Case Name:

Unite Here Local 40 v. Compass Group Canada (Nanaimo Seniors Centre) (Stauffer Grievance)

Labour Relations Code
(Section 84 Appointment)
Between
Unite Here Local 40, Union, and
Compass Group Canada (Nanaimo Seniors Centre), Employer
(Re: Preliminary Decision -- Melissa Stauffer)

[2012] B.C.C.A.A.A. No. 67

No. A-061/12

British Columbia
Collective Agreement Arbitration

Panel: James E. Dorsey, Q.C. (Arbitrator)

Heard: Union application: May 14, 2012.
Award: May 16, 2012.

(20 paras.)

Appearances:

Representing the Union: Michael J. Prokosh.

Representing the Employer: Mike McDevitt.

ARBITRATION AWARD

1 The union grieved April 19, 2011 that the employer contravened Article 9.12 and other provisions of the collective agreement when Melissa Stauffer returned from maternity/parental leave by not returning her to the position she held before taking her approved maternity/parental leave beginning April 6, 2010.

2 On October 21, 2011, I was notified of my appointment to arbitrate this grievance. At that time, counsel for the union was not available for hearing until February or March. On November 2, 2011, after identifying mutually agreed dates, the arbitration hearing was scheduled for March 5 and 6, 2012.

3 The union requested an adjournment on February 28th because the union's counsel had re-signed and it had retained new counsel. New mutually agreed dates could not be identified quickly. On March 21st, the union requested I convene a case management conference to set dates. My email response early the next morning was as follows:

> Gentlemen,
>
> > The simple administrative task of setting a hearing date is becoming unnecessarily complicated and resource consuming. A conference call will add more time and cost to the process.
> >
> > It has been three weeks since the employer was asked to identify two of the May dates being held by me and the union. It is time to finalize this administrative matter.
> >
> > Mike, please tell me before 3:00 p.m. today PDST which two of the following dates are convenient for the employer for a hearing in Nanaimo: May 10 - 11; 22 - 23; and 31.
> >
> > If there is no response identify[ing] two dates, I will schedule the hearing for May 22 and 23, 2012.

There was no employer response and the hearing was scheduled for May 22 and 23, 2012.

4 The union delivered particulars and documents to the employer on April 17th and requested the employer to reciprocate by April 27th. The union alleged employer breaches of the collective agreement, *Employment Standards Act* and *Human Rights Code*. It listed the remedies it would seek at arbitration. The union gave notice to the employer that if the employer did not reciprocate by April 27th, it would apply for an order for pre-hearing disclosure.

5 The employer did not reciprocate by April 27th. The union applied for an order on April 30th. I convened a case management conference call on May 4th. The union and employer agreed I have jurisdiction to finally resolve the merits of the union's grievance under their collective agreement and the *Labour Relations Code*. I granted the union's application and made an order that the employer disclose to the union particulars and the documents listed by the union no later than the close of business on Friday, May 11th, a date accommodating the employer's schedule. The order was confirmed by email on May 5th.

6 On the afternoon of Friday, May 11th, because of circumstances explained by the employer, I extended the delivery date and time to the close of business on Monday, May 14th. I understood the employer would contact counsel for the employer that day with a view to discussing settlement of the grievance.

7 After 5:00 p.m. on May 14th, the union applied for certain orders because of the employer's failure to comply with the disclosure order. My response that evening was, in part, as follows:

Gentlemen,

> I have received and reviewed the attached application from the union.
>
> Mr. Prokosh's recital of the relevant background does not include certain events late in the day on Friday, May 11th. Subsequent to my email of May 5, 2012 confirming the outcome of our May 4th conference call, I had no further communication with either of you until I received the attached email from Mr. McDevitt on Friday, May 11, 2012 requesting I call him on an urgent matter. I see that Mr. Prokosh was not an addressee of the email and that I failed to forward a copy to him.
>
> I telephoned Mr. McDevitt. He requested an extension of my order to the close of business on Monday, May 14, 2012 because of events that had occurred in his career. ... He advised he had most of the materials to disclose in compliance with the order, but he would need time on the weekend to complete his investigation and comply with the order. He said he anticipated referring this grievance-arbitration to counsel, but was confident from what he had learned through his investigation that the grievance should be resolved with the union. I urged him to speak to Mr. Prokosh about settlement.
>
> At the conclusion of the call I understood that, at my request, Mr. McDevitt was going to telephone Mr. Prokosh immediately to explain the situation, our discussion and explore or set the stage for settlement discussions with the union.
>
> I anticipated that, in the normal course of reciprocal courtesy in this business, the union would not oppose an extension to the close of business on Monday to accommodate Mr. McDevitt. ...
>
> This is notice that the employer has one further chance until 5:00 p.m. tomorrow, Tuesday, May 15th to (1) make disclosure in full compliance with my order of May 11, 2012 during the conference call and (2) to reply to the union's application filed today.
>
> I intend to make and communicate my decision on the union's application on Wednesday, May 16, 2012, unless it is necessary that the union have an opportunity to respond to the employer's reply to its application.

8 The employer replied the same evening: "At the moment I'm in Calgary returning Wednesday, I will call Union counsel before close of business tomorrow. I will have a proposal to settle said grievance." Promptly at 5:00 p.m. yesterday, May 15th, union counsel informed as follows: "(1) the parties have not settled this case (nor has Mr. McDevitt phoned my office today); (2) the Employer has still not delivered any particulars; (3) the Employer has still not delivered any documents; and (4) the Employer has not responded to the Union's May 14, 2012 application."

9 The union now applies for the following orders:

a) that the grievance regarding the above-noted matter (the "Grievance"), be granted without a hearing on the merits, on the basis of Compass Group Canada, Nanaimo Seniors Centre's ("Compass"' or the "Employer's"), failure to comply with this Arbitrator's May 4, 2012 order that the Employer deliver a) its particulars and b) all relevant documents within its possession, by the close of business on May 11,2012 (the "Arbitrator's Order");

b) that the remedies sought by the Union (per its April 17, 2012 particulars and re-stated during the May 4,2012 conference call), also be granted without a hearing on the merits;

c) that this Arbitrator's fees and disbursements associated with today's application including but not limited to the issuing of any order as a result of today's application be borne entirely by the Employer.

10 What is a grievance arbitrator's jurisdiction and appropriate response to a union, the grievor or an employer deliberately or repeatedly not complying with an arbitrator's pre-hearing disclosure order made to facilitate an orderly, constructive and expeditious settlement of the dispute and to ensure a fair arbitration hearing?

11 It is well settled that if the union or grievor is the non-complying person the ultimate response can be summary dismissal of the grievance despite the absence of any evidence or finding of any facts on the merits of the grievance.[1]

12 In 2002, the Labour Relations Board observed "The arbitration process continues to evolve and arbitrators must strive to ensure that it remains an efficient mechanism for resolving collective agreement disputes."[2] One element of the evolution is the legislated duty on arbitrators to exercise their jurisdiction "in a manner that ... promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes."[3] This includes protecting the integrity and viability of arbitration to maintain respect for arbitration as an efficient and affordable dispute resolution process for all persons bound by collective agreements.

13 Most recently, Arbitrator Steeves summarized the evolved view toward non-compliance with pre-hearing disclosure orders as follows:

> As pointed out in the *Surrey Memorial Hospital* award, the *Labour Relations Code* in British Columbia does not have the same provision as in the Ontario legislation and as relied on by the arbitrator in *National Standards of Canada, supra*. However, the obligation to prevent an abuse of the arbitral process is well established, independent of a specific provision in the legislation. An arbitrator must superintend the integrity of the arbitration process and prevent the abuse of that process. This follows from the authority to make decisions about the procedures of an arbitration in section 92(a) of the *Labour Relations Code*. As well, an arbitration hearing would be a superficial and artificial exercise if all relevant information was not before the arbitrator. Such a process would not be able to decide the real substance of the matters in dispute between the parties.

> On the basis of the above authorities I am satisfied that I have the authority, in an appropriate case, to dismiss a grievance without a hearing on the merits as a result of a refusal by one party to comply with a pre-hearing order for disclosure of documents.
>
> I am also satisfied that this is a case where the grievance should be dismissed without a hearing on the merits.[4]

14 While summarily dismissing a grievance without any evidence or findings of fact because of non-compliance with a pre-hearing disclosure order or other form of abuse of process by a union or grievor has become an accepted response in appropriate circumstances, what is an equivalent response to an employer's non-compliance with a pre-hearing disclosure order or other form of abuse of process?

