IN THE MATTER OF THE *CANADA LABOUR CODE*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

STERLING MARINE FUELS,
A DIVISION OF MCASPHALT INDUSTRIES LIMITED
- The Employer

-and-

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS UNION,
LOCAL NO. 880
- The Union

AND IN THE MATTER OF the grievance of Michael Merry and Michael Martin

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Jean Leslie Marentette	- Counsel
Peter L. Kelly	- Vice-President and General Manager
Bruce Lodge	- Facility Manager

On behalf of the Union:

Michael Klug	- Counsel
Rick Parent	- Vice President, Local 880
Justin Wambera	- Steward
Michael Merry	- Grievor
Michael Martin	- Grievor

Hearing held September 20 and October 5, 2007, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This is a job posting grievance. The Employer objected to my jurisdiction to hear the grievance on the grounds that the Union had not processed the grievance in a timely manner. This collective agreement is clear that any grievance not pursued in a timely fashion is "null and void."

By agreement of the parties, the award is limited to the objection to jurisdiction.

II. THE FACTS

Sterling Marine Fuels, a Division of McAsphalt Industries Limited, the Employer, operates a facility in Windsor where it supplies marine fuel to ships. The Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, the Union, represents the employees. Their collective bargaining relationship is regulated under the *Canada Labour Code.*

The bargaining unit consists of both full and part time employees. The agreement has language entitling the most senior part time employee to obtain a full time position under certain circumstances.

The Employer advertised for full time employees. Part time employees applied for the positions but none were successful. Instead, two outside applicants were hired. The two new employees began work April 2 or 3, 2007.

Two part time employees who had sought full time positions, Michael Merry and Michael Martin, then grieved. The grievors were students and often worked nights.

The grievance was presented Saturday April 7, 2007, to Bruce Lodge, the Facility Manager responsible for the hiring decision. It appears that this grievance was filed at step 1 of the grievance procedure. While the collective agreement specifies that an employee is required to have discussed the matter with his foreperson before filing a grievance at step 1, no such discussion was held. The Employer did not object to proceeding directly to step 1 in the absence of this discussion.

Mr. Lodge replied Tuesday April 10. Mr. Lodge's reply dismissed the grievance and that reply was given directly to the two part time grievors.

If no satisfactory settlement is reached within five working days of filing a grievance at step 1, the grievance may be processed at step 2 within a further five working days. However, nothing more was said by the Union until May 7.

Rick Parent is the Union Representative responsible for this and other bargaining units. Mr. Parent said that it was not until shortly before May 7 that he first heard that the grievance had been denied. On May 7 Mr. Parent telephoned the Employer Vice President, Peter Kelly. Mr. Kelly is the Employer representative who normally deals with grievances processed at step 2. Mr. Parent indicated to Mr. Kelly that he wished to have a meeting to discuss the outstanding grievances. After clarification of which grievances the Union wished to discuss, Mr. Kelly indicated that Mr. Parent should speak to Mr. Lodge.

Mr. Parent tried to contact Mr. Lodge by telephone and, after they each left messages for the other, a meeting was scheduled for May 23. The May 23 meeting resolved nothing and Mr. Parent sent a fax that day to Mr. Kelly advising that the Union wished to arbitrate the grievance. That same day Mr. Kelly advised Mr. Parent by fax that the Union was out of time.

There was considerable disputed evidence.

Mr. Kelly and Mr. Parent had differing recollections of their May 7 telephone call. Mr. Kelly said that he advised Mr. Parent that the Union was out of time, that the grievances had been dealt with a month before. Mr. Parent denied that such comments were made.

Mr. Lodge testified that he advised Mr. Parent the grievances were out of time when they spoke on the telephone. Again Mr. Parent denied any such comments. However, Mr. Lodge and Mr. Parent agreed that Mr. Lodge did not mention the issue of time limits during their May 23 meeting.

