IN THE MATTER OF AN ARBITRATION
(FORMAL PROCESS)

between

THE CANADA POST CORPORATION
("The Corporation")

and

THE CANADIAN UNION OF POSTAL WORKERS
("The Union")

2013 CanLII 23213 (ON LA)

REGARDING THE TERMINATION GRIEVANCE OF NOUMAN MIAN
(Preliminary Objection Regarding Timeliness)

PAMELA COOPER PICHER - ARBITRATOR

APPEARANCES FOR THE CORPORATION:

Madeleine Loewenberg	-	Counsel
Mark DeAbreu	-	Labour Relations Officer
Glen Ramlochan	-	Zone 8 Manager

APPEARANCES FOR THE UNION:

Adrienne Telford	-	Counsel
Debbie Carmichael	-	Regional Union Representative
Learie Charles	-	Scarborough Local Rep.
Nouman Mian	-	Grievor

Hearings in this matter were held in Scarborough on February 28th and October 25th of 2012; in Toronto on February 20, 2013 and via teleconference on February 21, 2013.

INTERIM AWARD

The Union filed a grievance on February 4, 2011 contesting the discharge of the grievor, Mr. Nouman Mian, on July 19, 2010 due to his failure to return to work when directed to do so by the Corporation. Mr. Mian was employed as a letter carrier and had over 10 years' seniority.

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At the outset of the hearing on February 28, 2012, the Corporation raised a preliminary objection to the timeliness of the grievance, which the parties agreed should be dealt with before turning to the merits of the termination.

The collective agreement addresses the timeliness of the filing of grievances regarding single employees, such as the instant grievance of Mr. Mian, in article 9.10 of the collective agreement, as follows:

> **Time limit on Grievance**
>
> **9.10** A grievance concerning only one employee may be presented by an authorized representative of the Union not later than the twenty-fifth (25th) working day after the date on which this employee first became aware of the action or circumstances giving rise to the grievance.

Additional relevant articles of the collective agreement include the following:

> **Corporation's Reply**
>
> **9.25** Within twenty (20) working days after receipt of a grievance, the Corporation shall reply in writing to the grievance.

Content of the Reply

> **9.26** The reply of the Corporation shall be sufficiently clear so as to determine the relationship between the collective agreement, the grievance and the Corporation's decision.

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It is common ground that the Union filed Mr. Mian's grievance approximately 5.5 months after the time limit set out in article 9.10 of the collective agreement.

Section 60(1.1) of the Canada Labour Code, RSC 1985, c. L-2, however, provides an arbitrator with the discretion to extend the time limits, 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.**
>
> [emphasis added]

While the Union acknowledges that Mr. Mian's grievance was filed well outside the time limits set down in the collective agreement, it maintains, first, that the Corporation waived the time limits through the manner in which it handled the grievance once it was filed, and, second, that, in any event, the Arbitrator should exercise her discretion under the Canada Labour Code to extend the time limits.

The Corporation acknowledges that the Arbitrator has the discretion to extend the time limits but contends that the circumstances of the delay do not provide reasonable justification for the Arbitrator to do so. Moreover, the Corporation asserts that it would suffer prejudice from an extension given fading memories resulting from the additional passage of time, given the enhanced difficulty of locating witnesses and given the lengthened time that damages, if awarded, would become applicable. Additionally, the Corporation denies that through its handling of the grievance it waived its right to rely on the time limits set down in the collective agreement.

Mr. Mian had been subject to a lengthy absence prior to his termination on July 19, 2010, which started in December of 2008 when the grievor suffered an injury on duty. It would appear that by 2010, the Corporation was satisfied that the grievor was capable of returning to work on modified duties. It would further appear that the grievor was not of the same opinion and declined to return when directed to do so by the Corporation through the issuance of multiple, successive letters. Ultimately, the situation culminated with a termination letter being issued to the grievor on July 19, 2010.

THE FACTS:

Evidence relevant to the Corporation's preliminary objection to the timeliness of the grievance begins with Mr. Mian's receipt of his termination letter, which occurred on or about July 24, 2010.

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The relevant evidence, a good deal of which is not in dispute, generally, may be divided into two parts: first, that which is related to the late filing of the grievance and, second, that which is related to the processing of the grievance and the timing of the Corporation's decision to raise its objection to the timeliness of the grievance. Highlights of that evidence may be summarized as follows:

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A. Evidence Relating to the Late Filing of the Grievance:

1. Mr. Mian testified that at the time he received his July 19, 2010 termination letter, he was in a depressed state of mind which was being exacerbated by the circumstance that he was both in the middle of a separation from his wife and was experiencing financial problems. He testified that when he read the termination letter, "… it was as if someone had just pulled the ground out from under my feet and I couldn't think clearly or decide things properly."

2. Within a week of receiving the termination letter, Mr. Mian faxed it to Ms. Joanna Hartanu, the vice-president of the Union. He placed a handwritten notation on the top of the letter, which read: "ATTN: Joanna". At that time, he had been dealing with Ms. Hartanu on his WSIB matters.

