: December 30, 2003; *Her Majesty the Queen in Right of Newfoundland Represented by Treasury Board and Newfoundland & Labrador Health Boards Association V. the Newfoundland Association of Public & Private Employees (Hospital Support Staff) Group Grievance*, John A. Scott, Arbitrator, July 16, 2004; *Her Majesty the Queen in Right of Newfoundland, Representing the Department of Transportation and Works and the Newfoundland and Labrador Association of Public and Private Employees*, Robert Simms & Tony Roberts, Grievors, John A. Scott, Arbitrator, May 9, 2006; *Newfoundland & Labrador Housing Corporation v. Canadian Union of Public Employees, Local 1860*, Mr. F. March, Mr. J. Peddle, Mr. D. Alcock, Chair, April 9, 1994; *Agnes Pratt Home v. Newfoundland Association of Public Employees, Ms. Elsie Rideout, Grievor*, Mr. David Alcock, Arbitrator, February 9, 2000.

Mr Simmons urged the Arbitrator to find in favour of the Employer on both preliminary objections.

FOR THE UNION Mr. Harris argued that the case is really about the interpretation of the Collective Agreement. The Employer objects that the Union has failed to meet time limits and suggests that, somehow or other, the onus is on the Union to provide a superior interpretation of the Collective Agreement.

What really is happening here is that the Employer is seeking to impede a hearing on the merits by invoking a procedural irregularity. But in fact, on the interpretation offered by the Employer, the right of the Union to have a hearing on the merits of the matter are defeated. This is not a trivial matter. More than ninety people are affected by the Employer's failure to pay for a number of days of work.

Throughout the whole of the presentation one thing has become clear: the Employer has not been prejudiced in any way by the time limit issues it is so concerned about. It is unrealistic to claim that any of those people who were still at work could keep the clock ticking on the time limits for referring the grievance to arbitration, but if any of them failed to do so, then that failure disposes of the rights of all others. That simply is unrealistic. But that is the interpretation the Employer seeks to have confirmed.

Most of Mr. Simmons' cases relate, in fact, to the question about the initial filing on August 17. Clearly there are mandatory time limits in this Collective Agreement. But the Employer seems happy to interpret the Collective Agreement so as to block a hearing on the basis of any or all of those ninety people working in order to defeat the rights of ninety others. The Employer has an obligation to meet the merits of this case. Mr. Harris invited the Arbitrator to look at the general case law. This is an objection relating to a procedural irregularity and should be treated as such.

Mr. Harris then introduced a number of cases drawn from the case law to support the Union's position in this matter, as follows: *National Steel Car Limited -And- United Steelworkers of America, Local 7135 Group Grievance* Stanley M. Beck Arbitrator, November 6, 2006; *Canadian Waste Limited v. Canadian Union of Public Employees Local 1003 Group Grievance* Francois G. Bastien, Sole Arbitrator: November 3, 1999; *Re Government of Province of British Columbia v. British Columbia Government Employees Union (Maddocks et al. Grievances)* H.G. Ladner, Q.C., May 12, 1988; *Re Canadian Broadcasting Corp. And National Association of Broadcast Employees and Technicians, Union Grievance* O. B. Shime, M. Hikl, J. W. Healy, Q.C. (Ontario), October 31, 1973; *Toronto District School Board V. Canadian Union of Public Employees, Local 4400*, Gordon F. Luborsky, Sole Arbitrator, November 27, 2006; *Sturgeon Creek School Division 24 Board of Trustees V. Alberta Teachers' Association* Court of Appeal,

Lieberman, McClung and Stevenson JJ.A., July 25, 1985; *Re Int'l electrical Workers, Local 1595, and Dominion Electric Protection Co.* R.W. Reville, C.C.L, J. Wedge, J.W. Healy, September 10, 1963.

Mr Harris summarised much of the jurisprudence as encouraging arbitrators to be liberal on procedural matters unless there are strong reasons to deny the exercise of rights.