I also heard evidence regarding the parties' past practice in handling grievances. Mr. Parent testified that his normal practice was to have a meeting as he found it best to discuss grievances rather than handle them by correspondence. He said that in the past the Employer had not stuck rigidly to either the time frames or to the process requirements (such as filing a grievance in writing at step 2) in the collective agreement.

The Employer witnesses expressed a different view on the issue of adherence to time limits. Mr. Kelly, in particular, said that the Employer had previously raised with the Union the need to pay attention to time limits and he felt there was agreement that the parties would not deal with old issues.

The parties also led evidence regarding the processing of several earlier grievances but that evidence did not assist in resolving this matter.

III. PROVISIONS OF THE *CODE* AND THE AGREEMENT

The key section of the *Canada Labour Code* is as follows:

60. (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.

The key sections of the parties' 2004-2007 collective agreement are as follows:

ARTICLE 5: GRIEVANCE PROCEDURE AND ARBITRATION

5.01 There shall be an earnest effort on the part of both parties to this Collective Agreement, to settle promptly, through the procedure set out herein, any complaints, grievances or disputes arising from the interpretation, application or administration of this Collective Agreement.

5.02 It is understood and agreed that an employee does not have a grievance until he has discussed the matter with his foreperson, or his alternate and given him an opportunity of dealing with the complaint. His decision shall be made known to said employee within forty-eight (48) hours. Grievances properly arising under this Collective Agreement shall be adjusted and settled as follows:

Step No. 1:

Within ten (10) days after the circumstances giving rise to the grievance occurred or originated, the aggrieved employee, with or without the assistance of the Steward or the authorized Union Representative, shall present his grievance orally or in writing to his foreperson. If a settlement satisfactory to the employee concerned is not reached within five (5) full working days, a grievance may be presented as indicated in Step No. 2, below, at any time within five (5) full working days thereafter.

Step No. 2:

a) At this step, the grievances may be processed as an individual, joint or Union grievance and shall be presented in writing to the Vice-President by a Steward or the authorized Union Representative. The Vice-President will make the Employer's decision known in writing within five (5) full working days.

b) The Employer or the Union may process a written grievance at this step concerning any matters related to this Collective Agreement.

5.03 All grievance to be dealt with under Step No. 2 above shall be in writing and signed by the party initiating such grievances. The Union may present a grievance in total on behalf of an employee. However, in the case of any disciplinary action taken by the Employer, the grievance must be signed

by the employee affected.

5.04 Written grievances, to be valid, shall set out the nature of the grievance, the article or articles of the Collective Agreement alleged to have been violated and the nature of the remedy sought and shall not be subject to change at later steps except by mutual agreement in writing with the Employer, or in the case of remedy, by an Arbitrator.

5.05 A grievance shall be null and void unless it has been presented in accordance with the grievance procedure outlined in this article, within and not after the respective time its [sic] mentioned therein. Saturdays, Sundays, and Statutory Holidays designated in this Collective Agreement shall not be counted in determining the time within which action has to be taken or completed under the grievance procedure.

5.06 . . .

5.07 The time limits set down in this article may be extended by mutual agreement of the parties to this Collective Agreement.

. . .

IV. EMPLOYER POSITION

The Employer reviewed the evidence in detail and submitted that the time limits in the agreement were mandatory, that the Union had failed to meet those time limits, that the Employer had not waived its right to rely upon those time limits, and that the clear result was the grievance was “null and void”.

The Employer said that on the issue of agreement to extend the time limits and on waiver, the evidence simply did not support the Union submissions.

As for the factors which might be considered regarding an extension of time limits under the *Code*, the Employer submitted that this grievance was a narrow one focussing on whether the grievors had the necessary qualifications and was not a grievance in which broad policy concerns were in dispute - it would be more reasonable to extend time limits on issues of broad application. As for the importance of the issue to the grievors, the Employer noted that neither grievor had testified as to why the job was important - the evidence had been they

were both students - so it was unclear whether the issue was important even to the grievors. The Employer also noted that no reason was given for the failure to meet the time limits, let alone a good reason for the failure. The Employer said that the Union had to show a good reason for the delay. As for the length of the delay, the Employer said that it was some three weeks late and that the delay was sufficient for the Employer to consider the grievance dead. Nothing the Employer did had led the Union to think the Employer would not rely on the time limits.

