IN THE MATTER OF GRIEVANCE #618 I18/13 DATED SEPTEMBER 11, 2013;

AND IN THE MATTER OF AN ARBITRATION OF THE SAID GRIEVANCE

BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1400,

UNION,

AND:

P & H MILLING GROUP, a Division of Parrish & Heimbecker, Limited Saskatoon,

EMPLOYER.

PRELIMINARY DECISION
August 26, 2014

T. F. (TED) KOSKIE, B.Sc., J.D., CHAIRPERSON
BLAKE McGRATH, UNION NOMINEE
BILL HUMENY, EMPLOYER NOMINEE

Date of Hearing: May 26, 2014

Place of Hearing: Suite 3, 501 Gray Avenue, Saskatoon, SK

Appearances: Dawn McBride, for the Union
Kevin C. Wilson, Q.C. & Brent Matkowski, for the Employer

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I. BACKGROUND

[1] On September 11, 2013, United Food and Commercial Workers, Local 1400 ("Local 1400") lodged a grievance (the "Grievance") alleging that P & H Milling Group, a Division of Parrish & Heimbecker, Limited Saskatoon ("P&H") "did not post the correct requirements on a millwright job posting, in violation of the CBA and/or any other applicable legislation."[1] On September 17, 2013, P&H responded[2] to Local 1400 maintaining that the Grievance had not been submitted "in accordance" with the Collective Bargaining Agreement (the "CBA").[3]

[2] On September 17, 2013, Local 1400 wrote to P&H "referring the . . . Grievance to arbitration."[4] P&H did not respond to that reference.

[3] On October 1, 2013, Local 1400 wrote the Federal Mediation & Conciliation Service ("HRSDC") requesting the appointment of "an arbitrator."[5] On October 1, 2013, Counsel for P&H wrote to HRSDC taking the position there is "no grievance to refer to arbitration" and therefore "there is no jurisdiction to appoint an arbitrator."[6] On November 8, 2013, the Minister of Labour "appointed . . . T. F. (Ted) Koskie, as Arbitrator, to hear the . . . Grievance."[7]

[4] The parties agreed:

a) T. F. (Ted) Koskie would serve as Chairperson of an Arbitration Board (the "Board") with Blake McGrath as Local 1400's nominee and Bill Humeny as P&H's nominee; and

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[1] Exhibit E-9, Grievance #618 I18/13 dated September 11, 2013

[2] Exhibit E-10, E-mail from P&H to UFCW dated September 17, 2013

[3] Exhibit E-1, CBA between P&H and UFCW effective March 1, 2011 to February 28, 2014

[4] Exhibit E-11, Letter from UFCW to P&H dated September 17, 2013

[5] Exhibit E-12, Letter from UFCW to HRSDC dated October 1, 2013

[6] Exhibit E-13, Letter from P&H Counsel to HRSDC dated October 9, 2013

[7] Exhibit E-14, Letter from HRSDC to T. F. (Ted) Koskie, Dawn McBride & Kevin C. Wilson, Q.C. dated November 8, 2013

b) the Board had been properly constituted and had jurisdiction to hear and determine the Grievance.

II. FACTS

[5] P&H owns a mill (the "Mill") in Saskatoon, Saskatchewan. The Mill produces, *inter alia*, hard wheat flours, barley flour, pot and pearled barley, wheat bran, wheat germ, cracked wheat and crushed wheat. P&H distributes it products–both branded and by private label–in bulk, paper bags and totes.

[6] The Mill has been in operation since the late 1940s. Its employees have been unionized since the early 1950s. P&H acquired the Mill in 2009. At that time, United Food and Commercial Workers, Local 342P ("Local 342P") represented the Mill's employees. On January 1, 2013, Local 342P merged (the "Merger") with Local 1400. In the words of Craig Thebaud ("Thebaud"), a Local 1400 union representative, Local 1400 "inherited" Local 342P's CBA. Thebaud characterized the relationship between P&H and Local 342P at the time of the Merger as "Outstanding." He testified that trying to maintain that relationship was important for Local 1400.

[7] Nick Huziek ("Huziek"), a former Local 342P President, testified that Local 342P was a small local. It had no paid staff. Its President, Unit Chairs, Chief Stewards and Department Stewards were Mill employees and, therefore, did their union work voluntarily. The President's home was, in essence, the union office. Representing employees was becoming a big job, almost full time for the President. Local 342P therefore decided it needed to merge with a larger local. It chose Local 1400. Apparently one reason it did so was Local 1400 wanted to keep things like they were before.

[8] The chronology of events causing this proceeding is as follows:

a) on June 27, 2013, posted a millwright position (the "Posting");[8]

b) on July 10, 2013, P&H hired an individual ("AS")–from outside the ranks of Local 1400–to fill the position;[9]

c) on July 30, 2013, Local 1400 first requested[10] a copy of the Posting, later that same day asked to discuss same;[11]

d) on August 13, 2013, Local 1400 asked to meet about the Posting;[12]

e) on August 14, 2013:

i) P&H asked Local 1400 if there was any reason to bypass the normal process, which I interpret to mean the grievance procedure in the CBA;

ii) Local 1400 responded by outlined its concerns with the individual hired for the millwright position, stating that he did not meet the qualifications of the position that P&H posted internally and requesting that the internal posting be redone; and

iii) P&H responded by stating those issues should be dealt with according to the provisions of the CBA;[13]

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[8] Exhibit E-4, Position Posting dated June 27, 2013

[9] Exhibit E-5, Letter from P&H to AS dated July 10, 2013

[10] Exhibit E-6, E-mail from Thebaud to McDougall dated July 30, 2013

[11] Exhibit E-7, E-mail from Thebaud to McDougall dated July 30, 2013

[12] Exhibit E-8, E-mail from Thebaud to McDougall dated August 13, 2013

[13] Exhibit E-8, E-mail thread between Thebaud and McDougall dated August 14, 2013

f) on September 11, 2013, Local 1400 lodged a grievance (the "Grievance");[14]

g) on September 13, 2013, P&H asked Local 1400 for particulars of who served as Unit Chair, Chief Steward, department Stewards and Grievance Committee members;[15]

h) on September 17, 2013:

i) P&H advised that it took the position Local 1400 had not complied with the grievance provisions of the CBA;

ii) Local 1400 responded by asking whether P&H wanted to meet or select an arbitrator; and

iii) P&H repeated its position set forth in subparagraph (i) above;[16]

i) on September 17, 2013, Local 1400 referred the Grievance to arbitration;[17]

j) on October 4, 2013, Local 1400 asked the Federal Minister of Labour to appoint an arbitrator;[18]

k) on October 8, 2013, Local 1400 responded to P&H's request of September 13;[19]

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[14] Exhibit E-9, E-mail from Thebaud to McDougall with attached Grievance, both dated September 11, 2013

[15] Exhibit E-2, E-mail from McDougall to Thebaud dated September 13, 2013

[16] Exhibit E-10, E-mail thread between Thebaud and McDougall dated September 17, 2013

[17] Exhibit E-11, Email from Local 1400 to McDougall with attached letter from Thebaud to McDougall, both dated September 17, 2013

[18] Exhibit E-12, E-mail from Local 1400 to HRSDC dated October 4, 2013, with attached letter from Local 1400 to HRSDC dated October 1, 2013 and Exhibit U-9, Letter from Local 1400 to HRSDC dated October 1, 2013

[19] Exhibit E-3, E-mail from Thebaud to McDougall dated October 8, 2013

l) on October 9, 2013:

i) P&H said that Local 1400 must make up the grievance committee of regular employees and any change in such composition must be the subject of subsequent collective bargaining; and

ii) Local 1400 responded asking for a labour relations meeting and advising it will use the same committee for labour relations as is used for grievance meetings;[22]

m) on October 9, 2013, P&H, though its legal counsel, took the position there was no jurisdiction for the Minister of Labour to appoint an arbitrator;[23]

n) on October 17, 2013, P&H responded to Local 1400's request of October 9, 2013, by saying another management person, Fergus Chisholm ("Chisholm"), schedules such meetings;[24]

o) on November 8, 2013, the Minister of Labour appointed T. F. (Ted) Koskie, as Arbitrator, to hear the Grievance;[25] and

p) the parties subsequently agreed T. F. (Ted) Koskie would serve as Chairperson of the Board with Blake McGrath as Local 1400's nominee and Bill Humeny as P&H's nominee.