3. When asked in cross-examination whether he understood from the series of letters from the Corporation leading up to the termination letter that if he did not either produce adequate medical evidence or return to work he would lose his job, he replied, "To be honest, I couldn't think that deep at the time." He acknowledged that he understood from the termination letter that he had lost his job "but not completely". He stated that he did not know at that point that he could grieve his termination. He further commented that he in fact thought that if he won his WSIB appeal of the denial of ongoing benefits, he would be able to go back to work.

4. When asked whether he followed up with Ms. Hartanu regarding what she did with his termination letter, Mr. Mian stated that he was not in his senses at the time and was unable to concentrate enough to follow up. He emphasized that he had been on medication and in treatment during that time.

5. Ms. Hartanu assumed her duties as the newly elected vice-president-at-large of the Scarborough Local in or about April of 2010. Prior to that, she had been a shop steward for approximately 3 ½ years.

6. Ms. Hartanu testified that following her election as vice-president, she was handed between 100-150 active case files and told to deal with them. She noted that she received no mentoring from her predecessor regarding either the details of the files she had been given or how to process them. Following her election, Ms. Hartanu received some training in WSIB matters, which became the focus of her Union work at that time, but no training in the processing of grievances.

7. As a shop steward, Ms. Hartanu had filled out fact sheets for employees filing grievances but had never filed a grievance. She had filed three grievances of her own but they were processed with the assistance of Union representatives.

8. Ms. Hartanu testified that handling Union files was new to her and that she felt significantly overwhelmed. She acknowledged that she did not understand the depth of what the responsibilities of her position demanded of her. Ms. Hartanu reflected that she was too arrogant to realize that she needed help.

9. As part of her newly assumed Union duties, Ms. Hartanu had been involved in looking after Mr. Mian's work related injury and WSIB matters extending therefrom. During that process, and prior to her receipt of the termination letter in July of 2010, Mr. Mian had faxed Ms. Hartanu WSIB related documents. When he did so, typically he had also provided her with a cover letter of instructions. In respect of the termination letter, Mr. Mian supplied no similar cover letter of instructions. Instead, he placed a note on the top of the letter saying, "ATTN: Joanna".

10. Upon her receipt of the faxed copy of Mr. Mian's termination letter, Ms. Hartanu testified that she gave it a brief read and then simply put it into Mr. Mian's WSIB file. The evidence reveals that the letter remained in the WSIB file, unknown to others in the Union, until after the commencement of the arbitration hearing in February of 2012. She informed no one from the Union about the termination letter and never took any action relating to it.

11. By way of explanation for her failure to act on the termination letter or to bring it to the attention of anyone else in the Union, Ms. Hartanu stated that she was in an overwhelmed state of mind because of the pressure and weight of her newly assumed Union duties. She reflected that in her anxious condition she didn't even think of filing a grievance for Mr. Mian and simply assumed that the letter was relevant only to his WSIB matters.

12. Between August and December of 2010, Ms. Hartanu's communications with Mr. Mian were in relation to both his LTD application and his WSIB appeal of the denial of ongoing benefits. She had no communication with him relating to his termination or termination letter. Moreover, Ms. Hartanu had no

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involvement in the filing of Mr. Mian's grievance against his termination on February 4, 2011.

13. It was only after the first day of the arbitration hearing on February 28, 2012 that Union officials became aware that Mr. Mian had faxed his termination letter to Ms. Hartanu shortly after his receipt of it in July of 2010. Mr. Learie Charles, the grievance officer for the Local, discovered the faxed termination letter when he was looking through Mr. Mian's WSIB file, as part of his ongoing investigation.

14. Mr. Charles testified that he was shocked when he found the termination letter sitting in Mr. Mian's WSIB file and saw that it had been faxed to Ms. Hartanu by Mr. Mian shortly after his dismissal. He stated without contradiction that it was the first time in his nine years in his position that a dismissal grievance had not gone forward in a timely manner.

15. Mr. Charles confirmed that at that point in March of 2012 when the Mr. Mian's dismissal letter was found lost in his WSIB file, he "read the riot act to the executive", to use his words, and put systems in place to ensure that this kind of wrong would not happen again. Now any member of the executive who receives a termination letter copies it to Mr. Charles immediately. He takes it from there, contacts the individual and files a grievance for the employee.

16. Ms. Hartanu testified that she knows that her actions were a disservice to Mr. Mian. Not by way of excuse but by way of explanation, Ms. Hartanu stated that she was so overwhelmed at the time that she wasn't thinking straight and just put the letter in Mr. Mian's WSIB file and thought nothing more about it until it was brought to her attention by the grievance department after the arbitration was underway, as set out above.

17. Turning to the events that led to the filing of the grievance on February 4, 2011, Mr. Mian testified that sometime in January of 2011 he met a Canada Post worker in his doctor's office who, in conversation, told him about the existence of time limits for filing grievances. According to Mr. Mian, she advised him to go see his grievance officer if he hadn't done anything yet.

18. Mr. Mian testified that he then went to the Union hall in late January where Mr. Ken Davidson, an executive officer with the Scarborough Local, told him they would file his grievance.