The Employer relied upon the following: Brown and Beatty, *Canadian Labour Arbitration*, Section 2:3130, Waiver of procedural irregularities; *United Steelworkers of America and Construction Products Inc., Canadian Division* (1970), 22 L.A.C. 125 (Brown); Ronald M. Snyder, *Annotated Canada Labour Code,* Section 60 (1.1); *Re Helen Henderson Care Centre and Service Employees Union* (1992), 30 L.A.C. (4th) 150 (Emrich); and *Re Hotel-Dieu Grace Hospital and Ontario Nurses' Association* (1995), 47 L.A.C. (4th) 66 (Watters).

V. UNION POSITION

The Union disagreed with the Employer on both the facts and on the legal principles.

Regarding the extent of the delay, the Union submitted that the delay was about two weeks, not three. The relevant time limits were based on working days. The Union said the grievance was filed on Saturday April 7 so that the first working day thereafter was Monday April 9. The five working days allowed to see if there was a "settlement satisfactory to the employee" took the matter to April 16. The further five working days to move the grievance to step 2 took the matter to April 23. Any delay was thus Monday April 23 to Monday May 7, a period of two weeks.

The Union reviewed the evidence in this case and suggested that the parties had not followed the collective agreement on several occasions. For example, there was to be a discussion with the foreperson before a grievance was filed, but there was no such discussion here. Similarly, the agreement called for a grievance to be presented to the "foreperson" and there was no foreperson at the facility. Instead the grievance went directly to the facility manager. In addition, a grievance was required to be presented in writing at step 2, but here the grievance was presented orally without any complaint. Finally, the step 2 response must be made within five days and no such reply was made. The Union said the evidence made it clear that these parties had not rigidly followed the grievance procedure in the collective agreement.

The Union said there were three bases upon which I should dismiss the Employer objections regarding timeliness. The Union said that either the parties mutually agreed to extend the time limit for processing the grievance at step 2 by agreeing to hold a meeting May 23, or the Employer had unilaterally waived its right to rely upon that time limit when it agreed to the meeting with the Union. Thirdly, the Union asked me to find that the time limit should be extended under Section 60 (1.1) of the *Code* (above). The Union noted that the issue in the grievance was an important issue for the grievors as it involved full time positions and full time positions include access to the benefit package. The actual delay was only two weeks and was not excessive. The delay had been in the middle of the process, as distinct from a delay prior to filing the grievance or prior to filing for arbitration. There was no indication of bad faith in the delay. The question of whether there was a good reason to extend the time limit was different from whether there was a good reason for missing the time limit, and I should find there was a good reason to extend the time limit. In addition, the Union said there would be no undue prejudice to the Employer, as continuing to employ the other two newly hired employees did not amount to prejudice.