[9] Article 9 of the CBA provides as follows:

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[22] Exhibit E-3, Email thread between Thebaud and McDougall dated October 9, 2013

[23] Exhibit E-13, E-mail and letter from Kevin Wilson to HRSDC, both dated October 9, 2013

[24] Exhibit E-3, E-mail from McDougall to Thebaud dated October 17, 2013

[25] Exhibit E-14, Letter from HRSDC to T. F. (Ted) Koskie, Dawn McBride & Kevin C. Wilson, Q.C. dated November 8, 2013

ARTICLE 9 - GRIEVANCES

9.1 The provisions of this article shall not prevent any employee from discussing with the immediate supervisor any grievance or misunderstanding in an effort to settle the same before invoking Step One of the Grievance Procedure. However, the Union shall not be bound by any decision made before the Grievance Procedure has been applied.

9.2 Grievance Committee - The Union agrees to elect or appoint a Grievance Committee from among regular employees of the Company, to deal with questions which are referred for settlement through the steps of the Grievance Procedure. A list of Grievance Committee members shall be supplied by the Union to the Company.

9.3 Grievance Procedure - It is the mutual desire of the parties hereto that complaints of employees shall be adjusted as quickly as possible. Any disputes, disagreement or complaint arising out of the interpretation, application or alleged violation of this agreement shall be dealt with in the following manner.

STEP 1

The employee shall take the grievance up with the Department Shop Steward who, with or without the aggrieved employee, shall discuss the grievance with the Department Manager concerned. The Chief Steward may accompany the Department Steward in this step. If a satisfactory settlement is not reached within two (2) working days, the matter shall be progressed to Step 2.

STEP 2

The Grievance Committee shall take the matter up, in writing, with the Plant Superintendent, and if following this stage, the grievance is not settled to the satisfaction of the employee(s) concerned two (2) working days, or within any longer period of time which may be mutually agreed to between the two parties. the grievance shall be progressed to Step 3.

STEP 3

a. The grievance shall then be taken up at a meeting of the Grievance Committee, the Director of Operations, or a designate, at which meeting a Representative or nominee of the United Food and Commercial Workers International Union may be present if requested by either the Company or the Union.

b. The Director of Operations, or a designate will submit a decision to the Union in writing within five (5) working days of the meeting held to discuss the matter or within such longer period as may be mutually agreed upon between the two parties.

c. If, at Step 3, a settlement to the satisfaction of both parties is not achieved, then either party may, within a further twenty-five (25) working days, request that the grievance be referred to a Board of Arbitration referred to in Article 10.

9.4 General

a. A grievance to be accepted must be initiated by or on behalf of an aggrieved employee in respect to a specific action of which there is a complaint within fourteen (14) calendar days of the alleged circumstances coming to the knowledge of the Grievor. A grievance submitted by the Grievance Committee shall be processed commencing at Step 2 of the procedure.

b. The Company acknowledges the right of the Union to appoint or otherwise select from among its regular staff, a reasonable number of stewards to assist employees in

presenting their grievances to the representative of the Company. The Union will supply the Company with a list of Stewards.

c. Union Stewards and Grievance Committee members will not absent themselves from their regular duties unreasonably in order to deal with disputes or grievances of employees, and in accordance with this understanding, the Company will compensate such employees for time spent in handling grievances of employees, at their regular rates of pay. Union Stewards will not leave their regular duties without first receiving permission from their Department Manager, or in their absence the Manager's designate, and such permission shall not be unreasonably withheld. When resuming their duties the employees will notify the Department Manager, or in their absence the Manager's designate.

d. At any stage of the grievance procedure including arbitration, the conferring parties may have the assistance of the employee or employees concerned and any necessary witnesses, and all reasonable arrangements will be made to permit the conferring parties to have access to the plant to view disputed operations and to confer with the necessary witnesses.

e. In the event of a written warning, suspension, or dismissal, the Company's action will be confirmed in writing to the employee, with a copy to the Department Shop Steward and a copy to the Unit Chair or Chief Shop Steward stating the specific reason or reasons for the discipline. If after having received a written warning or suspension, an employee has no further infractions for a period of eighteen (18) months, his or her previous disciplinary record shall become void.

f. A claim by an employee that they have been unjustly discharged from their employment shall be treated as a grievance if a written statement of such grievance is lodged with the Company office within three (3) working days after the employee ceases to work for the Company. All preliminary steps of the grievance procedure prior to Step 2 will be omitted in such cases. Such special grievance may be settled by confirming the Management's action in dismissing the employee, or by reinstating the employee with full compensation for time lost, or by any other arrangement which is just and equitable in the opinion of the conferring parties.

g. When an employee has been dismissed without notice, they shall have the right to interview a Steward for a reasonable period of time before leaving the Plant premises.

h. During the term of this agreement, meetings of the Grievance Committee with Management shall be held whenever requested by either the Grievance Committee or Management. The terms of Article 3, Section 3.b., outlining compensation to employees attending meetings of the Negotiating Committee shall similarly apply to employees attending meetings of the Grievance Committee.

[10] Article 10 of the CBA provides as follows:

ARTICLE 10 - ARBITRATION

10.1(a) When either party requests that a grievance be submitted to arbitration, it shall make such request in writing addressed to the other party of this agreement and at the same time name a nominee. Within 5 working days thereafter the other party shall name a nominee. The two nominees shall immediately attempt to select by agreement an arbitrator as a Chairperson of an Arbitration Board. If they are unable to agree upon such

Chairperson within a further period of 5 working days, they shall then request the Minister of Labour for Canada to appoint an impartial Chairperson.

b. If the Company and the Union mutually agree, the Board of Arbitration can be comprised of a single arbitrator with the same jurisdiction and authority. The single arbitrator will be chosen by mutual agreement of both sides, and if no agreement is reached one will be appointed by the Minister of Labour for Canada.

10.2 No person may be appointed as an arbitrator who has been involved in any attempt to negotiate or settle a grievance that is referred to arbitration or who has any direct affiliation with either P&H Milling Group, a Division of Parrish & Heimbecker, Limited or the United Food and Commercial Workers.

1 0.3 Each of the parties hereto will bear the expenses of the arbitrator appointed by it, and the parties, will jointly bear the expenses of the Chairman of the Arbitration Board, if any.

10.4 No matter may be submitted to arbitration which has not been properly carried through all the previous steps of the Grievance procedure, unless the parties hereto have mutually 8agreed to forego any or all of the preceding steps.

10.5 The Arbitration Board established under this article shall not have authority to alter or change any of the provisions of this Agreement or insert new provisions.

10.6 The proceedings of the Arbitration Board will be expedited by the parties thereto, and the decision of the Board or a majority of the Arbitrators shall be final and binding upon the parties hereto.