15 Often an adjournment of the hearing with or without conditions imposed on the employer is not a reasonable or practical response to the employer's non-compliance. While payment of certain costs can be a condition of events in a proceeding,[5] because sharing of costs is a legislative policy,[6] an award of punitive costs is not clearly contemplated as an appropriate response. Although, in 2004, Arbitrator Moore observed abuse of process might be an extraordinary circumstance when an award of costs is appropriate.

> The statutory standard with respect to fees and costs is set out in Section 90 of the Code and requires that they be borne equally by both parties absent a collective agreement provision to the contrary. The collective agreement between these parties is silent on the issue. Nonetheless, the authorities relied upon by the Union, and of particular significance those decisions of the BCLRB, appear to recognize a jurisdiction to award costs against a party. They do not, however, provide much assistance as to the principles upon which the exercise of this discretion should be based. Given that the arbitration system, unlike the civil court system, is by statute costs neutral, I am of the opinion that any departure from that neutrality by the exercise of a discretion should only occur in extraordinary circumstances. I am not persuaded that the circumstances of this case attract the exercise of that discretion. While earlier efforts to exchange documents and discussions between counsel would have identified the problem and may well have avoided the adjournment I cannot say that difficulties of this nature are uncommon in the informal process leading up to arbitration. Certainly counsel can be reasonably expected to act with reasonable diligence to try avoid such problems. However, the exigencies of arbitral practice are such that short of introducing a more formal procedural structure, which may have the undesirable effects of increasing the complexity and expense of the process, problems of this nature will arise. I decline to award costs against the Employer.[7]

In the circumstances of this arbitration, an award of costs presumes an adjournment, which does not address the employer's non-compliance.

16 Upholding a grievance is the equivalent response to dismissing a grievance for non-compliance with a pre-hearing disclosure order or other form of abuse of process. A 2003 On-

tario decision to do this[8] was quashed in 2006 by the Ontario Court of Appeal. The Court described the appeal before it as follows:

> An employer lost documents relevant to an employee's grievance. On a preliminary motion, the arbitrator found no bad faith on the part of the employer but concluded that without the lost evidence, both the union's ability to advance its case and the employer's ability to defend its actions were "irreparably prejudiced". Without hearing the employer's evidence on the grievance proper, the arbitrator ruled that the appropriate remedy was to allow the union's grievance. The employer applied for judicial review on the ground that by granting the grievance without a conducting a hearing on the merits, the arbitrator denied the employer's right to natural justice. The Divisional Court concluded that the arbitrator's award was not unreasonable and refused to quash it. The employer appeals that decision and asks for an order quashing the award and remitting the matter for a hearing on the merits.[9]

The Court decided: "Allowing the grievance on the ground that evidence had been lost was, in my view, an unusual and extreme remedy that cannot be supported on the basis of this jurisprudence"[10] and "...it was an error meriting the intervention of judicial review for the arbitrator to leap to the conclusion that the grievance had to be allowed on the basis of lost evidence without hearing all the evidence that was available."[11]

17 This is not a situation of lost documents. The employer has some or all the documents ordered to be disclosed and, despite an extension of the time to comply, has simply failed or refused to do so without explanation.

18 No previous decision allowing a grievance other than the decision reviewed by the Ontario Court of Appeal has been cited by the union in support of its application. In reaching its decision, the Court wrote:

> No doubt arbitrators do have the authority in appropriate cases to dismiss a grievance on preliminary grounds, for example, where the grievance is out of time, had been resolved by a settlement or suffers some other fatal procedural defect. However, I agree with the appellant that the arbitral jurisprudence relied on by the respondent and the Divisional Court does not support the decision to allow the grievance in the circumstances of this case. The arbitral decisions in *Re National-Standard Co. of Canada Ltd*. and *C.A.W., Local 1917* (1994), 39 L.A.C. (4th) 228 (Palmer) (Ont.) and *Re Budget Car Rentals Toronto Ltd. and U.F.C.W. Local 175* (2000), 87 L.A.C. (4th) 154 (Davie) (Ont.) both involve the dismissal of grievances and turn on the failure of a party to comply with an order in circumstance amounting to a deliberate or *male fides* attempt to thwart the arbitration process. Here, the arbitrator expressly exonerated the employer of any such deliberate conduct in the present case. Donald J.M. Brown & David M. Beatty, *supra*, at para. 3:1421, summarize the arbitral jurisprudence dealing with failure to produce documents in terms indicating that allowing a grievance for non-production of documents is restricted to situations of deliberate disregard of orders for production:

> where a timely request is made [for production of documents] and there is no response to it or to an order for production, it is open to the arbitrator to refuse to admit the document into evidence or to grant an adjournment. And if the party's refusal continues thereafter, the arbitrator may make an award of costs payable by the recalcitrant party where he has authority to do so, or may convene the hearing and either allow or dismiss the grievance [footnotes omitted].[12]

Since that Court of Appeal decision, the Ontario Grievance Settlement Board has been cautious in upholding a grievance for employer non-compliance with a disclosure order.[13]

19 As stated, this is not a circumstance where an adjournment or an order for costs is appropriate. At the same time, unless the employer takes immediate and extraordinary steps to remedy its persistent non-compliance the union will be severely constrained in its ability to present its grievance at the hearing in Nanaimo on Tuesday, May 22, 2012 because of the employer's non-compliance.

20 I, therefore, find the appropriate and measured response to the employer's non-compliance in this situation is to convene the hearing as scheduled and, in the absence of immediate and extraordinary steps by the employer or the grievance having been resolved, to allow the grievance. If that occurs at the outset of the hearing, I will proceed immediately to hear any evidence available to the union with respect to the remedies it seeks, including a calculation or estimation of Ms Stauffer's lost wages and benefits, steps to ensure future compliance with the collective agreement and any damages for alleged contraventions of the *Employment Standards Act* and *Human Rights Code*. To this extent the union's application is allowed.

MAY 16, 2012, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

qp/e/qlspi

1 See the discussions in *Island Paper Mills* [2000] B.C.C.A.A.A. No. 84 (McPhillips); *Fording Coal Limited* [2000] B.C.C.A.A.A. No. 434 (Sanderson); *International Forest Products Ltd*. [2001] B.C.C.A.A.A. No. 399 (Hope) review and set aside [2002] B.C.L.R.B.D. No. 258; *Surrey Memorial Hospital* [2005] B.C.C.A.A.A. No. 151 (Taylor); *Vancouver Island Health Authority* [2008] B.C.C.A.A.A. No. 2 (Korbin); *Abbotsford Police Department* [2007] B.C.C.A.A.A. No. 242 (Coleman).

2 *International Forest Products Ltd*. [2002] B.C.L.R.B.D. No. 258, para 24.

3 *Labour Relations Code*, s. 2(e).

4 *Rio Tinto Alcan, Primary Metal North America (Kitimat/Kemano British Columbia Operations)* [2011] B.C.C.A.A.A. No. 118 (Steeves), paras 26 - 28.

5 E.g., *Health Employers' Ass'n and H.E.U*. [2009] B.C.C.A.A.A. No. 33 (QL) (Burke).

6 *Labour Relations Code*, s. 90.

7 *Vibrant Health Products Inc*. [2004] B.C.C.A.A.A. No. 127 (Moore), para 35.

8 Ontario Public Service Employees Union (Larman) v. *Ontario (Ministry of Community, Family and Children Services)*, 2003 CanLII 52907 (ON GBS).

9 *Ontario (Ministry of Community, Family and Children Services) v. Crown Employees Grievance Settlement Board*, (2006), 81 O.R. (3d) 419 (C.A.). para 1; (2006), 151 L.A.C. (4th) 129 (O.C.A.), leave to appeal to S.C.C. refused 155 L.A.C. (4th) xi

10 para 29.

11 para 31.

12 para 29.

13 *See Ontario Public Service Employees Union (Brosseau et al.) v. Ontario (Ministry of Revenue and Ministry of Government Services)*, [2011] O.G.S.B.A. No. 159