19. Mr. Davidson stated that he first learned of Mr. Mian's situation when Mr. Mian came into the Union office in late January and advised that he had been dismissed and wanted to file a grievance. Mr. Davidson looked at the termination letter and immediately commented to Mr. Mian that they had a problem with time limits but that he would put a grievance in anyway. Mr. Davidson stated that he concluded that Mr. Mian was depressed by the

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sluggish manner in which he came into his office and the way he was just staring at him. He recalled that by the look in his eyes, he thought there was something really wrong with him, which was why he submitted the grievance even though it was late. He completed the grievance and handed it in on February 4, 2011.

20. Mr. Davidson testified that at that point in January he had no understanding of why the grievance was late. He confirmed that he was not aware that Mr. Mian had faxed the termination letter to Ms. Hartanu.

21. Mr. Davidson stated, without contradiction, that the Local files approximately 1500-2000 grievances a year and that very few of them are late.

22. Regarding the timing of when Mr. Mian realized that he had missed time limits for filing his grievance, counsel for the Corporation put to him for comment typed notes dated November 3, 2010 that were apparently taken by Ms. Rosanna Moses, an officer from Sun Life, in an interview regarding Mr. Mian's contractual, medical, functional and occupational circumstances. At this stage of the arbitration proceeding, focused as it is on the preliminary objection, Ms. Moses was not called as a witness and was not available for cross-examination concerning the circumstances under which the notes were taken.

23. On the basis of the notes, however, counsel for the Corporation questioned the validity of Mr. Mian's testimony-in-chief that it was in January of 2011 that he realized that the time limits for filing a grievance respecting his termination had been exceeded. Ms. Moses' notes of November 3, 2010 recorded, in part, the following:

> Workplace Issues
> Employment had been terminated. PM [Patient Mian] did not grieve termination as he missed the deadline to submit grievance.

24. In Reply Evidence, Mr. Mian insisted that he first realized that he had missed the deadline from a postal worker at his doctor's office and that that was in January of 2011, although he could not recall when in January.

25. In her submissions to the Arbitrator, counsel for the Union stated that she was not challenging the correctness of Ms. Moses' notes and maintained that Mr. Mian was simply incorrect in his recollection of the timing of when he had had a conversation with a co-worker in his doctor's office. Counsel for the Union suggested that that conversation, in all likelihood, occurred in late October of 2010 since the interview with Ms. Moses was in early November.

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B. Evidence Relating to the Processing of the Grievance and the Timing of the Corporation's Decision to Raise its Objection to Timeliness:

1. The First Level Grievance Hearing of Mr. Mian's grievance occurred on March 10, 2011, approximately one month following the filing of the grievance. In attendance for the Union were Mr. Ken Davidson and Ms. Ellen Deschene. Mr. Glen Ramlochan attended on behalf of management.

2. Mr. Ramlochan started in his position as Zone 8 Manager in December of 2010. His duties as Zone 8 manager included overseeing the Scarborough Depot and attending First Level Grievance Hearings for management. Mr. Ramlochan commented that at these Grievance Hearings he might typically hear 10 grievances. His evidence does not specify, however, the actual number of grievances he heard together with Mr. Mian's on March 10, 2011. Prior to assuming his position as Zone 8 manager, Mr. Ramlochan was a local area manager in Nova Scotia.

3. While the documentary and oral evidence plainly establish that Mr. Ramlochan attended Mr. Mian's First Level Grievance Hearing, Mr. Ramlochan testified that he had no recollection of being there or of having any other involvement in Mr. Mian's grievance.

4. In cross-examination, however, Mr. Ramlochan confirmed that it was his handwriting that appeared on Management's First Level Grievance Report, which recorded the respective positions of the parties that had been taken at the Grievance Hearing. Based on the fact that it was his handwriting that filled out Management's First Level Grievance Report, Mr. Ramlochan acknowledged that he had been at Mr. Mian's First Level Grievance Hearing with Mr. Davidson. Even so, he stated, apart from the fact that his memory was jogged slightly by seeing his own handwriting, he still did not remember any communications that were made at the Hearing.

5. Mr. Davidson testified that at this First Level Grievance Hearing, he said to Mr. Ramlochan, "Glen, I realize we have a problem with time limits but he [Mr. Mian] was so distraught that that is why I submitted it." He stated that Mr. Ramlochan simply looked at the grievance, said nothing in response to the late filing of the grievance and asserted that the termination was "just and warranted". Mr. Davidson acknowledged that the grievance itself does not record the date of the termination. Additionally, there was no clear evidence to establish whether Mr. Ramlochan had before him Mr. Mian's termination letter, which obviously would have recorded the date of termination.

6. Mr. Davidson reflected that in his career of 45 years, he could recall only 3 grievances that were filed over the time limits, and those were ones relating to attendance.