10.7 Where time limits appearing in this article have been violated by either party to the agreement such violations may be referred to the Arbitration Board and the Board shall be authorized to rule on questions arising out of such violations.

1 0.8 The Arbitration Board appointed pursuant to the provisions of this Agreement shall have the power to confirm a discharge penalty referred to it or substitute for discharge such other penalty as it deems just and reasonable under the circumstances.

[11] Huziek testified that before the Merger the relationship between P&H and Local 342P was such that if Local 342P had one conversation with P&H, it could have another without having to file a grievance. He said P&H would tell Local 342P to file a grievance if it was not prepared to talk again. Huziek said Local 342P did not always follow every grievance and arbitration step in the CBA "to a T." Rather, through discussion with P&H, it made sure the facts were "right." Following that process, it would file a grievance if it felt it was necessary.

[12] Huziek testified that, before the Merger, Local 342P would "usually" hand deliver grievances to a Department Manager. He said Local 342P and P&H would meet when convenient shortly afterwards. Although the CBA made provision for a "Grievance Committee,"

Huziek testified Local 342P "never had it formally." Attendees at grievance meetings varied. They usually involved P&H Department Managers and, for Local 342P, a Steward, Chief Steward and/or Unit Chair, depending on who was available. However, there were times when Local 342P had neither a Chief Steward nor a full complement of Stewards.

[13] Huziek testified that P&H did not lodge any complaint with Local 342P about not following the CBA. As a result, Local 342P did not propose any changes to the grievance and arbitration provisions of the CBA. It is worthy of note, however, that Local 1400 has–post Merger–proposed modifications to Article 9 of the CBA in current collective bargaining.[26]

[14] At and following the Merger, Huziek did not "stay on" in any union capacity. However, he testified that, as there was some restructuring, he advised Local 1400 to forward grievances to the P&H Director of Operations, Wilf McDougall ("McDougall"), so that he could direct same to the correct person. Huziek testified that, before the Merger, McDougall had an "open door" policy. Huziek said he had approached McDougall about things that could turn into a grievance, but not necessarily about a specific grievance. Huziek did not recall McDougall ever being involved at Steps 1 and 2 of the grievance procedure.

[15] P&H sees the pre Merger history differently. It does not dispute the existence of an open door policy. However, it says while that policy allowed for discussion of issues, it was never relied upon to delay or alter the grievance and arbitration provisions of the CBA. P&H says the purpose of the grievance and arbitration procedures is to come to sensible solutions productively. Therefore, it is important to follow them in the event a matter is not resolved.

[16] P&H tendered evidence that it has conveyed to Local 1400 its insistence on other grievances–both before and after the grievance that is the subject of this proceeding–that Local 1400 must follow the provisions of the CBA relating to grievances.[27]

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[26] Exhibit E-17, Local 1400 proposals presented to P&H on March 4, 2014

[27] Exhibit E-15 (Letter from Chisholm to Thebaud dated May 16, 2013) and Exhibit E-16 (E-mail thread between Local 1400 and P&H dated from October 22 to November 4, 2013)

[17] On the other hand, Local 1400 tendered evidence that–before the grievance that is the subject of this proceeding–P&H did not insist on strict compliance with such provisions.[28] While acknowledging the existence of–and benefits derived from–the grievance procedure, Thebaud testified:

a) Local 1400 was following the "usual"–we interpret this to mean "past"–practice to first try to talk to McDougall to see if they could work out the matter;[29]

b) until that happened, he would not even be sure Local 1400 had a grievance;

c) it was only after it became apparent there would be no meeting to discuss the matter that Local 1400 decided to lodge a grievance;

d) there was no grievance committee at the time–Local 1400 just had four stewards;

e) the normal process required three steps–verbal, written and meeting; and

f) as this matter involved a policy grievance, they did not require the first step and time was not an issue.

III. PRELIMINARY ISSUE

[18] P&H has raised the preliminary issue of whether the Grievance is Arbitrable. This issue has two parts. The first is whether Local 1400 properly followed the grievance procedure set

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[28] Exhibit U-1 (E-mail and grievance from Local 1400 to McDougall dated March 15, 2013) and Exhibit U-2 (E-mail and grievance from Local 1400 to McDougall dated April 30, 2013)

[29] Exhibit U-3 (E-mail thread between Thebaud and Jamie DeBaets dated July 29 to 30, 2013), Exhibit E-6 (E-mail from Thebaud to McDougall dated July 30, 2013), Exhibit U-4 (E-mail thread between Thebaud and Jamie DeBaets dated July 30, 2013), Exhibit E-7 (E-mail from Thebaud to McDougall dated July 30, 2013), Exhibit U-5 (E-mail thread between Thebaud and McDougall dated August 13 - 14, 2013), Exhibit E-8 (E-mail from Thebaud to McDougall dated August 13 - 19, 2013), Exhibit U-6 (E-mail thread between Thebaud and Jamie DeBaets dated August 14, 2013), Exhibit U-7 (E-mail from Thebaud to McDougall dated August 13 - 19, 2013) and Exhibit U-8 (E-mail thread between Thebaud and Jamie DeBaets dated August 13 - 29, 2013)

forth in Article 9 of the CBA. The second is whether Local 1400 complied with the time constraints set forth in Article 9 of the CBA and, if it did not, whether the Board should extend same.

IV. AWARD

[19] We find Local 1400 has not properly followed the grievance procedure set forth within Article 9 of the CBA. We also find Local 1400 did not refer the Grievance to arbitration within the time constraints set forth in Article 10 of the CBA.

[20] We decline to extend the time constraints set forth in Article 9 of the CBA.

[21] We will remain seized of the question of any matter that may arise out of carrying out this decision. We will reconvene the hearing at the request of either party.

V. REASONS

A. INTRODUCTION

[22] P&H argues Local 1400 did not comply with the grievance procedures of the CBA and therefore the Grievance is not a grievance for the purposes of the CBA and is not arbitrable.

[23] Specifically, P&H argues that ". . . without exception every step of the entire grievance procedure has been ignored by the Union from the very start to the Grievance being referred to arbitration." It says:

a) the grievance committee mandated by the CBA (the "Grievance Committee") is/was not properly constituted;

b) the Grievance Committee did not file the Grievance;

c) the Department Shop Steward did not submit the Grievance to the Department Manager;

d) there has been no discussion between the Department Shop Steward and the Department Manager as required by Step 1 of the grievance procedure;

e) Local 1400 improperly filed the Grievance with P&H's Director of Operations;

f) the Grievance Committee has not submitted the grievance in writing to the Plant Superintendent as required by Step 2 of the grievance procedure;

g) the Grievance Committee did not meet with the Plant Superintendent and he did not have an opportunity to provide a written response as provided for by Step 2 of the grievance procedure;

h) there has not been a meeting between the Grievance Committee and the Director of Operations as required by Step 3 of the grievance procedure;

i) the Director of Operations has not been given an opportunity to provide a written decision regarding the Grievance as provided for by Step 3;

j) Local 1400 did not file the Grievance within the required time limits;

k) Local 1400 improperly referred the Grievance to arbitration without following the procedures in the CBA; and

l) Local 1400 requested the Minister to appoint an arbitrator without following the preconditions required by the CBA.

B. ANALYSIS (a - i)

[24] P&H asks that we decide the Grievance is not arbitrable. In so doing, it refers us to

section 60(1)(b) of the *Canada Labour Code*:

> 60(1) An arbitrator or arbitration board has
>
> . . .
>
> (b) power to determine any question as to whether a matter referred to the arbitrator or arbitration board is arbitrable.

