IN THE MATTER OF AN ARBITRATION

BETWEEN

CATALYST PAPER CORPORATION

(the “Employer")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS
UNION OF CANADA, LOCAL 1

(the "Union”)

(Retroactive Payment of Severance)

ARBITRATOR: Robert Pekeles

COUNSEL: Donald Jordan Q.C., for the Employer
John Rogers Q.C., for the Union

DATE OF DECISION: May 4, 2010

INTRODUCTION

The Union grieves the calculation of severance pay for certain employees who retired after April 30, 2008. Its position is that increases negotiated in the most recent round of collective bargaining are retroactive for those employees. The Employer opposes that position.

FACTS

The duration clause of the parties' current Collective Agreement is as follows:

> ARTICLE XXXII – DURATION AND
> AMENDING PROCEDURE
>
> Section 1: Term of Agreement
>
> This agreement shall be in effect from midnight April 30, 2008 to midnight April 30, 2012, and thereafter from year to year subject to the conditions as set out in Sections 2 to 5 which follow hereunder.

The bargaining that resulted in the current Collective Agreement was not concluded until November 20, 2008.

With respect to severance allowance, certain increases were negotiated in the last round of collective bargaining. Included among those were the number of years at which the severance allowance was two weeks per year of service, as opposed to one week per year of service (increased from the first 10 years to the first 20 years), as well as the maximum severance allowance (increased from 45 weeks to 52 weeks). There was also a negotiated 2% wage increase effective May 1, 2008.

On February 24, 2007, during the term of the previous 2003-2008 collective agreement, a signed written agreement was reached between the Employer and the Union in which the

Employer agreed to provide 19 early retirement incentive packages in exchange for workplace changes (the "2007 Agreement"). Those workplace changes were with respect to a (an): (1) new Dedicated Crew Agreement (2) amended Compressed Work Week Memorandum of Agreement (3) amended 42 Hour Leave Agreement and (4) amended Agreement on Earned Time Off. The 2003-2008 collective agreement included Supplementary Agreements which included an Agreement on Earned Time Off dated September 5, 2002 and a Compressed Work Week Memorandum of Agreement dated August 11, 1998. Those Supplementary Agreements are set out at pages 142 and 158 respectively of the 2003-2008 collective agreement.

The Compressed Work Week Memorandum of Agreement dated August 11, 1998 begins with the following language:

> Unless specifically varied by this agreement, all the terms and conditions of the Collective Agreement shall apply.
> In order to implement a compressed work week schedule in any Local 1 department, the parties hereby agree to the following terms and conditions:

Some 23 articles of terms and conditions follow thereafter.

The workplace changes agreed to by the parties in the 2007 Agreement included amendments to the Compressed Work Week Memorandum of Agreement and a replacement for the Agreement on Earned Time Off dated September 5, 2002. The former amended Articles 14 and 16 of the Compressed Work Week Memorandum of Agreement. The amended Earned Time Off Agreement begins with the following language: "The following represents the understanding reached between the Union and the Company regarding the administration of earned time off (ETO) within Local 1 and will replace the Agreement on Earned Time Off dated September 5, 2002..." The 42 Hour Special Leave Agreement begins with the following language: "The following agreement represents the amended terms of participation in the 42 Hour Special Leave Plan for members of CEP Local 1 as of February 7th 2007:" The Dedicated Crew Agreement begins with the following language: "The following represents the understanding reached

between CEP Local 1 and the Company regarding the implementation of Paper Machine Dedicated Crews:" The Dedicated Crew Agreement could potentially expire as late as December 31, 2011 (see Article 10 thereof) i.e., well past the expiry date of the 2003-2008 collective agreement.

In short, each of the workplace changes set out in writing new or amended terms and conditions of employment agreed to by the Employer and the Union.

The early retirement incentive package provided for 19 early retirements for those employees who were age 55 or older as of December 31, 2007. The early retirement incentive package went on to provide the following, among other things:

> Subsequent Offer: In the event there are early retirement packages remaining after this initial declaration period, CEP Local 1 members who reach age 55 in 2008 will become eligible for the early retirement incentive packages. Applicants will be provided with individual retirement statements based on reaching age 55 and will have approximately one month to declare their intention. All applications for this subsequent offer must be returned by May 4, 2007. These applicants must retire on the first day of the month following their 55th birthday. Employees who declined the initial offer will not be eligible to apply for this subsequent offer.

