IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADA POST CORPORATION

("the Employer")

AND:

CANADIAN UNION OF POSTAL WORKERS

("the Union")

IN THE MATTER OF:

NATIONAL GRIEVANCE N-00-07-00032

ARBITRATOR:

Kevin M. Burkett

FOR THE EMPLOYER:

Louise Bechamp - Counsel
Rolland Forget - Counsel

FOR THE UNION:

Gaston Nadeau - Counsel

SUPPLEMENTARY AWARD

In an award dated October 17, 2013, I made the following three findings:

1. There existed a requirement for a thorough workplace risk assessment of the two bundle delivery method and Canada Post, although taking a number of steps to enhance letter carrier health and safety under the two bundle delivery method, breached its contractual and statutory obligation to identify and assess all workplace hazards, including ergonomic ones, by failing to undertake a comprehensive workplace risk assessment in connection with the introduction of the two bundle delivery method.

2. The two bundle delivery method (as described), that compromises the forward field of vision to a statistically significant degree, presents a greater risk of slip, trip and fall injuries to letter carriers than the one bundle delivery method.

3. Based on a consideration of all the relevant evidence, the issue as to whether or not there is a greater risk of musculoskeletal injury under the two bundle delivery method is left as an open question.

The parties had agreed that the remedial aspects of the case be remitted to them such that I did not fashion any remedies but remained seized in the event the parties were unable to reach agreement on remedy.

The parties, although making progress with respect to the parameters of a workplace risk assessment, have brought the matter back before the arbitrator. It was my understanding that the Employer, in place of the two bundle delivery method (as

fully described in the October 17, 2013 award), had provided letter carriers with three other delivery method options, none of which requires mail to be carried horizontally across the forearm while holding a second bundle in the same hand. In a supplementary award dated November 8, 2013, I found that these options (only one of which the Union concedes is safe) "address(ed) the finding of increased risk of slips, trips and falls." However, the three delivery options referred to above were in addition to the fourth option of allowing individual letter carriers to continue to utilize the two bundle delivery method. The Union, citing the findings in the October 17, 2013 award, is adamantly opposed to the continued use of the two bundle delivery method, even as an option. Hence, the Union is seeking a cease and desist order.

The Employer challenges my jurisdiction to deal with the remedial question at this point in the process. The Employer draws a distinction between interim remedies and final remedies and argues that, in circumstances where the parties agreed at the outset that I should not fashion any remedies but remit that question to the parties, the parties must be given a full opportunity to address the question through an interim stage. It is the position of the Employer that, pending the results of a full workplace risk assessment, we are in this interim stage as evidenced by the fact that the parties are working toward an agreement with respect to the parameters of a full workplace risk assessment and by the fact that interim delivery method options have been put in place such that use of the two bundle delivery method is now voluntary. In these circumstances and not having acted upon earlier Union requests for a cease and desist,

the Employer asserts that I am *functus officio* in regard to the issuance of any interim remedy and that, because we are not yet at the final stage in the remedial process, I am without authority at this point in time to issue a final remedy.

In addressing the merits of its interim arrangement under which letter carriers are no longer required to use the two bundle delivery method but are given four options, including the two bundle delivery method, and in addressing the merits of the Union request for a cease and desist order, the Employer draws a distinction between risk and danger within the meaning of the Code. The Employer argues that a finding of increased risk, as was made in the October 17, 2013 award, does not mean that there is an increased danger. It is the position of the Employer that, absent an increased danger and given the variability in the physical characteristics of individual letter carriers, the replacement of the mandatory two bundle delivery method with four optional delivery methods, including the two bundle delivery method, is a safe and sensible interim measure. The Employer asserts that in the absence of a finding of increased danger and in the face of this interim measure, there is no reason to impose a permanent cease and desist, especially when a full workplace risk assessment of the two bundle delivery method has yet to be carried out.

The Union, for its part, does not accept that there are two distinct phases to the remedial process as would allow the Employer to avoid a remedial response from the arbitrator by arguing that we are in an interim stage. It is the position of the Union that, whereas the arbitrator was initially content, as an interim measure, with the

replacement of the two bundle delivery method with three other delivery options that did not require mail to be carried horizontally across the forearm (November 8, 2013 supplementary award), the two bundle delivery method as a sanctioned fourth option is inconsistent with the findings made in the October 17, 2013 award. Given the Employer's insistence on the continued use of the two bundle delivery method, the Union argues that, even if there was an interim phase, the remedial discussions between the parties are at an end. It is the position of the Union that in the circumstances, it is now incumbent upon the arbitrator to provide a full and meaningful remedy reflective of the findings already made.