[25] In its brief, P&H argues:

> 13. Absent the specific statutory power regarding relief against time limits, arbitrators of course do not have the power to amend or override the express provisions of a collective agreement.
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> 14. Article 10.5 of the present collective agreement makes that clear:
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> > 10.5 The Arbitration Board established under this article shall not have authority to alter or change any of the provisions of this Agreement or insert new provisions.
>
> 15. Further, Article 10.4 of the collective agreement specifically prevents matters from being submitted to arbitration where the grievance procedures in Article 9 have not been followed. Article 10.4 requires that an arbitrator enforce the requirement that grievance procedures be utilized prior to proceeding to arbitration.
>
> . . .
>
> 28. There are no statutory exceptions or exceptions within the collective agreement that would allow for non-compliance with the mandatory grievance procedures. Further, the Employer has not waived the requirements of Article 9. Instead, it has consistently made it clear that it intends to rely on and utilize the grievance procedures as outlined in Article 9.
>
> . . .
>
> 34. In the current case without exception every step of the entire grievance procedure has been ignored by the Union from the very start to the Grievance being referred to arbitration. The current case is not simply about clarifying particulars of the process or determining whether the substance of the procedures has been satisfied, it is about the blatant disregard in both form and substance for every step of the grievance procedure contained in the collective agreement.
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> 35. . . . [T]he issue with respect to the grievance procedures is not a minor irregularity or technicality. Both the letter and spirit of the grievance procedures have been completely ignored by the Union. The substantive purposes behind the grievance procedures in Article 9 have not been met.

[26] Counsel for P&H argues that, absent the specific statutory power regarding relief against time limits, we do not have the power to amend or override the express provisions of the CBA.

In that regard, counsel submits Article 10.5 of the CBA makes that clear. It says:

> 10.5 The Arbitration Board established under this article shall not have authority to alter or change any of the provisions of this Agreement or insert new provisions.

As well, counsel submits Article 10.4 of the CBA specifically prevents matters from being submitted to arbitration where the grievance procedures in Article 9 have not been followed. That Article says:

> 10.4 No matter may be submitted to arbitration which has not been properly carried through all the previous steps of the Grievance procedure, unless the parties hereto have mutually agreed to forego any or all of the preceding steps.

Counsel submits that, in essence, Article 10.4 requires us to enforce the requirement that grievance procedures be used before proceeding to arbitration.

[27] Counsel for P&H referred us to *Re Regency Towers Hotel Ltd. and Hotel and Club Employees' Union, Local 299*.[30] That decision dealt with a provision very similar to Article 10.4. That arbitration board held that, absent special circumstances, the language of Article 10.4 is mandatory and noncompliance with the grievance procedures will result in the grievance being inarbitrable. It said:

> We say at the very outset that we find on the evidence the failure of the grievors and the union to comply with art. II in some of the ways alleged. **Therefore, in the absence of any other considerations, the mandatory direction contained in art. II that "[n]o matter may be submitted to arbitration which has not been properly carried through all previous steps of the grievance procedure" would prevent this board from considering the grievances.** See R. v. Weiler et al., Ex p. Hoar Transport Co. Ltd. , [1968] 1 0.R. 705, 67 D.L.R. (2d) 484, affd 4 D.L.R. (3d) 449, [1969] S.C.R. 634, sub nom. General Truck Drivers Unions, Local 938 et al. v. Hoar Transport Co. Ltd. However, there are other considerations which become apparent upon a brief review of the relevant facts. [Emphasis Added]

[28] Counsel for P&H also referred us to Brown and Beatty, Canadian Labour Arbitration.[31]

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[30] (1973) 4 L.A.C. (2d) 440

[31] (4th ed), (Ontario: Canada Law Book, 2014)

There, the authors commented that where grievance procedures are mandatory provisions in the collective agreement, arbitrators do not have authority to give a party relief when the procedures have not been complied with unless it is provided for by statute, the collective agreement, or where a party has waived their rights in the collective agreement. They say:

> **2:3140 Relief against non-compliance with the grievance procedure**
>
> 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 the collective agreement.** Moreover, although it has been held that a provision such as s. 123 of the Ontario Labour Relations Act, 1995 which provides that "No proceeding under "this Act is invalid by reason of any defect of form or any technical irregularity" clothes an arbitrator with jurisdiction to relieve against the requirement that a grievance be in writing, that section does not permit relief against noncompliance with a time-limit for processing a grievance. [Emphasis Added]

[29] Counsel for P&H concludes this portion of his argument by saying:

> There are no statutory exceptions or exceptions within the collective agreement that would allow for non-compliance with the mandatory grievance procedures. Further, the Employer has not waived the requirements of Article 9. Instead, it has consistently made it clear that it intends to rely on and utilize the grievance procedures as outlined in Article 9.

[30] Local 1400 does not take issue with the fact that it has not strictly followed the Grievance Procedure. Rather, it argues that it was simply following past practice. Thebaud testified he has:

a) always presented grievances;

b) always presented grievances to McDougall and that has never been an issue until the case here; and

c) frequently met with McDougall to discuss and negotiate grievance issues and, again, that has never been an issue until now.

[31] Local 1400 therefore argues:

a) P&H should be estopped from changing the established practice;

b) by its conduct, P&H has represented to Local 1400 and it predecessor that it will follow the established practice;

c) the conduct is clear and unambiguous and supported by the evidence before me; and

d) had Local 1400 been aware of P&H's intention to abandon the practice without negotiating new language, it could have insisted upon bargaining language for same and this constitutes a detrimental reliance.

[32] In support of its position, counsel for Local 1400 referred us to *Westfair Foods Ltd.* v. *United Food and Commercial Workers' Union, Local No. 832.*[32] She says the decision therein of arbitrator W. D. Hamilton sets forth the elements of estoppel to consider. Though counsel did not point out specific references within that decision, we note the following passages:

> 154 The Union did not rest its case on the assertion that Section 26.05 is ambiguous, either patently or latently, thereby allowing recourse to extrinsic evidence (past practice) in order to ascertain whether such evidence discloses that the disputed wording has been consistently administered and/or applied, to the knowledge of both parties and without objection, in accordance with one party's interpretation, allowing the arbitrator to reach the conclusion that the practice itself reveals the common intention of the parties (ie. the actual meaning of the wording itself).
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> 155 However, estoppel does not depend upon an ambiguity being found. An estoppel can rest on either a past practice or negotiating history where one party, either by words or conduct, (which can include silence where there is otherwise a duty to speak), has made a representation to the other party that it will not enforce its strict rights under the Agreement or that the Agreement will be interpreted in a certain way and the other party has relied on that representation to its detriment. The onus is on the party pleading the estoppel and that party must establish that the duration of the estoppel ought to last to the end of the Agreement (as the Union alleges here).
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> 156 The constituent elements of a "past practice" are essentially the same whether the doctrine is used as an aid to interpret an ambiguous provision or is used to establish an "estoppel" by conduct. The characteristics of a past practice (as an aid to interpretation) were distilled in *Re: International Association of Machinists, Local 1740 and John Bertram and Sons Ltd.* (1967) 18 L.A.C. 362 (P. Weiler) at p. 368:
>
> > "...there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the collective agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred

[32] [1999] M.G.A.D. No. 61 (W. D. Hamilton)

> from the continuance of the practice for a long period without objection; (4) evidence that members of the Union and management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice."
>
> 157 One or two occurrences will not normally constitute a sufficient practice to be reliable. Rather, a uniform practice which has survived several negotiations and has been "...openly and without surreptition carried out for...a long period" [*HEPC of Ontario* (1963) 14 L.A.C. 46 (Thomas)] are often critical benchmarks.
>
> 158 In my view, the critical differences between using past practice as an aid to interpret an ambiguous provision as opposed to being used as a basis for estoppel are that, in the case of estoppel, (i) "detriment" must be established by the party relying on the estoppel and (ii) an estoppel may be brought to an end by the "estopped" party giving notice that it intends to return to its strict rights under the Agreement. When the estoppel may be brought to an end is a distinct question.