John Belrose, the First Vice President of Local 76 of the CEP which represents another bargaining unit of the Employer in Powell River, was the sole witness called in the hearing before me. He testified that an Employer document regarding the early retirement offer (Exhibit 4) was presented to employees in both of the CEP's two bargaining units in Powell River. That document indicated, among other things, that one of the qualifications for eligibility included that the employee must be "age 55 before December 31, 2008." It further listed as one of the program highlights that the offer included: "A lump sum payment based on contractual severance". It stated further that: "If you accept the Early Retirement Offer, you will receive a lump sum payment based on contractual severance."

Belrose agreed in cross-examination that early retirement packages were not contemplated by the collective agreement at that time. Those who accepted an early retirement offer signed a form of release contained in the offer. Belrose testified that the Union was not part of the signing off of those offers. An example of a signed early retirement offer was tendered as Exhibit 7. The calculation of severance referred to the maximum number of weeks as 45, which was the maximum number of weeks of severance allowance under the 2003-2008 collective agreement.

Belrose was on the CEP's bargaining team leading to the 2008-2012 Collective Agreement. Steve Boniferro was the Senior Vice President, Human Resources, for the Employer as of November 20, 2008, the date of the Memorandum of Agreement that concluded collective bargaining. He was the spokesperson for the Employer. Mike Fenton and Bob Hughf, National Representatives for the CEP, were the spokespersons for the CEP in collective bargaining.

Belrose testified that retroactivity was a very important issue in collective bargaining. On November 7, 2008, Boniferro proposed that retroactivity would only apply to those who were on the payroll and voted on the collective agreement. Therefore, someone who had severed would not receive retroactivity. Fenton took the position that all those who were employees on May 1, 2008 should be covered.

Hughf indicated that the CEP had asked the Employer to bargain early and the Employer chose not to. He indicated that the CEP's members were entitled to retroactivity.

Later that day, Fenton indicated there should be retroactivity for everything but health benefits. He indicated that it was not practical to pay sick benefits. He indicated that the deal should be retroactive on all issues back to May 1, 2008, other than W.I. benefits. Belrose testified that the terms "health benefits" and "W.I. benefits" were interchangeable.

On November 8, 2008, Boniferro indicated that the Employer disagreed with the application of retroactivity and was willing to have the issue arbitrated. Fenton again indicated that the CEP's proposal was that the collective agreement would be retroactive to May 1, 2008.

Later on that same day, Fenton indicated that the CEP would not conclude a collective agreement without retroactivity being applied to all the CEP's members who were on the payroll on May 1, 2008. Boniferro proposed that people who were fired or quit were exceptions. Fenton indicated that the CEP's position on retroactivity remained the same. Belrose testified that retroactivity was a strike issue for the CEP.

Finally, on November 9, 2008 Boniferro indicated that retroactivity was okay. Belrose testified that the CEP took that as meaning that the Employer was okay with the CEP's position that all employees on the payroll as of May 1, 2008 would receive retroactivity with the exception of W.I. benefits.

Belrose testified that to the best of his knowledge, employees who severed their employment after April 30, 2008 received retroactive pay for work they performed after April 30, 2008.

EMPLOYER'S ARGUMENT

In view of my conclusion in this matter, I will only set out the Employer's argument.

The Employer submits that the 2007 early retirement packages were a *quid pro quo* for the workplace changes agreed to. It submits that the 2007 Agreement was outside of the collective agreement. The Employer referred to the 2007 Agreement as a "one off exchange" outside of the confines of the collective agreement.

The Employer in addressing *Penticton and District Retirement Service* (1977), 16 L.A.C. (2d) 97 (P.C. Weiler) ("*Penticton*") accepts that the presumption of retroactivity applies

to the collective agreement. However, the Employer submits that the 2007 Agreement was not a collective agreement matter.

In response to a question from myself as to whether the 2007 Agreement fit within the definition of "collective agreement" in the *Labour Relations Code*, Mr. Jordan replied that the 2007 Agreement was a "spent force" and was not part of the new Collective Agreement.