The Union relied upon the following: *Ontario Engineered Suspensions Ltd. v. C.A.W. Canada, Local 127 (Thompson Grievance)* [2005] O.L.A.A. No. 279 (Kennedy); *Iafrate Machine Works v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 199 (Hammond Grievance)* [2004] O.L.A.A. No. 270 (Kennedy); *Re Regency Towers Hotel Ltd. and Hotel and Club Employees' Union, Local 299* (1973), 4 L.A.C. (2d) 440 (Schiff); *Ottawa-Carleton District School Board v. Ontario Secondary School Teachers Federation, District 26 (Lay-off Notices Grievance)* [1999] O.L.A.A. No. 255 (Thorne); *Re Falconbridge Ltd., Sudbury Smelter Business Unit and United Steelworkers of America, Local 6855* (2002), 112 L.A.C. (4th) 243 (Shime); *Re Greater Niagara General Hospital and Ontario Nurses' Association* (1981), 1 L.A.C. (3d) 1 (Schiff); *Re The Donwood Institute and Ontario Public Service Employees Union, Local 541* (1997), 60 L.A.C. (4th) 367 (Brandt); *Re Leon' s Furniture and Canadian Auto Workers, Local 1000* (2000), 93 L.A.C. (4th) 229 (H. D. Brown); *Re International Language Schools of Canada and Ontario Secondary School Teachers Federation, District 34* (2005), 141 L.A.C. (4th) 248 (Gray); *Re Prestressed Systems Incorporated and Labourers' International Union of North America, Local 625* (2005), 143 L.A.C. (4th) 340 (Snow); *Purolator Courier Ltd. v. Teamsters, Local 141* [2000] C.L.A.D. No. 675 (McLaren); and *Re Loomis Courier Service and Canadian Auto Workers, Local 4100* (2000), 86 L.A.C. (4th) 180 (Dorsey).

VI. CONCLUSIONS

The Union did not concede that the time limit expressed in the collective agreement was missed. The Union argued that if the time limit was missed then the parties had nevertheless agreed to extend that time limit and, also, assuming that I found that the time limit had been missed, disagreed with the Employer as to how late the Union had been. Although it appeared that the grievance was initially filed at step 1 of the grievance procedure, the parties did not agree on that point.

The first issue is this: Did the Union fail to process the grievance in accordance with the time limit specified in the collective agreement?

I find that the grievance was initially presented in writing Saturday April 7, 2007, at the first step of the procedure. The relevant time limit is based on working days, thereby excluding Saturdays and Sundays, so that in assessing the time limit it was as though the grievance had been presented Monday April 9. A reply was made in writing Tuesday April 10 but that date is irrelevant in assessing the time limit. The grievors had five working days from filing the grievance, ie. from Monday April 9, to decide whether the reply was a "settlement satisfactory" to them and, if not satisfactory, then the grievance was to be moved to the second step within another five working days. With the exclusion of Saturdays and Sundays this would take the allowable time limit for step 2 to Monday April 23. As the earliest the Union initiated the step 2 process was Monday May 7 with the telephone call from Mr. Parent to Mr. Kelly, the time limit set out in the collective agreement was indeed missed. The Union was two weeks late in proceeding to the second step.

Article 5.05 is clear as to the intended result - the "grievance shall be null and void."

I begin with a consideration of the *Code* provision. On this issue some background may be helpful. Years ago (e.g., 1930 - 1940) when the parties to collective agreements disagreed about the meaning or application of those collective agreements, the unions frequently went on strike to attempt to enforce their views. These strikes during collective agreements were disruptive and various Canadian legislation soon required that strikes during the term of collective agreements cease and that a "no strike, no lockout" clause be included in collective agreements. A "no strike, no lockout" clause is included in this agreement. Instead of using strikes to settle differences during collective agreements, the parties to collective agreements are now generally required by legislation to settle their differences by arbitration.

Although requiring the arbitration of differences, this *Code* and other labour statutes say little about either the requirement for or the nature of any grievance procedure. Nevertheless, parties commonly agree to include a grievance procedure. As part of these various grievance processes the parties to collective agreements have usually included time limits, limits such as those included in this collective agreement. Since arbitrators receive their jurisdiction primarily from the collective agreement and not from the governing legislation, arbitrators have frequently concluded that if the collective agreement specified that a grievance was barred from arbitration after the Union had missed a time limit, then the arbitrator must enforce the parties' agreement. The result was that many differences could not be resolved by arbitration, contrary to the legislative requirement to arbitrate all differences. In due course various Canadian legislatures adopted remedial provisions to address the issue of differences between the parties which could not otherwise be resolved in arbitration because the Union had missed a time limit - often a very short time limit. Since 1999 the *Canada Labour Code* has included such a remedial provision in Section 60 (1.1), above. It is clear that the provision in the Code is designed to address exactly this matter - the Union missed a time limit and the language of the parties' collective agreement says that the difference between these two parties cannot be arbitrated. While the collective agreement is my primary source of jurisdiction, I also have jurisdiction to apply this section of the *Code.*

Section 60 (1.1) contains a two part test - first, there must be reasonable grounds for the extension and secondly, the other party cannot be unduly prejudiced by an extension.