[33] Counsel for Local 1400 argues:

a) P&H attempts to reach too far–the union can and should be able to file a grievance on behalf of its members;

b) the uncontroverted evidence is such that there was never a grievance committee and P&H never objected to same;

c) Local 1400 tried to discuss the matter, but P&H refused;

d) communication is a two-way street–the current complaint of P&H is really the result of P&H's fault; and

e) P&H cannot rely upon its own default to support an objection.

[34] Counsel for Local 1400 referred us to *Horizon Operations (Canada) Ltd.* v. *Communications, Energy & Paperworkers Union, Local 2000.*[33] She says the decision therein of arbitrator R. Coleman sets forth the proposition that P&H cannot rely on its own default to defeat Local 1400's grievance. Though counsel did not point out specific references within that

[33] [2000] B.C.C.A.A.A. No. 391

decision, we note the following passages:

> 38 In the normal course of events, failure to properly follow and exhaust the applicable grievance procedure will be fatal to an application for an arbitrator pursuant to section 104.(2). See *7-Eleven Inc. and United Food and Commercial Workers* (January 3, 2000) B.C.C.A.A.A. No. 15. Award no. X-001/00 (McPhillips) and *Fording and U.S.W.A., Local 7884*, (1996) Larson, B.C.A.A.A. No. 249. Section 104.(2) is not a unique requirement, and in fact reflects Canadian jurisprudence on the issue. Generally proper completion of the process is a prerequisite for proceeding to arbitration. But there are exceptions.
>
> 39 In *Bilt Right Upholstering and USWA*, (1990)10 LAC 4th 342 (Springate) the Employer refused to meet at Step II if a particular Union Representative was present. They were willing to have the requisite Step II meeting, but not if the Union was represented by the person to whom they objected. Relying on an Ontario Labour Board decision that a Union is entitled to select who will represent them, Arbitrator Springate found the Employer's refusal to meet with the person selected by the Union to be tantamount to refusal to attend the meeting and as a result the Union was entitled to move the grievance forward, which in that case meant to arbitration. Much like the present case, the grievance procedure in Bilt Right called for referral to a Plant Manager, and if not resolved, to the Vice President of Human Resources and a meeting of the Grievance Committee, and then to arbitration. A similar decision was made in *Hub Transportation Services Ltd.* v. *Local 1997, Longshoremen's Assn.*, (October 11, 1989, unreported, Springate) (referred to in *Bilt Right Upholstering and USWA*, *supra*, page 347) where the arbitrator found that the Employer's refusal to make itself available to meet with the Union at a first step grievance meeting concerning a policy grievance, entitled the Union to proceed to the next step. Likewise, *Teamsters, Local 2313* v. *Canada Building Materials* (1970) 21 LAC 140 (H.D. Brown) found the Union's failure to respond to the Company's request for a meeting entitled the latter to file a notice of its intent to proceed to arbitrate. The Union argued that the arbitration board had no jurisdiction because the meeting requested by the Employer had not taken place. The published summary of the award sets out the arbitrator's decision as follows:
>
> > ...the Union was in default by not meeting with the employer and it therefore cannot rely on its own default to defeat the grievance of the employer...
>
> 40 These cases stand for the proposition that failure to follow the grievance procedure is fatal unless the other side refuses to participate, in which case, the grieving party can proceed to the next step. . . .

[35] In considering this matter, our goal is to ascertain the meaning of Articles 9 and 10 and to give effect to the intention of the parties when they entered the agreement as so expressed. In so doing, we are entitled to look at the plain meaning of the Articles in the context of the collective bargaining agreement.[34] In so doing, we are guided by, *inter alia*, the following provisions of the CBA:

> ARTICLE 1 - PURPOSE

[34] *UFCW, Local 1400* v. *Real Canadian Superstores* (2012), 392 Sask. R. 124 (Q.B.)

> 1.1 The general purpose of this Agreement is to establish mutually satisfactory relations between the Company and its employees, and to provide machinery for the prompt and equitable disposition of grievances . . . .
>
> . . .
>
> ARTICLE 3 - RECOGNITION
>
> 3.1 The Company acknowledges that the employees . . . have selected the Union as their sole and exclusive collective bargaining agent . . . .
>
> . . .
>
> ARTICLE 5 - RESERVATION OF MANAGEMENT RIGHTS
>
> . . .
>
> 5.2 It is understood and agreed that inasmuch as the Company recognizes the Union as an employee's bargaining agency, as evidence of good faith, the Union assumes responsibility for its members in their relations with the Company, and will use its best efforts to have the employees' responsibilities under this contract carried our in letter and in spirit.
>
> 5.3 The Company also agrees to carry out the terms of this contract in letter and in spirit.
>
> . . .
>
> ARTICLE 9 - GRIEVANCES
>
> . . .
>
> 9.2 . . . Any disputes, disagreement or complaint arising out of the interpretation, application or alleged violation of this agreement shall be dealt with in the following manner.

[36] Counsel for P&H submits:

a) "The ability to settle workplace issues without the stoppage of work is an essential and core component of the Canadian labour relations and arbitration process." He cites section 57 of the *Canada Labour Code* in support of that proposition. It provides:

> 57(1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.

b) "Grievance procedures are important to settling disputes, administering the collective agreement, and maintaining positive labour relations." He cites *Sifto Canada Corp. and*

C.E.P., Local 16-0 (20090917A) (Re)[35] as highlighting the importance of grievance procedures, the process for implementing the requirements of section 57 of the *Canada Labour Code* and its provincial equivalents. Therein, Arbitrator Surdykowski stated:

> A collective agreement is the contractual "law" that governs the relationship between the parties, and the rights and obligations of the parties and the bargaining unit employees. Section 48(1) of the *Labour Relations Act, 1995* requires that every collective agreement "provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable." Almost all collective agreements contain comprehensive grievance arbitration provisions. Most such provisions contain time limits within which grievances must be filed and processed through the grievance procedure, and if necessary referred to arbitration. These operate as collective agreement limitation periods. The purpose of such provisions is to ensure that collective agreement disputes and alleged violations of a collective agreement are raised and dealt within a timely way, not only because "labour relations delayed are labour relations defeated and denied" (an adage coined *Journal Publishing Co. of Ottawa Ltd.* v. *Ottawa Newspaper Guild* (1977] O.J. No. 8 (C.A.) at para. 4, and repeated often by both courts and labour relations tribunals), but also because **certainty and finality with respect to collective agreement liability are essential to the proper and hopefully harmonious functioning of a collective bargaining relationship.** [Emphasis Added]

He also cites Willis and Winkler on Leading Labour Cases[36] as highlighting the importance of grievance procedures and dispute resolution. Therein, the authors state:

> In order to have predictable production cycles, with no interruption of goods or services over the life of the collective agreement, there has to be a mechanism for resolving disputes between the parties which arise during the term of the agreement. **That mechanism, and the original quid pro quo of the undertaking not to engage in mid-contract work stoppages or lock-outs, is a binding grievance and arbitration system.** In all jurisdictions in Canada, parties who enter into collective agreements must make provision for such a system. If they fail to do so, the various labour statutes will deem a model arbitration clause to form part of the collective agreement. [Emphasis Added]

c) "The arbitral jurisprudence supports that the parties to a collective agreement must utilize the grievance procedures and arbitration provisions when disputes over the interpretation of the collective agreement arise." He cites *Royal Oak Resources Ltd. and C.A.S.A. W.,*