The Union strongly feels that the procedural requirements have been observed and the time limits complied with. This is layman's operation here and arbitration should not be treated on technicalities. The grievance was processed in time.

The Step 2 to Step 3 time limits are not within the grievor's sight. It is the group whose working days must be considered. If even one member of the group had not been working for ten days there should be no loss of rights in moving to the next step. This is the only valid and appropriate interpretation of the Collective Agreement. It is preferable to the Employer's interpretation and clearly causes the least injustice to the Employer and employees. There's no prejudice to the Employer resulting from the delay.

It is important to consider the purpose is served by rules governing grievances and time limits. Are these requirements designed to create a minefield, and to trap people, or to deflect attention from the substance of the grievances? Or are they designed to help resolve disputes in a timely manner so that work does not stagnate? Time limits keep things moving efficiently and effectively by ensuring mutual knowledge about what the cases are really say. It is important that the entire meaning of time limits is interpreted properly. Any abandonment must be genuine, and not an inadvertent abandonment.

In effect, this is a continuing grievance. Employees are still going back and forth to Rotterdam. It is preposterous to claim the company truly believes that the individuals have given up on this grievance as of August 6. The company cannot truly believe that the individuals had given up their rights. There is no grounds here to apply a strict interpretation and the arbitral jurisprudence provides lots of reasons not to do so.

Mr. Tilley's evidence is clear that this was a group grievance. It was signed by Mr. Tilley on behalf of all, as is clear from Consent #2 and Consent #3. The form itself makes it clear. He filed it on his own behalf and for all members of the group. He is also the Shop Steward. Shawn

Lewis is not a grievor, despite his name appearing on the list, and has no stake in the grievance. The list attached remains attached to 64230. The "Grievor" in this case is the group represented by Mr. Peter Tilley. That is the substance of the fact as found, for instance, in *Canada Waste Ltd. v CUPE* (at pages 3, 5, & 8).

Where is the general prejudice to the Employer over the few days involved? Procedural problems can arise, but should not be used to defeat the substance of the grievance brought, in this case, by Mr. Tilley on his own behalf and on behalf of others. *Re Government of Province of British Columbia v. British Columbia Government Employees Union (Maddocks et al. Grievances)* H.G. Ladner, Q.C., May 12, 1988 and *Re Canadian Broadcasting Corp. And National Association of Broadcast Employees and Technicians*, Union Grievance O. B. Shime, M. Hikl, J. W. Healy, Q.C. (Ontario), October 31, 1973 both bear on this issue.

It also should be asked whether the Employer caused the problem, in some sense, by failing to respond at Step 3. The Parties have specifically defined a grievance at Article 5.03 and again at 8.01 and 8.03(a) and (b) and at 11.01. The Employer is required to act through the Supervisor who shall do certain things as set out in Article 11.01 at Step 2. The Employer did not do this. The Employer did not send a copy to the Grievor with a copy to the Shop Steward. The Arbitrator should also note *Browne & Beatty* at para. 4:2153 on interpretation of "day".

Mr. Tilley goes off on August 1 for three weeks. He only has worked for four days and has six days to deal with the matter when he returns to work. The Collective Agreement says that it is "working days of the grievor." There is no indication that, for instance, Mr. Patterson who came on duty on August 3 was aware that the time limits were running against them. But according to Mr. Simmons the time is running against them as soon as Mr. Tilley gets the response. Mr. Tilley assumes that he has until August 26th. On August 17th Mr. Shewfelt files the grievance. The group as a whole is the issue. It is a collective grievance. It is the time limits of the group that apply. If the time limits remain open for any member of the group, then they are open for the group. That is not inconsistent with the Collective Agreement. To rule otherwise leads to injustice.