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7. The Union's First Level Grievance Hearing Report from for Mr. Mian's grievance was filled out by Ms. Deschene for the Union and records the following under "Argumentation by the Union":

    - man was ill could not report to work
    - not in right mind at time that this was going on
    - serious depression – which Manulife is aware [of]
    - had car accident

    Under the section, "Argumentation and Information Received From the Employer", the following was recorded by Ms. Deschene:

    just and warranted

    For the "Decision" options listed on the form, which included, "Denied", "Adjusted", "Sustained" and "Investigate", she circled "Denied" as the decision taken by the Corporation.

8. The Grievance Hearing Report form completed by the Corporation was similar in its content. As noted, Mr. Ramlochan confirmed in cross-examination that it was he who recorded, in part, the following:

    UNION POSITION:
    EE [employee] was ill. He could not report to work. Psychological Problem. Submission of Grievance was late because EE was not of sound mental mind. State of Depression at the time and M'Life 'knows all about it'.

    MANAGEMENT'S POSITION:

    Just & warranted.

9. Mr. Ramlochan confirmed in evidence that what he recorded for the respective positions of the parties on the First Level Grievance Report, as set out above, was an accurate reflection of what had been said at the Hearing. More specifically, based on what was written rather than an active memory of the Hearing, he acknowledged that the Union raised at the First Level Grievance Hearing the fact that the grievance was out of time and that he did not object to the late filing of the grievance either at the Grievance Hearing or in the Report.

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10. The next portion of Management's Grievance Hearing Report, the section headed, "LEVEL ONE REPLY" appears to have been filled out by hand by Ms. Julie Parent some 10 months later on January 31, 2012. Recorded, in part, on the bottom of the one page form is the following:

> A review of the facts indicates that
>
> Not sure if this grievance ever written up at first level
> Should be in arbitration process as employee dismissed for AWOL
>
> …
>
> SIGNATURE "Julie Parent"
> PREPARED BY – Julie Parent
> DATE: Jan 31, 2012

11. The Corporation's formal Grievance Reply was issued to Mr. Mian by Ms. Parent on February 6, 2012. It recorded, in part, the following:

> This grievance has been discussed with your union representative. A review of the facts indicate[s] that the action taken was just and warranted. There was no violation of the collective agreement.

12. Mr. Davidson stated that normally a copy of the Grievance Reply is sent to both the Union and the Employee. Article 9.25 of the collective agreement stipulates that, "Within twenty (20) working days after [the Corporation's] receipt of a grievance, the Corporation shall reply in writing to the grievance." Mr. Davidson observed that typically the Reply will be sent between 2 weeks and 3 months or so after the Corporation's receipt of the grievance. While he noted that clearly this Reply was processed well outside that time frame referred to in the collective agreement, since it was sent over 10 months later, the Union raised no objection to the timing of the Corporation's Reply.

13. Mr. Davidson did not deal with Mr. Mian's grievances after the First Level Grievance Hearing. Further handling of the grievance then moved to Mr. Learie Charles, the grievance officer.

14. Mr. Charles stated that in late January of 2012, as the date of the arbitration hearing on February 28, 2012 was approaching, he and Mr. DeAbreu, the Corporation's labour relations officer, entered discussions regarding Mr. Mian's grievance. He noted that as is customary at that early stage of their discussions, he and Mr. DeAbreu exchanged information regarding their

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respective counsel for the case and made efforts to try to settle the matter through discussion of medical evidence for Mr. Mian and his readiness to come back to work. Mr. Charles noted that at this time there was no discussion of the Union's delay in filing the grievance.

15. Mr. DeAbreu testified that he had no recollection of this initial discussion with Mr. Charles about Mr. Mian's grievance, although he conceded that it was possible that it had occurred since he and Mr. Charles had frequent conversations about different labour relations issues. He does not, though, recall any discussion of Mr. Mian's situation at that time.

16. The parties agree that on February 14th and 15th, Mr. DeAbreu and Mr. Charles engaged in an email exchange relating to the settlement of the grievance. In that exchange, neither party raised the issue of delay or time limits.

17. Mr. DeAbreu testified that in advance of the February 14 -15 email exchange concerning the settlement of the Mian grievance, he had not reviewed Mr. Mian's file.

18. Both Mr. Charles and Mr. DeAbreu agree that approximately a week before the February 28th arbitration hearing, they had a discussion, as opposed to an email exchange, regarding Mr. Mian's grievance in which Mr. DeAbreu advised that they had to go in a different direction. For the first time between them, Mr. DeAbreu raised the fact that the grievance was out of time as a basis for the Corporation not pursuing settlement.

19. According to Mr. DeAbreu, this conversation between himself and Mr. Charles was their first discussion regarding the grievance. He stated that he had just reviewed the file for the first time and saw immediately that the grievance was out of time. He then, forthwith, advised Mr. Charles that the Corporation had an issue with the time limits for the grievance.

20. Mr. DeAbreu insisted that at no time did he waive time limits.

21. Mr. DeAbreu acknowledged that it is not a normal occurrence for the Scarborough Local to file a grievance outside the time limits. He estimated that over the past 4 years, he is aware of approximately 2 other grievances that the Scarborough Local has filed outside the time limits.

22. It is common ground that at the first arbitration hearing on February 28, 2012, the Union's explanation for the delay in filing the grievance was that the grievor was depressed and in such a poor mental state that he could not instruct the Union regarding his termination.