The Union asserts that given the fact that I remained seized to deal with unresolved remedial issues, given that the Code contemplates an end result that includes the awarding of appropriate remedies and given that the parties have been unable to agree, I not only have the jurisdiction but also the obligation to fashion a meaningful remedy.

As for the merits, the Union does not accept the distinction between risk and danger relied upon by the Employer. It is the position of the Union that it has already been found that the increased risk of slips, trips and falls occasioned by the two bundle delivery method (that was found not to be a condition of employment) constitutes a danger to the health and safety of letter carriers. Alternatively, even if there is some merit to the Employer's position, which it disputes, the Union points out that the Employer's obligations under the collective agreement are triggered by

increased risk. Given the findings made in the October 17, 2013 award, therefore, the Union asserts that letter carriers can no longer be permitted to use the two bundle delivery method. The Union advises that, in the face of the Employer's insistence that the two bundle delivery method remain as a delivery method option, the only meaningful remedy would be a cease and desist order.

DECISION

This is a supplementary award dealing with the question of remedy. Before considering the issues related to remedy, it is useful to reiterate the findings made in the October 17, 2013 award with respect to the two bundle delivery method – findings made after an 18-day hearing at which considerable expert and other evidence was tendered and comprehensive submissions were made. I found as follows:

> In addressing the issue before me, it is necessary to reiterate at the outset that under the predecessor one bundle delivery method, to which the Union seeks to return, the delivery of mail on foot entailed significant risk of accident and/or injury. That risk, however, is at a level that both the Union and the Employer were and are prepared to accept. It follows that any increased risk resulting from the two bundle delivery method would be cause for concern and that, therefore, the ultimate determination in this matter will depend upon whether the two bundle delivery method gives rise to risk of danger that is greater than that faced under the one bundle delivery method. (p. 66)

> I do not accept that the sortation method and the delivery method are inextricably intertwined such that the combined sortation method and delivery method, whatever they might be, constitute a normal condition of employment within the meaning of the Code….The delivery method is an element of the work routine that can be controlled and in respect of which a direction could be issued under the Code should it be found that the delivery method causes an increased risk to the health and safety of letter carriers. (p. 69)
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> Canada Post, therefore, had both a contractual and statutory obligation to satisfy itself that the two bundle work method that was being implemented as part of postal transformation did not give rise to hazards that increased the risk of letter carrier illness or injury beyond that under the one bundle delivery method. (p. 72)
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> …I am satisfied that the long and short mail carried on the forearm under the two bundle delivery method constitutes a danger beyond that present under the one bundle delivery method that has the reasonable potential to increase the risk of slips, trips and falls that, more likely than not, will result in additional injuries to letter carriers beyond that under the one bundle delivery method. (pp. 80-81)

and concluded at p. 86 that:

> The two bundle delivery method (as described), that compromises the forward field of vision to a statistically significant degree, presents a greater risk of slip, trip and fall injuries to letter carriers than the one bundle delivery method.

These findings leave no doubt that the two bundle delivery method posed an unacceptable health and safety risk and a danger to letter carriers beyond that posed by the one bundle delivery method.

Under the Code, "every employer shall ensure that the health and safety at work of every person employed by the employer is protected." Under the collective agreement, the Employer "shall provide and maintain workplaces, equipment, work

methods and tools that are safe and without risk to health" and "take, without delay, all the measures necessary to prevent or correct a situation liable to endanger the health and safety of employees." (emphasis added)

Given the findings made with respect to the two bundle delivery method in the October 17, 2013 award and given the statutory and contractual obligations upon the Employer to protect the health and safety of its employees, it could reasonably have been expected that, upon release of the October 17, 2013 award, the Employer would have moved to provide its letter carriers with a required delivery method or methods that bring the risk of slips, trips and falls back to the baseline. It could not have been imagined that, given these findings and the statutory and contractual obligations upon it, the Employer would continue to allow letter carriers to deliver mail using the two bundle method. Indeed, if the question of remedy had not been remitted to the parties, I would have directed, as part of the initial award, that the two bundle delivery method be discontinued.

Notwithstanding the foregoing, the Employer draws a distinction between an interim remedial phase and a final remedial stage and argues that not having exercised my remedial authority at the time I released the award and having remitted the remedial question back to the parties who are now working toward a workplace risk assessment arrangement, I am *functus* with respect to the exercise of my remedial authority during this interim period.