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[35] 2010 CLB 25689, 198 L.A.C. (4th) 325

[36] (Aurora: Canada Law Book, 2010)

Loc. 4 Re[37] in support. Therein, Arbitrator Bird made the following comments with respect to grievance procedures in a collective agreement:

> The Company relies on s. 57(1) of the *Code* as an aid to the interpretation of art. 9.0l(d). **That section gives directions on how parties to collective agreements are to resolve differences under a collective agreement.** Clearly, the only way to remedy a breach of the collective agreement is through the dispute resolution procedures of the collective agreement. Is assisting a member seeking relief through a personal complaint under the *Fair Practices Act* based on the same allegations of fact upon which the Union bases its grievance a violation of the collective agreement? I find that it is not. The issues of law in a grievance are not the same as in a complaint. Even though an arbitrator or the Minister might grant similar remedies on the same facts, the Minister cannot interpret or apply the collective agreement and cannot make a declaration as to the meaning. [Emphasis Added]

[37] Finally, counsel for P&H argues:

> 28. There are no statutory exceptions or exceptions within the collective agreement that would allow for non-compliance with the mandatory grievance procedures. Further, the Employer has not waived the requirements of Article 9. Instead, it has consistently made it clear that it intends to rely on and utilize the grievance procedures as outlined in Article 9.
>
> 29. Grievance procedures similar to those at issue in this case are commonplace in collective agreements. They assist parties in settling disputes prior to requiring the assistance of an arbitrator while also satisfying the requirement that there is no work stoppage. The specific procedures assist in at least two important ways. First, the grievance procedures start closest to the individuals involved, such as the Department Shop Steward and the Department Manager, and gradually expands to include others. This allows for the discussion to start first with individuals who are likely very familiar with the matters at issue and also with each other. Individuals like the Plant Superintendent and the Union representative may not have the same knowledge background as those closer to the grievance issue, and may take time to get up to speed on what is really being grieved. Essentially, the grievance procedures seek to engage individuals in the organization hierarchy in a logical way that promotes dispute resolution.
>
> 30. It is unnecessary and inappropriate to skip straight to the top of the organizational hierarchy or go straight to arbitration.
>
> 31. Second, the grievance procedures allow for the parties to gather information and present their point of view prior to getting to the expensive and adversarial setting of a grievance arbitration. It is crucial for the sake of positive labour relations that there is a middle ground prior to a full arbitration for reasons of cost and time delay. The grievance procedures provide a middle ground that promotes earlier determination of grievances without unnecessarily expending the resources of the parties in an adversarial forum.
>
> . . .
>
> 35. . . . [T]he issue with respect to the grievance procedures is not a minor irregularity or

[37] 1991 CLB12013, 23 L.A.C. (4th) 151

> technicality. Both the letter and spirit of the grievance procedures have been completely ignored by the Union. The substantive purposes behind the grievance procedures in Article 9 have not been met.

The Composition of the Grievance Committee

[38] P&H argues Article 9.2 of the CBA mandates that Local 1400 elect or appoint a Grievance Committee from among regular employees of the Company. It argues that:

a) Thebaud purports to be a member of the Grievance Committee;

b) Thebaud is a union representative that is a regular employee of Local 1400, not P&H; and

c) hence, "there is an ineligible and unqualified person purporting to be on and act for the Grievance Committee."

[39] P&H says this is significant because:

> Having employees on the Grievance Committee assists with the overall purpose of settling disputes because those employees are very familiar with their particular workplace and the individuals involved.
>
> . . .
>
> The lack of participation of the employees actually qualified and eligible to be on the Grievance Committee further highlights that the Grievance Committee has been unable to play its appropriate role in resolving workplace disputes pursuant to the grievance procedures.

[40] On the other hand, Local 1400 does not dispute that Thebaud is an employee of Local 1400, not P&H. However, it argues that:

a) there has never been a formal Grievance Committee–both before and after Local 1400 began to represent the P&H employees;

b) rather, grievances have always been discussed and decided upon by various

employees–usually a subset of available Stewards, Chief Steward and/or the Unit Chair;

c) P&H was always aware of the lack of a formal Grievance Committee and made no complaint in that regard;

d) Thebaud has never purported to be a member of the Grievance Committee–he simply advised Local 1400 members–the P&H employees–and processed matters on their behalf;

e) before Local 1400's representation of P&H employees, Huziek–the president of Local 342-P–performed a similar function to that of Thebaud; and

f) though Huziek was an employee of P&H, there is really no practical distinction between the two roles.

[41] The uncontroverted evidence is that Local 1400:

a) did not have a formal grievance committee; and

b) gave no notice to P&H of any such committee.

This was the established practice.

[42] We are satisfied that P&H should be estopped from changing the established practice. By its conduct, P&H has represented to Local 1400 that it will follow the established practice. The conduct is clear and unambiguous and supported by the evidence before us. Had Local 1400 been aware of P&H's intention to abandon the practice without negotiating new language, it could have insisted upon bargaining language for same. This constitutes a detrimental reliance.

The Grievance Committee Did Not File the Grievance

[43] P&H argues the Grievance was filed by Thebaud, not the Grievance Committee.

[44] Local 1400 argues this is simply semantics. The CBA does not prohibit a grievance process in the form used by the P&H employees. Thebaud merely submitted the Grievance on behalf of Local 1400's members.

[45] Local 1400 is the exclusive representative of P&H employees. As such, we are satisfied Thebaud, as the union representative, is entitled to file the Grievance.

The Grievance Was Not Submitted by the Department Shop Steward to the Department Manager

There Has Been No Discussion Between the Department Shop Steward and the Department Manager as Required by Step 1 of the Grievance Procedure

The Grievance Was Improperly Filed with P&H's Director of Operations

[46] P&H says a Local 1400 Department Shop Steward did not:

a) submit the Grievance to the Department Manager–rather, it was filed with the Director of Operations (McDougall); and

b) discuss the Grievance with the Department Manager–rather, Thebaud attempted to have discuss same with McDougall.

It argues this is contrary to Step 1 of the Grievance Procedure.

[47] Local 1400 argues the Grievance was a policy grievance and, therefore, Step 1 did not apply. P&H subsequently did not take issue with this argument.

[48] On its face, the Grievance stated it was a policy grievance. At no time did P&H object

to the Grievance being one of policy. P&H counsel argued that a grievance is not a policy grievance just because Local 1400 states that it is so. However, until hearing evidence on the substance of the Grievance, it is our ruling that under the circumstances of this case, we must treat the Grievance as *prima facie* a policy one. Therefore, Step 1 does not apply.

[49] We therefore rule P&H's objections with respect to Step 1 must fail. We therefore do not need to address any issue concerning estoppel at this stage.

The Grievance Committee Has Not Submitted the Grievance in Writing to the Plant Superintendent as Required by Step 2 of the Grievance Procedure

The Grievance Committee Did Not Meet with the Plant Superintendent and He Did Not Have an Opportunity to Provide a Written Response as Provided for by Step 2 of the Grievance Procedure

[50] P&H says a Local 1400 Grievance Committee did not:

a) submit the Grievance to the Plant Superintendent–rather, Thebaud filed it with McDougall; and

b) discuss the Grievance with the Plant Superintendent–rather, Thebaud attempted to have discuss same with McDougall.

It argues this is contrary to Step 2 of the Grievance Procedure.