Clearly Mr. Shewfelt's letter is the Step 3 reference; but the Employer says they are not accepting it because it is out of time ... and, in fact, was out of time as of August 6th. This cannot

be realistic. The fact is, of course, that the Employer has not done its job in responding. It was not sent to the Grievor with a copy to the Shop Steward. Mr. Vokey did not even write to Mr. Tilley. The question is, did the Employer respond at Step 3, at all? The Union, in fact, suggests that the Employer did not do so. There was no proper Step 3 response. If the grievance was abandoned, why respond at all? This is not a decision on the merits of the case, and it is not in writing to the grievor with a copy to the shop steward. The Union is entitled under Steps 2 & 3 to a substantial response, to the Grievor with a copy to the Shop Steward, and that is not in evidence because the Employer did not do it.

The Union contends that Mr. Tilley's response is well within time limits. Mr. Tilley did not even see the Employer's letter (Consent #7) because it was not addressed to him. He did not get a copy of this letter. Article 11.11 plays into this issue. It reads:

In the event that the grievance is not responded to within the specified time limits outlined in this grievance and arbitration procedure, the grievance may be advanced to the next step in the grievance and arbitration procedure.

The reasonable, sensible approach was to conclude that the period from July 27 to August 26 applies for the Step 3 reference, and that August 17 is certainly on time. Therefore 30 days from August 31 to submit to arbitration is also perfectly acceptable, and it was made on September 26.

The Employer did not meet its own proper obligation in its replies, and it is not proper for them to trigger a time limit against the Union in this matter. Look at *Toronto District School Board V. Canadian Union of Public Employees, Local 4400*, Gordon F. Luborsky, Arbitrator, November 27, 2006 for this principle. It is Mr. Peter Tilley who matters. There is clear evidence that Consent #8 is not accepting the abandonment of the grievance. The Employer never did respond to the grievance.

The Union's interpretation does not have to be better than the Employer's. It is not the Union who screwed up.

The objection on referral to arbitration within time limits was effectively waived. It was set up for arbitration in the fall of 2006, and that objection was never raised as an issue until last week when I was notified. September 26 was a legitimate filing date for the grievance. Furthermore, 11.14 requires to mail or fax and does not accept e-mail.

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Court of Appeal, Lieberman, McClung and Stevenson JJ.A., July 25, 1985 deals with waiver. There is no correspondence in evidence between the Parties concerning the objection about the referral to arbitration and the jurisprudence does not support Mr. Simmons' position. The quality of the evidence has to be very high for the Employer's position to be sustained by the arbitrator.

On the issue of the "working days of the grievor", it is clear that the Parties did not direct their minds to the question of a group grievance. The way to deal with it is either to treat it as a gap, or to find that Mr. Tilley is a representative and a Shop Steward. *Palmer & Palmer* has helpful commentary (at p. 123, para. 4.25). It is important to bear the Collective Agreement as a whole in mind, and not to focus exclusively on one or other clause. *Palmer & Palmer* at page 216- 217 provides a clear statement of the principle.

Re Int'l electrical Workers, Local 1595, and Dominion Electric Protection Co. R.W. Reville, C.C.L, J. Wedge, J.W. Healy, September 10, 1963 concerns ambiguity. This applies in the instant case because the phrase "days of the grievor" is an ambiguous provision in a group context. We still don't even know who all the Grievors are.

The Union is asking for an interpretation, nothing else: whether Mr. Tilley's time is what determines the matter, or whether the group's time is what determines the matter. There is no hardship to the Employer and the Union's interpretation is fully in keeping with the Agreement.

IN REBUTTAL ARGUMENT Mr. Simmons noted that many of the Union's cases do not apply under legislation of this province, particularly Section 139 of the *BC Labour Relations Act*

Article 11.11 is not relevant. This is not based on anything the Employer did wrong. Further, if you join a group you operate as a group. Each employee could have filed an individual grievance. *Palmer & Palmer* shows jurisprudence (at p 204).

On the waiver issue there must be some intent, as *Resource Development Trades Council of Newfoundland and Labrador* and *Voisey's Bay Employers Association Inc.* Grievor: Edgar O'Dell, W.J. Clarke (Arbitrator) July 30, 2004 makes clear. If, as the Union argues, they don't know the Grievors and didn't even bother to try and figure out who the Grievors were prior to the grievance, then how could the Employer inform "the Grievor" or respond to "the Grievor"? Clearly it was Mr. Lewis who was putting the matter forward. There was nothing to prevent individual grievances, but it is a group grievance, and must be treated as such.