The intent of the October 17, 2013 referral of the remedial question was to give the parties time to discuss, consider and hopefully agree upon the remedies flowing from the October 17, 2013 award. This might well be described as an interim period and clearly it would have been imprudent for the arbitrator to have pre-empted the parties so long as they were engaged in fruitful discussion in this regard. While not conceding that the *functus officio* doctrine applies, I concur with the Employer that so long as these discussions were ongoing, my remedial authority should have been held in abeyance. However, in so far as they pertain to the two bundle delivery method, these discussions are at an end and the ultimate responsibility of the arbitrator to fashion an appropriate remedy remains. Indeed, the Employer acknowledges that the arbitrator is vested with full remedial authority in what it described as the final remedial phase.

If there is any doubt as to the obligation upon a rights arbitrator to provide full remedial relief, reference need only be had to the 1992 award of this arbitrator between these parties (see *Canada Post Corporation and CUPW (1992) 28 LAC (4th) 228*), wherein it is was stated:

> Section 57 of the Canada Labour Code stipulates that disputes between the parties with respect to the interpretation application or administration of a collective agreement, during its term, are to be submitted to arbitration for final and binding resolution. Furthermore, the statutory draftsmen understood that where binding arbitration is substituted for the right to strike during the term of a collective agreement the power of an arbitrator to grant full and effective remedies is necessary to ensure the integrity and viability of any collective agreement and concomitantly the integrity and viability of the collective bargaining system.

> Notwithstanding the general application of the statutory scheme these parties have expressly provided in art. 9.39 that "[t]he arbitrator shall be vested with all the powers that are necessary for the complete resolution of the dispute" and further that "…the arbitrator shall be vested with all of the powers conferred upon him by the Canada Labour Code." The important point to be made is that under both the statute and the collective agreement, for the policy reasons that I have referred to, I have "…all the powers that are necessary for the complete resolution of the dispute."

The parties were given the opportunity to attempt to reach agreement as to the appropriate remedy in this case. They have reached an impasse with respect to the two bundle delivery method. The Employer seeks to have it maintained as a delivery option while the Union is adamant that it must be discontinued. If there was an interim remedial phase during which my remedial authority should properly have been held in abeyance, that phase has now ended.

To the extent that the Employer argues that the interim period encompasses the time required to complete a full workplace risk assessment that would include the two bundle delivery method, that argument is not tenable. As noted, the findings in this matter followed upon an 18-day hearing during which expert, statistical and comparator evidence was tendered and full submissions made. It cannot be that the two bundle delivery method would remain as a delivery method option even though it has been found that the two bundle delivery method gives rise to an increased risk of letter carrier slips, trips and falls that constitute a danger that more likely than not will cause additional letter carrier injuries. Nor can it reasonably be argued that, after an 18-day hearing and the issuance of a binding award, the findings made in respect of

the two bundle delivery method are subject to reconsideration under a workplace risk assessment. The Employer, having chosen not to undertake a full workplace risk assessment at the outset, cannot now be heard to argue that the findings in respect of the two bundle delivery method made after an 18-day hearing are not final and binding. Although there remain reasons for conducting a post-hearing workplace risk assessment, this risk assessment cannot be the basis for a reconsideration of the findings already made with respect to the two bundle delivery method.

The Employer's argument with respect to the absence of jurisdiction to exercise my remedial authority is confined to what it describes as the "interim period." As noted, the parties, having been given the opportunity, have failed to reach agreement with respect to the delivery method such that, if there was an interim remedial phase, it has ended. There is no *functus officio* challenge to my jurisdiction to fashion a full and responsive final remedy. Indeed, I am now under a positive obligation to do so.

Having regard to all of the foregoing and to my findings under the October 17, 2013 award with respect to the two bundle delivery method, I hereby confirm that the continued use of the two bundle method constitutes a breach of the Employer's statutory and contractual obligation to take all reasonable measures to protect the health and safety of its employees and direct that the two bundle delivery method be discontinued. I accept that it might take some time to communicate and enforce the necessary directives and to put in place the alternative delivery method(s). Accordingly, it is my further direction that the discontinuance of the two bundle

delivery method be fully in effect within thirty (30) days of the date hereof. I am confident that the 30-day period is reasonable given the fact that three other delivery methods that do not require mail to be carried horizontally across the forearm are now in place as delivery method options.

I continue to remain seized.

Dated this 24th day of February 2014 in the City of Toronto.

Kevin Burkett

KEVIN BURKETT