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23. As soon as the Union discovered a short time thereafter that Mr. Mian had in fact emailed the termination letter to the Union soon after he had received it, as set out above, the Union revised its position and asserted that the delay in filing the grievance was caused by the Union.

24. Mr. DeAbreu observed that the Union's failure to adhere to time limits can be very prejudicial to the Employer because of an increase in potential liability, an increase in the risk of fading memories, as exemplified by Mr. Ramlochan's lack of recollection of the First Level Grievance Hearing, as well as an increase in potential problems in locating witnesses. He noted that the Corporation, in trying to locate an officer from Sun Life, has learned that she has now left the company.

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POSITION OF THE UNION:

The Union asserts that the Corporation waived its procedural right under the collective agreement respecting time limits for the filing of grievances by dealing with Mr. Mian's grievance through multiple steps in its processing without objecting to the time limits: through the First Level Grievance Hearing in March of 2011, through the referral of the grievance to arbitration in December of 2011, through management's formal Grievance Reply dated February 6, 2012, and, finally, through communications regarding the grievance between Mr. Charles, on behalf of the Union, and Mr. DeAbreu, on behalf of the Corporation, including an email exchange on February 14 and 15, of 2012 regarding settlement of the grievance two weeks before the arbitration. Counsel for the Union stresses that it was not until approximately a week before the arbitration hearing that Mr. DeAbreu advised Mr. Charles that the Corporation had a problem with the timeliness of the grievance.

Underscoring its assertion of waiver, counsel for the Union emphasizes that article 9.26 of the collective agreement stipulates that the Corporation's Reply, which was issued February 6, of 2012, should be "sufficiently clear so as to determine the relationship between the collective agreement, the grievance and the Corporation's decision." Counsel stresses that the Corporation's Reply makes no reference to article 9.10 of the collective agreement respecting the time limits for filing grievances and, instead, addresses the grievance on its merits. Counsel argues that the absence from the Corporation's Reply of any objection to the Union's breach of the time limits set down in article 9.10 of the collective agreement would reasonably cause the Union to conclude that the timeliness of the grievance would not become an issue at arbitration.

In addition to the Union's contention that the Corporation waived its right the raise a timeliness bar to the grievance, the Union maintains, the alternative, that, in any event, the circumstances present an appropriate situation for the Arbitrator to exercise her discretion under section 60(1.1) of the Canada Labour Code to extend the time limits for the filing of the grievance.

Counsel emphasizes that the primary responsibility for the delay in the filing of the grievance lies with the Union because the grievor did what he was supposed to do, which was to fax his termination letter to the Union shortly after he received it. Counsel maintains, however, that the grievor played a secondary role by not following up with the Union regarding what it was doing with the termination letter he had faxed to them shortly after his release.

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Counsel observes, however, that an explanation of why the grievor did not follow up with the Union regarding his termination until January of 2011, some 6 months after faxing it to the Union, rests with the grievor's compromised mental state during the relevant period. Counsel contends that further circumstances impacting the grievor's failure to follow up his termination letter were his unsettling separation from his wife, the fact that he was on medication, his lack of knowledge of the grievance process and his incorrect understanding that winning his WSIB appeal would mean that he could go back to work.

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While recognizing that the time limits in the collective agreement are mandatory, counsel for the Union points to the decision in Canada Post Corporation and Canadian Union of Postal Workers, (discharge grievance of Trevor Rees), unreported decision of Arbitrator Vincent Ready dated September 3, 2010, where the arbitrator allowed the Union's request for an extension of the time limits for the filing of the grievance, notwithstanding that the time limits were mandatory. At page 9, he stated as follows:

> While we make no informed judgment at this stage of the proceedings as to the strength of the case on the merits, it must be remembered that we are dealing with a termination. We are understandably, and justifiably, loath to render a case of that nature inarbitrable on the basis of the time limits.
>
> It is true that the relevant Collective Agreement language is mandatory in nature and strictly enforced, but those facts alone do not preclude the application of Section 60(1.1). As Arbitrator Munroe states in *Re Canada Mortgage Corp., supra:*

> We hasten to add that the fact a time limit is mandatory and not just directory, does not mean that Section 60(1.1) of the Canada Labour Code is inapplicable. However, reiterating what was said in Pacific Forest Products, the degree of force with which the parties have given contractual expression to a time limit is a factor to be considered.
>
> The time limits were breached in the early stages of the grievance procedure and that stands in the Employer's favour, but the three week delay is not particularly significant in relative terms, and resulted from error and inadvertence as opposed to bad faith or a deliberate ignoring of time limits.

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POSITION OF THE CORPORATION:

Regarding the Union's assertion that the Corporation has waived its right to raise a preliminary objection based on the Union's breach of the time limits for filing Mr. Mian's grievance, the Corporation contends that no one from the Corporation expressed specific words or engaged in conduct that was clear enough to constitute a waiver of the Corporation's right to rely on the mandatory time limits set down in the collective agreement as a bar to proceeding with the merits of the grievance. Counsel contends that none of the Corporation officials who took part in the processing of the grievance had the requisite knowledge of the circumstances or the necessary intention to result in a waiver of the Corporation's right to rely on the time limits in the collective agreement.