[51] Though Local 1400 argued Step 1 did not apply to the Grievance, it did not argue did not argue that Step 2 did not apply. Rather, it argued:

a) upon the advice of Huziek, the outgoing president of Local 342-P, Local 1400 always forwarded grievances to McDougall;

b) as there was some restructuring upon becoming the representative of the P&H employees, to avoid confusion, it forwarded grievances to McDougall so that he could

direct same to the correct person;

d) P&H was always aware of that practice and made no complaint in that regard; and

e) there was no intent or effort to circumvent Step 2–Thebaud and McDougall were simply the conduits for complying with it.

[52] The evidence is clear. Local 1400 did not submit a grievance to the Plant Superintendent. It did not discuss same with him. The question that then arises is whether Local 1400 has satisfied Step 2 by submitting the Grievance to McDougall. For the reasons set forth in "Analysis (j - l)," we are of the view:

a) it has not; and

b) estoppel does not help Local 1400.

There Has Not Been a Meeting Between the Grievance Committee and the Director of Operations as Required by Step 3 of the Grievance Procedure

The Director of Operations Has Not Been Given an Opportunity to Provide a Written Decision Regarding the Grievance as Provided for by Step 3

[53] P&H argues Step 3 of the grievance procedure requires:

a) a meeting between the Grievance Committee and McDougall–which meeting may involve a representative of Local 1400; and

b) after the meeting, McDougall provide a written decision.

P&H says such a meeting did not take place and McDougall therefore was deprived the opportunity to render a decision. It argues this is contrary to Step 3 of the Grievance Procedure.

[54] Local 1400 argues:

a) Thebaud made repeated attempts to arrange a meeting with McDougall;

b) the requested meeting was to be attended by Thebaud on behalf of Local 1400's members;

b) McDougall refused to have a meeting;

c) it was P&H's fault that there was no meeting and decision resulting therefrom; and

d) it was P&H, not Local 1400 that breached this portion of Step 3 of the Grievance Procedure.

[55] The evidence is clear. Local 1400 did not have a meeting with McDougall. The questions that first arise are whether that is the fault of P&H and, if so, whether P&H can rely on this objection. Then the question is whether Local 1400 has satisfied Step 3. For the reasons set forth in "Analysis (j - l)," we are of the view:

a) Local 1400 has not complied with Step 3; and

b) estoppel does not help Local 1400.

C. ANALYSIS (j - l)

The Grievance Was Not Filed Within the Required Time Limits Agreement

[56] P&H argues that the time limits outlined in the collective agreement are mandatory. In support of this proposition, its counsel cites the decision of the Ontario Divisional Court in *Re*

Dominion Consolidated Truck Lines Ltd.[38] It sets forth the following principles with respect to the interpretation of time limits:

a) the use of imperative language alone does not render time limits mandatory;

b) the failure to spell out the consequences of a noncompliance with time limits does not, in and of itself, render time limits directory only; and

c) the question of whether time limits are mandatory can be answered by an analysis of the appropriate terms of the collective agreement.

[57] Counsel for P&H further argues:

> 59. Given the requirement of Article 9.4 (a) that a grievance "must be initiated" within 14 calendar days and the principles expressed above, it is respectfully submitted that this arbitration board has no alternative but to hold the time limit of 14 calendar days for initiating the grievance procedures is mandatory. Numerous arbitral decisions have held that imperative words such as "shall" or "must" indicate the time limit is mandatory. As previously discussed, Article 10.4 is also a mandatory provision that requires that the grievance procedures be followed if a matter is going to be heard at arbitration.
>
> 60. In Re U.A. W. and Massey-Fergusson Industries Ltd. (1979) 94 D.L.R. (3d) 743 (Tab 6), the court concluded at 745:
>
> > The word "must" is a common imperative. It is hard to think of a commoner. There is no dictionary of stature of which I am aware that accords to the word any other connotation. Jn its present or future tense it expresses command, obligation, duty, necessity and inevitability.
>
> 61. Further support for the mandatory nature of the time limit is found in article 9.3:
>
> > Grievance Procedure - It is the mutual desire of the parties hereto that complaints of employees shall be adjusted as quickly as possible. Any disputes, disagreement or complaint arising out of the interpretation, application or alleged violation of this agreement shall be dealt with in the following manner.
>
> 62. There is no evidence the Employer intended to waive the time limits set out in the collective bargaining agreement. To the contrary, the Employer made it clear to the Union from the outset that they intended for the grievance procedures in Article 9 to be followed and specifically informed the Union that the time limits in Article 9.4 had been

[38] (1975), 60 D.L.R. (3d) 37 (Ont. S.C.)

exceeded for the Grievance.

63. Clearly, there can therefore be no argument that the Employer has waived any objection based on failure to comply with time limits. As noted in Brown & Beatty at 2:3130:

> 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.

64. The Employer further submits that this is not a case which warrants relief being granted to the Union pursuant to section 60(1.1) of the Canada Labour Code, which reads as follows:

> The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

65. Arbitrator Hall has very recently considered what factors are relevant to an extension of time in Vancouver Airport Authority v Public Service Alliance of Canada (Stier Grievance), [2014] C.L.A.D. No. 57 (Tab 7). There is a two part test which requires both that there is a reasonable ground for extending the time limit and also that a party would not be unduly prejudiced (paragraph 19):

> In my view, there is considerable force to the notion that a lack of prejudice alone is not sufficient to justify the extension of a time limit. Indeed, under Section 60 (1.1) of the Canada Labour Code, the test requires both reasonable grounds and the absence of undue prejudice.

66. The first element of the test was broken down into the following non-exhaustive factors (paragraph 11):

> As set out at page 621 of the Annotated Canada Labour Code, Ronald M. Snyder (2012), the factors applicable to determining whether reasonable grounds exist to extend a time limit include: the nature of the grievance; whether the delay occurred in launching the grievance or at some later stage; whether the grievor was responsible for the delay; the reasons for the delay; the length of the delay; and whether the employer could reasonably have assumed that the grievance had been abandoned.

67. The Employer submits that the Union has not discharged their burden of establishing that reasonable grounds exist to extend the time limit for the following reasons:

(a) There is nothing unique about the grievance that would take an inordinate amount of time or effort to bring forward.

(b) There is no explanation for the delay in filing the grievance.

(c) The Employer had made it consistently clear to the Union that it intended for the grievance procedures to be followed and was informed of that fact.

68. The Employer will be unduly prejudiced if an extension is granted in the circumstance. Of course, prejudice must amount to something more than just whether or not the

> grievance is allowed to proceed. The significant prejudice in this instance relates to the loss of the use of agreed upon and mandatory grievance procedures to attempt to settle grievances in the workplace. The Employer would lose the benefit of Steps 1-3 of the grievance procedures if the time limit was extended.

[58] In summary, then, P&H argues:

a) the timing–all in 2013–of this matter is as follows:

   i) June 27 - posting;
   ii) July 10 - hiring;
   iii) July 30 - Local 1400 aware of circumstances;
   iv) August 14 - first letter from Thebaud to McDougall; and
   v) September 11 - Grievance;

b) Local 1400 could only have brought forward the Grievance on or before August 13, 2013;

c) Local 1400 did not bring forward the Grievance within fourteen calendar days from the alleged circumstances coming to the knowledge of Local 1400; and

d) this is contrary to Article 9.4(a) of the CBA.

[59] Counsel for Local 1400 referred us to *Telecommunications Workers' Union, Local 348* v. *Telus*.[39] She says the decision therein of arbitrator D. C. Elliott sets forth helpful principles concerning time lines. Though counsel did not point out specific references within that decision, we note the following passages:

> 120 A considerable volume of cases were provided to me on the question of whether time limits under the Collective Agreement are mandatory. I continue to hold the view I expressed in 2003 with respect to the same Collective Agreement:
>
> The grievance process is a mandatory one -- that is, unless the time periods are

[39] [2007] C.L.A.D. No. 236

waived -- the grievance "must be processed according to ... the grievance procedure.