It was done without Mr. Peter Tilley's knowledge because he was off. If the 31 day logic works, then those who drop off the list before the thirty-one days lose their rights as well. Time limit provisions are there to protect the Employer and the employees. It was Chuck Shewfelt and Shawn Lewis who were carrying the grievance for the employees. The only onus the Union bears in this is to provide a better interpretation of the Agreement. They have not done so.

The question of prejudice to the Employer is not at issue. The recourse is from mandatory time limits. There are ten days from the 27 to August 6, and five people were working those ten days. That's what it is. It is what it is. The trigger is working days when all members are working.

Palmer & Palmer (p. 123) deals with obvious injustice. As long as an employee is there it attracts the time limit. Look at the O'Dell case (at paras. 45 & 46). Time limits are not technicalities.

The liability is huge for the seven employers trying to track their employees. The reference to Article 11.12 is not relevant. The pressure here is to make this work on schedule. Consent #8 shows that the Union knew about the time limit problems.

CONSIDERATIONS

At Issue Between the Parties are two objections to the arbitrability of the grievance based on separate timeliness issues.

The Employer objects, in the first instance, that the referral to Step 3 of the grievance procedure (Consent #6) was outside the mandatory time limit set out in Article 11.01.

The Employer's second objection is that the referral to Arbitration (Consent #10) was also outside the mandatory time limit set out in Article 11.05.

The Union argues in respect of the first objection that the evidence shows the referral at Step 3 was within prescribed time limits, given the prevailing circumstances. The Agreement specifies (at Article 11.001, Step 3) time limits are calculated in "working days of the grievor." The evidence shows that Mr. Peter Tilley – himself one of the group of Grievors and the Shop Steward who submitted the grievance – had, because of the alternating shift rotation, several of the required "working days" remaining when the referral was filed.

The Union also argued that it had no advance indication of the second objection until a

week before the Hearing, and that the objection has no ground since the Employer's position had not crystallised until the August 28 response (Consent #9) to Mr. Lewis's correspondence (Consent #8) on the matter. Thus, in the Union's view, the September 26, 2006 referral to arbitration (Consent #10) was within the 30 day time limit set in 11.05.

The Union further argued that the Employer had waived any right to object to the reference to Arbitration as it had contributed to any perceived time limit irregularities by its failure to respond either to the issue grieved, or "to the grievor and a copy to the Shop Steward" as required under the Article 11.01 at Steps 2 and 3. Thus, in the Union's view, Article 11.11 justifies the Union in advancing the grievance "to the next step in the grievance procedure."

Powers of the Arbitrator: I note that Article 11.09 provides that:

The arbitrator shall not be authorized to make any decision inconsistent with the terms of this Agreement, nor to alter or modify any portion of this collective agreement.

I also note that Brown and Beatty (*idem*) at para. 2:3140 reads, in part, as follows:

Apart from specific and express enabling provisions in a statute or in the collective agreement, and apart from instances of waiver, an arbitrator has no power to relieve against a failure to comply with mandatory provisions in a collective agreement.

Mandatory? The Union does not deny that the time limits specified in the instant Collective Agreement are normally mandatory. I also note, *inter alia*, that the presence of Articles 11.03 and 11.10 in the Collective Agreement support this conclusion, in any case.

The Evidence: I must examine the Collective Agreement in light of the evidence and argument to determine whether the Employer has discharged its onus and established that either or both of the time limits were missed, or whether the Union's interpretation of the Collective Agreement is to be preferred.

Referral to Step 3

The Employer points out that Mr. Shewfelt's referral to Step 3 (Consent #6) is dated 17 August 2006, and that the Employer's response to Step 2 (Consent #5) was dated more than "ten working days" earlier, on July 27, 2006. Consequently, in the Employer's view, the mandatory time limit was missed, and the grievance was "abandoned in accordance with the provisions of Article 11.10" (Consent #7).