More specifically, counsel highlights that Mr. Ramlochan, acting on behalf of the Corporation at the First Level Grievance Hearing on March 10, 2010, was new to his position as Zone 8 manager, that he typically heard 10 grievances a day at a First Level

Grievance Hearing, that he was unfamiliar with Mr. Mian and his grievance and that he did not have time to review whether the grievance was timely before he met with the Union. Counsel asserts that since the evidence establishes that Mr. Ramlochan did not have much knowledge of the situation when he was talking to Mr. Davidson at the First Level Grievance Hearing, it is unlikely that he could have formed an intention to waive the time limits.

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Counsel maintains that a typical situation involving waiver is where the employer knows about a defect but does not say anything about it to the Union. Counsel stresses that in the instant matter, both parties knew early on that the Union had breached the time limits so the Union would not have been surprised when the Corporation raised the defect. On this basis, counsel seeks to distinguish this matter from numerous cases relied on by the Union.

Counsel for the Corporation further contends that the Union's change of position regarding the reason why the grievance was filed late negates the ability of the Corporation to have formulated an intention to waive the time limits for the filing of Mr. Mian's grievance. Counsel emphasizes that at the First Level Grievance Hearing on March 10, 2011, Mr. Davidson advised that the grievance was filed late because the grievor was ill and "not of sound mental mind". Counsel observes that approximately a year later, after the arbitration had gotten underway, in March of 2012, the Union changed its position regarding the reason for the late filing and asserted as of that point

that it was the Union that was responsible for the late filing. Counsel questions how the Corporation could be found to have meaningfully waived the time limits when the reason for the late filing was not clear until after the first day of hearing. Counsel maintains that the Corporation could not have given an informed waiver when it did not have the correct facts before it as to the reason for the delay.

Additionally, counsel denies the Union's suggestion that there was an ongoing "course of conduct" regarding the grievance through which no objection to the time limits was raised. Counsel comments that after the First Level Grievance Hearing in March of 2011, the next communication between the parties was almost 11 months later, February 6, 2012, when the Corporation's Reply was filed. Counsel maintains that there was no treatment of the grievance in between to establish a "course of conduct" which would have misled the Union.

Counsel emphasizes that when Mr. DeAbreu and Mr. Charles had their email exchange on February 14 and 15, Mr. DeAbreu had not seen the file. Accordingly, counsel asserts that Mr. DeAbreu could not have given an informed waiver at that point. Counsel stresses that Mr. DeAbreu raised the problem of timeliness as soon as he looked at the file approximately a week later and discovered the timeliness problem.

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Counsel for the Corporation asserts that when she asked for particulars regarding who had waived the time limits, the answer given by the Union was that it was Mr. Ramlochan and Mr. DeAbreu. No mention was made of Ms. Parent. It may be noted that the Management Grievance Hearing Report, which documents Ms. Parent's additions to the Report, as set out above, is not a document provided to the Union in the normal course.

Turning to the Union's request for the Arbitrator to exercise her discretion under section 60(1.1) of the Canada Labour Code to extend the time limits, counsel for the Corporation maintains that the circumstances are not appropriate for the Arbitrator to do so. Counsel argues that there was a consistent lack of urgency in the manner in which the grievance was treated from the outset by both the Union and the grievor, which would not support the exercise of discretion.

Counsel maintains that Ms. Hartanu's assertion that she only briefly reviewed the termination letter and then put it in Mr. Mian's WSIB file when she received the faxed copy from Mr. Mian at the end of July of 2010, shortly after he was terminated, is unrealistic given her position and experience with the Union and her work with Mr. Mian on WSIB matters. Counsel asserts that there is a further lack of credibility in her contention that she did not read the termination letter in detail and assumed it was related to WSIB matters only. Counsel contends that additional evidence confirming that the Union did not treat Mr. Main's grievance seriously is that Ms. Hartanu suffered no

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adverse consequence for her failure to properly handle the termination letter once her error was discovered.

Additionally, the Corporation asserts that the grievor was at least partly responsible for the failure of the grievance to be filed on time. Counsel contends that Mr. Mian's assertion that he was not fully aware that he had lost his job is not credible. Moreover, counsel maintains that no evidence was presented to establish that the grievor suffered from any level of depression or mental fogginess that would have prevented him from filing a grievance. Counsel emphasizes that Dr. Sutton was released as a potential witness in the Corporation's preliminary objection after the first day of hearing, once the Union advised that it was no longer advancing the grievor's alleged sickness as an explanation for why the grievance was filed late. Moreover, counsel highlights that the grievor was apparently well enough to participate in the pursuit of his WSIB claim and his LTD application.

Counsel asserts that the reason the grievor did not follow up with the Union regarding the faxing of his termination letter to Ms. Hartanu of the Union was simply because he was not diligent enough to do so. Counsel contends that it certainly was not because he was prevented from so doing by a health issue.