While the Employer has no real quarrel with the Union's elucidation of the law with respect to the presumption of retroactivity, the Employer argues that is simply not applicable in the circumstances of the present case. With respect to the arbitral case law, the Employer argues that there is not a single case in which the presumption of retroactivity applies to a "one off" agreement. The Employer argues that the 2007 Agreement was never discussed in collective bargaining; that the 2007 Agreement was a "one off" agreement outside the collective agreement; and that the changes to severance pay were changes to provisions of the collective agreement itself.

The Employer does acknowledge that *Penticton* has thrived. It notes, however, that the presumption of retroactivity has been tempered by the notion that a duration clause does not automatically confer retroactivity on all provisions of the collective agreement. Rather, arbitrators have developed the concept of the reasonable expectation of the parties by looking at whether the particular result would be absurd, impractical, unintended or unfair: see for example, *Multifoods Inc.* (1993), 38 L.A.C. (4th) 396 (Knopf); and *Accenture Business Services* [2007] B.C.C.A.A.A. No. 38 (Taylor).

The Employer's primary argument is that the presumption of retroactivity does not apply in the particular circumstances of the present case. If I were to conclude that it does apply, then in the alternative, the present case fits within the exception set out in the arbitral case law.

With respect to the releases signed by the employees, the Employer argues that they are relevant to whether or not the presumption of retroactivity applies in the present case. In response to a question from myself as to whether counsel would like an opportunity to further address the issue of the releases after the hearing itself, both counsel declined.

ANALYSIS AND DECISION

The leading case in British Columbia with respect to the issue of retroactivity is *Penticton.* Briefly stated, the facts there involved employees who had voluntarily terminated their employment in July 1975. The collective agreement was not concluded until December 23, 1975. The collective agreement contained a duration clause which was effective as of April 1, 1975. The issue was whether the employees who voluntarily terminated their employment in July 1975 were entitled to the newly negotiated wage rates. The grievance was brought to the Labour Relations Board under the old Section 96(1) of the *Labour Code.* On reconsideration, the Board upheld the grievance in a lengthy analysis. I pause to note that the Board sometimes referred to the duration clause as a "duration clause" and sometimes referred to it as a "retroactivity clause". In the course of its analysis, the Board stated the following:

> Suppose that all parties expect that negotiated changes in compensation will be retroactive to the expiry date of the old contract. This usually is the best antidote to charges that the Employer is stalling negotiations to save money, and to possible wildcat strikes by militant employees who are exasperated at the delay. Finally, this continuity in the life of successive collective agreements provides legal support to the real life experience that there is one, enduring collective bargaining relationship between the parties; and this relationship sets the basic terms and conditions of employment in the plant, until and unless they are modified by the parties.
> (p. 99; emphasis added)

The Board further stated:

> Thus, the current approach of Canadian arbitrators is to start from the presumption that the agreement as a whole is made retroactive, as the

parties have stated in their duration clause. But specific exceptions may be read into this standard retroactive principle, excluding certain terms of the agreement from the clause, if full retroactivity would appear to lead to quite impractical and unintended results. Perhaps as good a statement of the current consensus of arbitrators is contained in this passage from *Re Canadian Canners Ltd. And Int'l Assoc. of Machinists* (1973), 4 L.A.C. (2d) 59 (Schiff) at p. 61:

> Despite the obvious differences in the facts, the reasoning in most if not all of the awards cited yields a standard of interpretation important to our consideration of the present grievance: when a new collective agreement supersedes a predecessor agreement, in the absence of compelling language in the new agreement arbitrators will not read the new provisions as applicable to events occurring before the date of the new agreement's execution *if the effect of the retroactive reading would be absurd or would unfairly disappoint the reasonable expectations of those who had been subject to the provisions of the predecessor...*
>
> (p. 102; emphasis added by the Labour Relations Board)

And further:

> The situation which occurs here – that individuals who terminate their employment after the effective date of the contract did so before its execution date – is obviously a peripheral problem. It is unlikely to be in the forefront of the minds of negotiators who are pressed to resolve more serious concerns. Thus it is not at all strange that the general language of a duration clause does not speak directly to these issues… (p. 107)

And further:

> The cumulative force of that analysis supports this conclusion: arbitrators should interpret the general language of a duration clause as conferring retroactivity benefits on all individuals doing work during the period of the contract, even if some of them may have left their employment before the contract was actually signed. Certainly, there is a strong argument to that effect in the case of the renewal of a contract which is made retroactive to the date of expiry of the previous one...(p. 109)

And further:

> The Board has engaged in this rather elaborate analysis of the specific issue of the proper interpretation of a retroactivity clause not simply because of the intrinsic significance of that issue. We are also concerned to illustrate by this example the manner in which s. 92(3) of the Code contemplates that an arbitrator should approach such issues of contract interpretation by fashioning legal principles of the collective agreement which are based on practical considerations of industrial relations policy and the typical expectations of the parties.
>
> But having said that, I want to emphasize as well that my judgment about this retroactivity clause flows from a *principle* of contract interpretation, not a binding legal *rule*... (emphasis in the original)
>
> As regards this issue, for example, the parties remain perfectly free to negotiate a provision which restricts eligibility to retroactivity pay to those employees who remain on the pay-roll as of the date the agreement was negotiated.....If the parties strike that bargain and express it in their contract language, then the arbitrator must respect their wishes: as in *Re Huron Steel Products Co. Ltd. and U.A.W.* (1967), 18 L.A.C. 69 (Weatherill). Indeed, there may be evidence of negotiation history or past practice which indicates clearly that the mutual intention of the parties in adopting a broad retroactivity clause was to exclude from its scope individuals who have terminated their employment. If that is so, arbitrators are entitled to place a gloss on the interpretation of the broad language of the clause, in reliance upon that extrinsic evidence: see *University of British Columbia and C.U.P.E.,* [1977] 1 Canadian L.R.B.R. (pp. 111-112)

The *Penticton* case has since been applied in British Columbia: see for example, *Pattison Sign Co.,* [1993] B.C.C.A.A.A. No. 123 (Taylor); *International Forest Products Ltd.,* [2005] B.C.C.A.A.A. No. 52 (Steeves) and *Accenture Business Services* (referred to in the Employer's argument). In *Pattison Sign Co.*, after quoting from *Penticton,* Arbitrator Taylor wrote:

> It is often the case that collective bargaining negotiations extend beyond the expiry date of the last contract. Indeed, it is probably correct to say this is most often the case. In the absence of a new contract, working life goes on. Employees continue to work and get paid under the provisions of the previous contract. This is because there is a generally-held

> understanding that the new contract, certainly as it applies to monetary benefits, will be retroactive to the expiry date of the previous contract. (para. 32)

The Employer, as noted above, does not quarrel with the law set out in *Penticton*. Rather, it argues that that law does not apply to the present circumstances.

I am unable to agree. As stated in *Penticton* itself: "... there is one, enduring collective bargaining relationship between the parties; and this relationship sets the basic terms and conditions of employment in the plant, until and unless they are modified by the parties." (emphasis added). The 2007 Agreement was part of the one enduring collective bargaining relationship. It was not something outside of the collective agreement, as argued by the Employer. Indeed, it modified the terms and conditions of employment set out in the 2003-2008 collective agreement. That collective agreement included the Compressed Work Week Memorandum of Agreement and the Agreement on Earned Time Off. The workplace changes agreed to in the 2007 Agreement included amendments to the Compressed Work Week Memorandum of Agreement and a replacement for the Agreement on Earned Time Off. The workplace changes included in the 2007 Agreement set out in writing new or amended terms and conditions of employment agreed to by the Employer and the Union. It modified the terms and conditions of the collective agreement and was part and parcel of the parties' "one, enduring collective bargaining relationship". Reading the terms of the 2007 Agreement satisfies me that the mutual intention of the parties was that it was to form part of their collective agreement.

Moreover, the workplace changes agreed to in it carried on as part of the parties' Collective Agreement. On the evidence, it was not a "spent force" as argued by the Employer. I note, for example, that the Dedicated Crew Agreement could potentially expire as late as December 31, 2011, well past the expiry date of the 2003-2008 collective agreement. Moreover, the early retirement incentive package contemplated applicants "who reach age 55 in 2008". Some of those might reach that age after April 30, 2008, the end date of the duration clause in the 2003-08 collective agreement.

I conclude that the presumption of retroactivity set out in *Penticton* applies as much to the 2007 Agreement as to anything else in the parties' Collective Agreement.