The primary question is whether there are reasonable grounds to extend the time limit. In the authorities relied upon by the parties (above), a number of issues were found to be important in those particular fact situations. The issues in those cases are not a checklist, and they need not be present in every case in order to extend the time limit. I will simply indicate four reasons which, taken together, persuade me that there are reasonable grounds to extend the

time limit here.

First, the delay was not unduly long - it was 10 working days. Secondly, while there was no clear evidence as to why the delay occurred, I note that the collective agreement contemplates that either the Union Steward or the Union Representative must be involved at step 2. In this instance, neither of them were informed directly of the Employer's answer at step 1. I anticipate that the communication between the part time grievors working nights and the steward and representative might involve greater delays than if the grievors had been full time employees working days. If, for example, the reply had been provided directly to Mr. Parent, the Union Representative, I would be less inclined to extend the time limit than I am in this case in which the Union Representative only learned of the denial shortly before May 7. Third, as this grievance deals with full time hours and benefits, I find it raises issues which are important to the two grievors. I do not think it is necessary for two part time employees who have sought full time positions, and grieved when denied the positions, to testify before me that full time work is important to them in order for me to accept that full time positions are more desirable than part time and that the grievance thus raises matters important to the grievors. Fourth, the grievance was initially raised in a timely manner and the missed time limit occurred later during the processing of the grievance so that the Employer representatives, such as Mr. Lodge, had an opportunity to recall the events relevant to the substance of the grievance soon after those events took place.

The second part of the Section 60 (1.1) test involves undue prejudice. Since arbitration is intended to be a fair process, the Section directs that if a party - in this instance, the Employer - would be unduly prejudiced by an extension of the time limit, the Arbitrator should not grant the extension. Undue prejudice simply means that the Employer should not be excessively harmed or injured because of the proposed extension. The harm may relate to the Employer's ability to present its case, the harm may arise from the fact that the Employer has

taken steps in the belief that the grievance had been resolved, or the harm may be of another sort. The question is would the Employer be in a much worse position after the proposed extension than it would have been if the grievance had been processed in a timely manner. The Employer harm must arise because of the proposed extension, and not simply flow from the original grievance. I fail to see how the mere hearing of the grievance can be the basis of a finding of undue prejudice under this provision.

Three examples may assist in understanding the concept. Suppose that an important witness was no longer available to testify, but would have been available to testify had the Union pursued the matter within the time limit. To extend the time limit in such a situation might cause considerable harm to the Employer's ability to present its case. Similarly, suppose that certain important documentary evidence was destroyed because the grievance was thought to have been resolved. An extension in that situation might cause considerable harm to the Employer, as compared to the position it would have been in had the time limit been met. Finally, suppose an employer had delayed hiring an outside employee until it concluded the grievance was resolved. The granting of an extension in that situation might constitute undue prejudice.

I note that in the case before me the two new employees were already at work when the grievance was filed, and there was no evidence of any harm to the Employer from an extension of the time limit.

Under Section 60 (1.1) I conclude that there are reasonable grounds for extending the time limit and that the Employer will not be unduly prejudiced by the extension. I therefore extend the time limit for processing the grievance at step 2.

In light of my conclusion regarding Section 60. (1.1) it is unnecessary to consider the

Union's alternative arguments.

The preliminary objection to my jurisdiction is dismissed. I will reconvene the hearing at the request of either party.

Dated at London, Ontario this 29th day of November, 2007.

Howard Snow, Arbitrator