The Union's position (initially raised in Consent #8) turns on the fact that Mr. Tilley –

and, according to Mr. Lewis, several others listed – had not actually worked the "10 ... working days of the grievor" allowed for referral to Step 3 before that referral was made on August 17 (Consent #6). I understand this was because of the alternating 3 weeks on / 3 weeks off work schedule. Thus, in the Union's view, the time limit had not expired, and the referral to Step 3 was timely.

I note that Mr. Lewis testified that:

... the Grievors' ten working day cycle had ended. Peter had not passed his ten working days. The Company's argument is not accurate, and we had a large number of Grievors who would say their 10 working days was still a go...

I also note that Mr. Tilley testified that:

My shift was ending on the 27, and I still had 5 or 6 days of my working days. By the term set out here, they were 'working days'. I was due to return on August 22.

The Employer argued that the Union's interpretation of the Collective Agreement is untenable, since it is unreasonable to interpret the Collective Agreement as setting a time limit that is contingent on the various work schedules of individual members of a group of Grievors.

The Union responded that, in its view, its interpretation is required by the plain language of the Collective Agreement. Further, in the Union's view it is entirely reasonable that, so long as any single member of the group of Grievors had not exhausted the time limit, the Union should be free to refer the matter to Step 3. In the Union's view, it is unreasonable to argue that the rights of the whole group can be extinguished by the simple fact that some, or even the majority, of the group had completed their ten working days "of the Grievor".

The Union argued that the substantial merits of the grievance itself should not be jeopardized simply because of differing work schedules.

"working days of the grievor"?

I must examine the intent of the Parties in setting the time limit in this Article, and in denominating that limit as "days of the grievor". In this context I note the comments of Brown and Beatty (*idem*) at para. 4:2100 *The Object of Construction: Intention of the Parties*:

... When faced with a choice between two linguistically permissible interpretations, ... arbitrators have been guided by the purpose of a particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to an anomaly. But

where a Collective Agreement is silent on an issue ... such a provision "must be interpreted on its own terms and not in light of the understandings of the parties."..

Article 11.01 Step 3 reads as follows:

STEP 3: If the employee or the Union is not satisfied with the decision at Step 2, the grievance may, within ten (10) working days after the day of receipt of the decision at Step 2, be presented to the Petro-Canada Operations Manager who will give a decision in writing to the grievor with a copy to the Shop Steward within fourteen (14) calendar days after the day he received the grievance. For the purpose of this provision, "working days" means the working days of the grievor.

The purpose of time limits is to provide certainty for all participants in the workplace.

This is very important to healthy labour relations. M. R. Gorsky *Evidence and Procedure in Canadian Labour Arbitration* comments (at p. 48), as follows:

Time limits are useful, even necessary, in the establishment of a grievance system. If a dispute arises it should be discussed – and settled – quickly. Neither party benefits from having the threat of a grievance hanging over them for weeks or months... A balance must be struck; one that will give the aggrieved party time to become aware of his right of redress, while at the same time, not extending for too long the grievance process... .

Thus, it is clear that definitive and workable time limits are "necessary" to the health of the relationship between the Parties. Their mandatory character, where established, serves a vital purpose, and is not intended to provide either party a procedural trap/licence or a convenient way to avoid addressing the merits of substantial disputes.

I note that, in the instant Collective Agreement, the Parties have addressed their minds to the "balance" question that Gorsky (above) cites, and appear to have taken account of the schedule of employees by agreeing (Article 11.01 Step 3) that "For the purpose of this provision, 'working days' means the working days of the grievor."

The Union suggested that, in the instant situation where the time limits are denominated as working days of the "grievor" in the singular and does not use the plural "grievors", I should either rule that the Collective Agreement is silent on time limits governing group grievances, or rule that there is an ambiguity, and find, liberally, in favour of the Union's interpretation as some arbitral jurisprudence would seem to suggest.