I turn then to the Employer's alternative argument that the present case fits within the exception to the presumption of retroactivity set out in *Penticton.*

I am unable to accept that submission. I note that *Penticton* itself allows for the use of negotiating history to decipher the mutual intention of the parties with respect to retroactivity. The evidence in the present case strongly supports the Union's position.

To recap, on November 7, 2008 Boniferro initially proposed that retroactivity would only apply to employees who were on the payroll and voted on the collective agreement. Someone who had severed would not receive retroactivity. Fenton did not accept that. Later that day, Fenton indicated that the deal should be retroactive on all issues back to May 1, 2008, other than W.I. benefits. On November 8, 2008, Boniferro proposed that employees who were fired or quit were exceptions. Fenton did not accept that either. Finally, on November 9, 2008 Boniferro indicated that retroactivity was okay. Belrose testified that the CEP took that as meaning that the Employer was okay with the CEP's position that all employees on the payroll as of May 1, 2008 would receive retroactivity with the exception of W.I. benefits. In light of the parties' positions in collective bargaining leading up to that, that was an entirely reasonable understanding.

In short, based on the language of the duration clause, as well as the bargaining history with respect to retroactivity, I have no difficulty in concluding on the evidence that it would have been entirely within the reasonable expectations of these parties that the terms of the current Collective Agreement would apply retroactively to May 1, 2008, with the exception of W.I. benefits.

The fact that the parties did not specifically discuss retroactivity with regard to the 2007 Agreement does not lead to a different conclusion. There is a "presumption" of retroactivity.

In my view, retroactivity in the present case would not lead to any impractical, unintended or absurd results. The present case involves monetary benefits, which are practical to apply retroactively. The 2007 Agreement was not a "one off" agreement outside of the collective agreement or a "spent force", as argued by the Employer. Rather, it was a modification of the existing collective agreement. Its terms were part of the one, enduring collective bargaining relationship between the parties. I have concluded on the evidence that it would have been entirely within the reasonable expectations of the parties that the terms of the current Collective Agreement would apply retroactively to May 1, 2008, with the exception of W.I. benefits. Accordingly, retroactivity would not unfairly disappoint the reasonable expectations of the parties. Similarly, nor would it lead to unintended or absurd results. The changes to severance allowance and wage rates were changes to the provisions of the Collective Agreement and by virtue of the duration clause, reinforced by the collective bargaining history, they apply retroactively to May 1, 2008.

I turn to the fact that the employees who accepted an early retirement offer who reached age 55 in 2008, signed releases. There is no evidence before me that the Employer bargained with the Union with respect to the terms of the release.

The Union argues that the releases have no force and effect as being a contract between the Employer and individual employees. The Union was not involved. I agree. Article III, Section 1 of the parties' collective agreement (in both the 2003-2008 and 2008-2012 collective agreements) provides:

> The Company recognizes the Communication, Energy and Paperworkers Union of Canada and the Union as the only agency representing all employees as defined in this Agreement for the purpose of Collective Bargaining. (emphasis added)

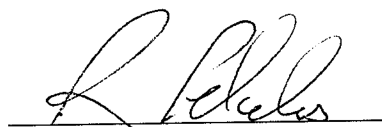
In that context there is no room left for private negotiation between the Employer and individual employees. This is long established law. For example, the majority of the Supreme Court of Canada in *Ainscough v. McGavin Toastmaster Ltd.* [1976] 1 S.C.R. 718 quoted an earlier Supreme Court of Canada decision stating:

> There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations.

The Employer is free to negotiate with the Union regarding the terms of releases. It may not, however, do so with individual employees: see for example, *Pacific Newspaper Group* [2003] B.C.C.A.A.A. No. 43 (Pekeles), referred to in Arbitrator Steeves' decision in *International Forest Products Ltd.,* referred to earlier. In short, I conclude that the releases signed by individual employees are of no force and effect.

I leave it to the parties to calculate how much is owed to whom, consistent with this decision. I retain jurisdiction to resolve that issue or any other issue that may arise out of this decision regarding the present matter.

Dated at the City of Vancouver, in the Province of British Columbia, this 4th day of May, 2010.



Robert Pekeles
Arbitrator