121 What is different is that in this arbitration I am being asked to extend the time limits in the Collective Agreement under the Canada Labour Act, in 2003 I was not.

. . .

133 My starting point is that the time limits in the Collective Agreement are mandatory and that the union failed to comply with them following the step 2 meeting. I now turn to whether I should exercise my discretion under section 60(1.1) of the Canada Labour Code which reads:

Power to extend time

(1.1) The arbitrator or arbitration board may extend the time for taking any step in the grievance process or arbitration procedure set out in a collective agreement, even after the expiration of the time, if the arbitrator or arbitration board is satisfied that there are reasonable grounds for the extension and that the other party would not be unduly prejudiced by the extension.

134 There are two factors to subsection (1.1) -- it must be "reasonable" for an arbitrator to exercise discretion and there must be no "undue prejudice" to the other party by the extension.

135 I agree with the general approach of others to the question of whether to grant an extension of time limits under section 60(1.1) of the Canada Labour Code -- the decision requires a balancing of interests.

136 My assessment considers:

- the agreement of the parties: what they agreed to and why
- the nature of the grievances: their importance to the individuals as a whole and the workplace generally
- the reason for the delay
- any other circumstances.

137 Following that assessment, the alleged prejudice to the employer must be assessed and a decision made about, if prejudice is evident, whether the extension of time would constitute undue prejudice sufficient not to grant a time extension.

The Collective Agreement

138 In my view, the analysis of whether to exercise discretion under the Canada Labour Code should start with what the parties themselves agreed to. Section 60(1.1) of the Code intrudes into an agreement about how grievances are to be processed. It is not a discretion that should be exercised simply because it is there. The parties agreed on detailed time limits and processes for moving grievances through a system. . . .

. . .

146 . . . Although not determinative, I tend to the view that the importance of the grievances is not, of itself, sufficient to warrant an extension of time.

. . .

148 The lack of a satisfactory reason for the delay is an important factor in my decision.

149 There are no other particular circumstances to consider.

150 I agree with Arbitrator Moreau that the exercise of discretion under section 60(1.1) of the Canada Labour Code involves a balancing of interests. This goes, in part, to the test of "reasonableness". Arbitrator Moreau noted that there had been "ongoing discussions" indicating that the union and grievor continued to press issues. In the result Arbitrator Moreau placed "great weight" on the human rights issue and a delay of 3 months not prejudicing the employer.

[60] Local 1400 argues:

a) Local 1400 was just following past practice to first try to talk to McDougall to see if they could work out the matter;

b) Local 1400 regularly communicated with P&H trying to meet;

c) until a meeting happened, Local 1400 was not even be sure it had a grievance;

d) it was only after it became apparent there would be no meeting to discuss the matter that Local 1400 decided to lodge a grievance;

e) as this matter involved a policy grievance, time was not an issue;

f) if time is an issue, P&H should be estopped from relying upon same as a bar to the Grievance proceeding to arbitration; and

g) there was no prejudice to P&H from any delay.

[61] We accept the time line given by counsel for P&H. While an argument exists that the clock starts ticking on July 30, 2013, we prefer to use the date of August 14, 2013, being the date P&H wrote to Local 1400 advising the issues being raised should be dealt with according to the provisions of the CBA. That would have set the deadline for filing a grievance at August 28, 2013.

[62] No evidence was introduced with respect to the importance of the Grievance. However, based on what has been submitted, we are of the view that the importance of the Grievance is not, of itself, sufficient to warrant an extension of time.

[63] We are also of the view Local 1400 provided no satisfactory reason for the delay. We know the evidence of Local 1400 was such that it was asking for a meeting. The evidence did state that Local 1400 wanted to meet in order for discussion to place it in a position to make a fully informed decision. However, P&H made it clear that it was insisting upon the grievance procedure to be followed. In our view, P&H was entitled to do this. We find Local 1400 had sufficient information that would have needed to draft a grievance and initiate the grievance procedure. Had Local 1400 lodged a grievance within 14 days of the first such notification, our decision might have been different.

[64] We find there are no other particular circumstances to consider. Therefore, we conclude that in the circumstances of the Grievance, it is not reasonable to grant an extension of time limits under section 60(1.1) of the *Canada Labour Code*. The importance of the Grievance does not outweigh the failure to provide a satisfactory reason for the delay.

[65] We need to go no further than so to hold, but we will add that, if we had found a satisfactory reason for the delay, we would have found the employer to have been unduly prejudiced by the delay. This is particularly in light of the evidence that there had not been substantial compliance with the various steps of the grievance procedure.

[66] We also conclude that Local 1400 is not successful with its estoppel argument. Local 1400 did tender evidence of past discussions concerning matters. However, the evidence was clear that such discussions were consistent with an "open door" to discuss matters, but was never intended to waive or circumvent compliance with the grievance procedure. Therefore, McDougall challenged Thebaud's testimony concerning past presentations of grievances. In fact, his testimony confirmed P&H provided written notice to Local 1400 concerning its view on the practice–not only with respect to the Grievance at issue herein, but on previous grievances. We are of the view P&H should not be estopped from insisting upon strict compliance with the

Grievance Procedure. It did not represent to Local 1400 that it will follow a contrary practice. There is no such conduct that is clear and unambiguous and supported by the evidence before us.

[67] We also conclude that Local 1400 is not successful with any waiver argument. The evidence supports that P&H object to Local 1400's compliance with the grievance procedure at its first opportunity and several opportunities afterwards.[40] We can find no circumstances from which it would be reasonable to find or imply waiver.

Local 1400 Improperly Referred the Grievance to Arbitration Without Following the Procedures in the CBA

[68] P&H argues Local 1400 is only entitled to refer the Grievance to arbitration if it is not satisfied with McDougall's written decision pursuant to Step 3 of the grievance procedure. Since no such decision exists, P&H says the referral is contrary to Step 3 of the Grievance Procedure.

[69] Local 1400 argues:

a) P&H:

   i) refused to meet and discuss Local 1400's concerns; and

   ii) failed to respond to the Grievance; and

b) it had no choice but to refer the matter to arbitration.

[70] For the reasons hereinbefore stated, we accept P&H's argument. We find Local 1400 improperly referred the Grievance to arbitration without following the procedures in the CBA.

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[40] See *Re Dominion Stores Ltd. and RWDSU, Local 414*, [1981] 1 L.A.C. (3d) 436 (McLaren, Spaxman, Sargeant)

Local 1400 Requested the Minister to Appoint an Arbitrator Without Following the Preconditions Required by the CBA

[71] P&H argues Local 1400 is only entitled to request the Minister to appoint an arbitrator if there has been:

a) a proper reference of the Grievance to arbitration; and

b) no agreement upon an arbitrator.

Since neither of these events exist, P&H says the request does not meet the preconditions mandated by the CBA.

[72] Local 1400 argues:

a) P&H failed to respond to its reference of the Grievance to Arbitration; and

b) it had no choice but to ask the Minister to appoint an arbitrator.

[73] For the reasons hereinbefore stated, we accept P&H's argument. We find Local 1400 requested the Minister to appoint an arbitrator without following the preconditions required by the CBA.

Dated at Saskatoon, Saskatchewan, on August 26, 2014.

T. F. (Ted)Koskie, B.Sc., J.D., Chairperson

Blake McGrath, Union Nominee

Bill Humeny, Employer Nominee