With respect, I am not persuaded that this is the approach I am able to adopt. I do not find the Collective Agreement ambiguous. There appears to be some confusion in the instant

case, but that is a function of several of the facts, including the provisionality of the lists constituting the "group" and Mr. Tilley's dual role as Grievor and as Shop Steward who signed the grievances. I am also aware of the Article 11.09 limitations on my powers as an Arbitrator.

It is essential that, if mandatory time limits are to perform their "necessary" function effectively, they must provide as much certainty as possible. They must let those involved know in advance how long they have, and when the process terminates. While time limits can be subject to challenge and recalculation in the light of specific circumstances, a time limit that can only be calculated retrospectively is not an effective time limit.

I note that, at Article 11.01 Step 2, the Parties explicitly speak of "All Union, group, and policy grievances...". Thus, I conclude that in framing Article 11.01 the Parties were explicitly aware of the possibility of "group" grievances, and that the Collective Agreement is not "silent" in this respect. Rather, I take it that the Parties intended that the sub-clause should read as it stands, and that the "ten ... working days of the grievor" (in the singular) should denominate the duration allowed for the referral of a grievance, including a group grievance, to Step 3.

To read the singular as the Union proposes, as allowing the particular work schedule of any one – or any subgroup – of a group of grievors to render the specified time frame uncertain would be inconsistent with the determinative purpose and express wording of the Collective Agreement. In this group grievance situation, therefore, the word "grievor" refers to the group itself as a collective, whose "working days" gives functional certainty and predictability to the provision. The group, itself, is "the grievor" whose "working days" set the time frame involved.

As noted above, in setting a time limit the Collective Agreement does not reasonably contemplate the working days of this group "grievor" as available for only for retrospective calculation. It must, by virtue of its term-setting role in the Collective Agreement, be available for calculation in advance. Thus, the "working days of the grievor", which in this case is a group, means those "days" the group was to work as a group.

As the Employer cogently argued, it was open to the individual members of the group to file individual grievances. Having chosen to come together as a group, the applicable, and predictable, time limit under this Collective Agreement is that which applies to the group they severally constitute as a singular "grievor". In this context, I note that Mr. Lewis said, in direct

examination, that "... the Grievors' ten working day cycle had ended."

I also note that the logic of the Employer's interpretation of the Collective Agreement is supported by the Collective Agreement when read as a whole. Article 8.03(b), for instance provides for the substitution of a Shop Steward, which suggests that the Parties intended that the work of the Union on behalf of the bargaining unit would not be disrupted as a result of the individual work schedules of particular employees who are Shop Stewards or Alternates.

Waiver & Procedural Irregularities? The Union argued that Employer had, by its actions, given a waiver on time limits. The Union pointed out, for instance, that the Employer Consent #7b response at Step #3 had not been made "to the grievor with a copy to the Shop Steward" as required by Article 11.01 at Step 3.

With respect, I do not find support for this in the evidence presented. I note that from as early as August 18, (Consent #7), the Employer had insisted there was a time limit problem. I find no evidence to support the Union's claim of a waiver. Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para: 2:3130 reads

2:3130 Waiver of procedural irregularities

The concept of "waiver" connotes a party not insisting on some right, or giving up some advantage. However, to be operative, waiver will generally require both knowledge of and an intention to forego the exercise of such a right.

In its application, waiver is a doctrine that parallels the one utilized by the civil courts known as "taking a fresh step", and holds that by failing to make a timely objection and "by treating the grievance on its merits in the presence of a clear procedural defect, the party waives the defect". That is, by not objecting to a failure to comply with mandatory time-limits until the grievance comes on for hearing, the party who should have raised the matter earlier will be held to have waived non-compliance, and any objection to arbitrability will not be sustained. This has been held to be so even though there was a timely objection as to arbitrability but not one that related to the failure to meet time limits. Where, however, the objection to untimeliness is made at the earliest opportunity, even if it is not made in writing, it will preclude a finding that the irregularity was waived....

I conclude, therefore, that the Employer has discharged the onus it bears of demonstrating that the Union did, in fact, make the referral to Step 3 of the grievance procedure outside the mandatory time limits specified in the Collective Agreement.

Referral to Arbitration:

The Union also argued the Employer was raising a procedural objection at the last minute in complaining about the timeliness of the referral to arbitration. In its view, the Union has a right to regard this matter as waived since the Employer had only made this claim a week prior to the hearing.

The Union also argued that the Employer had waived any right to object as it had contributed to any perceived time limit irregularities by its failure to respond either to the issue itself as grieved, or "to the grievor and a copy to the Shop Steward" as required under the Article 11.01 Steps 2 and 3. Thus, in the Union's view, Article 11.11 justifies the Union in advancing the grievance "to the next step in the grievance procedure".

Further the Union argued that the Employer's second objection has no ground, since the Employer's own position on the Step 3 referral only crystallised in the Employer's August 28 response (Consent #9) to Mr. Lewis's letter (Consent #8) on the matter. In the Union's view, the September 26, referral to arbitration (Consent #10) was within the time limit set in 11.05.

With reference to the Union's counterclaim that the Employer is barred from raising the objection the timeliness of the referral to arbitration I note that Brown and Beatty (*idem*) advises, at 3:1400 "*Pre-hearing Disclosure*" in part as follows:

To participate effectively in the hearing, the parties and other persons affected must have some knowledge of both the factual and contractual issues in dispute. In the courts, procedures such as an exchange of pleadings, production of documents, and examinations for discovery exist for this purpose. Because of the continuing nature of the collective bargaining relationship in grievance arbitration, however, much less formality is generally required. Accordingly, the grievance itself and the submission to arbitration, together with the grievance procedure, the exhaustion of which is often a condition precedent to proceeding to arbitration, suffice as surrogates for pleadings and the other pre-trial procedures associated with the judicial process.

The launching of a grievance usually has three simultaneous effects: it will initiate the proceedings; determine the particular scope of the arbitrator's authority; and it will inform the other party of the matters in dispute. And generally, if the grievance is sufficiently particular to define the arbitrator's jurisdiction, it will usually be sufficiently particular to meet the requirement of giving the opposite party notice of the issues in dispute. ...

However, notwithstanding the absence of a provision in the collective agreement requiring disclosure, the requirements of natural justice require that one

party not unfairly surprise the other, and accordingly, some arbitrators have required pre-hearing disclosure of information and documents that are necessary to enable a party to participate properly in the adjudicative process.... In any event, where there has been surprise resulting from inadequate pre-arbitration disclosure, the usual remedy is simply to adjourn the hearing to permit the party caught by surprise to prepare its response.

In the instant matter, I am not aware that the Union was so surprised by the timing of the Employer's objection as to have been disadvantaged in presenting its argument and evidence on it. Further, I do not find persuasive the suggestion that the alleged lateness of the notice given constitutes a waiver of the Employer's right to bring the objection.

With respect to alleged procedural irregularities on the Employer's part, I note, first, that the Union acknowledged the grievor list "may not have fell into the right hands" (SL #3); and, second, that the "Shop Steward" (also a Grievor) in this case had actually signed the grievance "... for Shawn Lewis". Mr. Lewis was copied on Consent #7. Further, I note that the Employer's response at Step 2 (Consent #5) does address the substance of the matter, in point form. Thus, I do not find that the irregularities alleged constitute evidence of a waiver in these circumstances, or that they count against the Employer's objection.

I find, further, that I am not persuaded by the Union's claim that the referral to arbitration was timely in that the Employer's response at Step 3 had not crystallised until its August 28 response (Consent #9). The Employer's position crystallised clearly on August 18 (Consent #7), and was explicitly reconfirmed in later correspondence. The period from August 18 (Consent #6) to September 26 (Consent #10) clearly exceeds the 30 calendar days prescribed in Article 11.05. I conclude that the Employer has also discharged its onus in respect of the second objection.

DECISION

In light of the foregoing considerations, I find that

The Employer has discharged its onus in respect of both objections. Both objections are sustained. I am without jurisdiction to hear the merits of the case.

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, Arbitrator

July 31, 2008