Counsel challenges the credibility of what she describes as "the grievor's vague evidence" that in January of 2011, in his doctor's office, he ran into an unidentified co-

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worker, whose name he could not remember, who allegedly alerted him to the fact that there was a time limits issue regarding his termination.

Counsel points to the conversation between Mr. Mian and Ms. Moses from Sun Life, as recorded in her notes of November 3, 2010, to demonstrate that well before January of 2011, when Mr. Mian went to the Union to file his grievance, he was fully aware that he had missed the deadline for filing his grievance. The notes of November 3, 2010 record: "Employment has been terminated. PM [Patient Mian] did not grieve termination as he missed the deadline to submit grievance."

Counsel emphasizes that the time limits in the collective agreement are mandatory and that they should be strictly enforced. While counsel does not challenge the Arbitrator's jurisdiction under the Code to extend the time limits, she asserts that to relieve against a provision in the collective agreement is an extraordinary event, particularly in the face of a 5.5 month delay in the filing of the grievance. She further highlights that additional time has been taken up by arguing the preliminary objection itself, which she argues should further weigh against the exercise of the Arbitrator's discretion. Counsel points to cases where arbitrators have stopped their inquiry regarding the exercise of discretion to extend time limits upon concluding that the time limits are mandatory, which is the undisputed circumstance in the instant collective agreement.

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DECISION REGARDING WAIVER:

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In Brown and Beatty's Canadian Labour Arbitration, third edition, 2005 Canada Law Book Inc., the following summary of the jurisprudence is set out regarding the waiver of procedural irregularities at paragraph 2:3130 at pages 2-107and 2-108:

> **2:3130 Waiver of procedural irregularities**
>
> The concept of 'waiver' connotes a party not insisting on some right, or giving up some advantage. However, **to be operative, waiver will generally require both knowledge of and an intention to forego the exercise of such a right.**
>
> In its application, waiver is a doctrine that parallels the one utilized by the civil courts known as 'taking a fresh step', and holds that by failing to make a timely objection and **'by treating the grievance on its merits in the presence of a clear procedural defect, the party waives the defect.' That is, by not objecting to a failure to comply with mandatory time-limits until the grievance comes on for hearing, the party who should have raised the matter earlier will be held to have waived non-compliance, and any objection to arbitrability will not be sustained.** …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.
>
> [emphasis added]

For the purposes of determining whether the Corporation waived its right to rely on the time limits in the collective agreement, the important question, as drawn from the jurisprudence and summarized in the above quotation from Brown and Beatty, is whether the Corporation "[failed] to make a timely objection" to the Union's

acknowledged failure to adhere to the mandatory time limits and, instead, "[treated] the grievance on its merits in the presence of a clear procedural defect."

Shortly after the Union filed Mr. Mian's termination grievance on February 4, 2011, the parties, on March 10, 2011, jointly engaged in the First Level Grievance Hearing for his termination grievance. Mr. Glen Ramlochan represented the Corporation and Mr. Ken Davidson and Ms. Ellen Deschene represented the Union. Both the oral and documentary evidence establish that at this meeting, Mr. Davidson advised Mr. Ramlochan, in clear and unequivocal terms, that Mr. Mian's termination grievance had been filed late and that he realized they had a timeliness problem. The oral and documentary evidence further confirm, clearly and unequivocally, that Mr. Ramlochan did not pursue or respond to Mr. Davidson's acknowledgement that the grievance had been filed late. Instead, according to Mr. Davidson's uncontradicted testimony, Mr. Ramlochan simply looked at the grievance and replied that the termination was "just and warranted".

The Corporation maintains that because Mr. Ramlochan was new to the position at that location, because he was unfamiliar with the grievor or the grievance at the time of the First Level Grievance Hearing, and because he had not had time to review whether the grievance was timely before he met with the Union at the Hearing, he had neither the knowledge nor the intention required to create an effective waiver of the Corporation's right to rely on a strict application of the time limits set out in article 9.10 of the collective agreement.

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The Arbitrator accepts the Corporation's assertion that Mr. Ramlochan did not give an express or explicit waiver of the time limits. He did not say that the Corporation would not raise the Union's late filing of the grievance against the arbitrabiltiy of the grievance. The absence of such clarity, however, does not end the matter.

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In Canadian Union of Postal Workers and Canada Post Corporation (grievance of L. Grantmeyer), unreported decision of Thomas Jolliffe dated February 27, 1991, the arbitrator determined at page 11 that the corporation had waived the procedural irregularity regarding the union's failure to file the grievance within the time limits. As further set out on page 11, the corporation raised its objection to timeliness for the first time 6 days prior to the arbitration hearing. At pages 11-13 the arbitrator stated, in part, the following regarding the knowledge and intention factors relevant to waiver:

> The fact of a missed mandatory time limit might indeed have played a significant role in [the] early resolution [of the grievance at the regular grievance hearing]. Certainly it is at the reply stage where the collective agreement envisages that the parties should discuss at least the obviously relevant aspects of their respective cases. **However, there are other reasons for my conclusion based on whether the facts evidence an intention not to rely on the mandatory timeliness provision.**
>
> Mr. Tait rather deftly has argued **the position that the corporation … had only become actually aware of the relevant facts indicating a missed time limit for initiating the grievance at some time shortly prior to hearing and thereby only at that juncture had the requisite knowledge addressed in the case law to present its procedural objection.** Accordingly, he says, the corporation should not be taken to have waived its ability to rely on the procedural defects only

> lately coming to its attention. **I have great difficulty with the approach …The knowledge and intention factor of which the cases speak can be a matter of legal inference to be drawn from the factual circumstances presented and not necessarily in the sense presented by Mr. Tait in his argument. The factual background of the matter speaking to the timeliness issue was within the corporation's knowledge and control** … Obviously in many cases, perhaps invariably, when an employer in fulfilling a grievance reply obligation fails to state a union violation of a mandatory procedural requirement which would neatly defeat the matter at that point, it does so out of the happenchance of missed opportunity as opposed to actually having considered all the available facts and legal avenues available to it at that juncture in the proceedings. The same holds true for the corporation's actions in the present case even if described in terms of acquiescence. **The knowledge and intent of which the cases speak and as it applies to the doctrine of waiver merely means that by not making an appropriately timely objection and by continuing to treat a grievance on its merits despite a clear procedural defect on the available facts of the matter it will be taken to have impliedly waived the other party's non compliance and any objections to arbitrability will not be sustained.**
>
> [emphasis added]

Mr. Ramlochan testified that he had no active memory of what occurred at the First Level Grievance Hearing, although he did confirm that it was his handwriting that recorded both the Union's and Management's respective positions as taken at the Grievance Hearing in the write-up of the Hearing in the Corporation's Grievance Hearing Report. His write-up confirms the evidence of the meeting given by Mr. Davidson that he advised Mr. Ramlochan of the late filing of the grievance. He

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recorded, “Submission of Grievance was late because [employee] was not of sound mental mind.”

While Mr. Ramlochan may have been new to his job as Zone 8 manager, he was not new to the work, since he had previously been a local area manager in Nova Scotia. The evidence does not reveal what knowledge Mr. Ramlochan had of the grievance prior to coming into the First Level Grievance Hearing since he could not remember anything specific about the grievance or the grievor. Nor does it reveal what documents, if any, other than the grievance, he had before him at the hearing, i.e. whether he had the termination letter itself, dated July 19, 2010, which would have clearly revealed the significant time lag between the discharge on July 19, 2010 and the filing of the grievance on February 4, 2011.

What Mr. Ramlochan did have, however, was clear advice from the Union that the grievance had been filed late. He was presented with an opportunity, if not an invitation, to make further inquiries regarding the late filing or to register an objection on behalf of the Corporation had he so desired. Instead, he chose not to pursue the open opportunity for clarification or objection and responded to the merits of the grievance. He declared, simply, that the termination was “just and warranted”.

In these circumstances, the Arbitrator cannot accept the “he hadn’t read the file” defense advanced by the Corporation as constituting a sound foundation for a conclusion that Mr. Ramlochan lacked the requisite knowledge and intent to have

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waived a procedural requirement. Having been advised of the late filing by the Union, Mr. Ramlochan had every opportunity to pursue the timeliness issue before responding to the grievance on its merits, whether or not, independently, he had sufficient familiarity with the matter to have drawn a conclusion of late filing on his own. In this situation, the Arbitrator must find that Mr. Ramlochan is accountable for his decision to respond to the grievance on its merits in the face of a clear procedural defect. Consistent with the decision in the arbitration between the parties in Re Grantmeyer, set out above, the Arbitrator finds that Mr. Ramlochan had, or must be deemed to have had, the requisite knowledge and intent to waive the Corporation's right to insist on a strict adherence to the time limits for the filing of Mr. Mian's termination grievance.

Counsel for the Corporation maintains, in addition, that Mr. Ramlochan could not have had the requisite knowledge to cause a waiver since at the First Level Grievance Hearing he was given the wrong reason for the cause of the late filing. At the Hearing he was advised that the reason for the late filing was that the grievor was "not of sound mental mind" when it turned out, in fact, through evidence discovered after the first day of the arbitration, that the actual reason for the delay was the Union's failure to act on the termination letter that Mr. Main had faxed to the Union in a timely manner, shortly after he was advised of his discharge.

As discussed in further detail below in respect of the exercise of the Arbitrator's discretion, the Arbitrator is satisfied that Mr. Mian did bear some responsibility for the delay, albeit a secondary responsibility, by failing to follow up with the Union, after

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having faxed the Union his termination letter. For reasons discussed in more detail below, the Arbitrator is satisfied that Mr. Mian's failure to follow up was due to what Mr. Ramlochan recorded as his lack of "sound mental mind". Accordingly, not only was the reason provided by Mr. Davidson at the First Level Grievance Hearing the best information he or anyone else had prior to the start of the arbitration itself almost a year later, but also it remained accurate information, even if not complete information. It became the secondary, not the primary, reason why the grievance was filed late.

In all of the circumstances, including the absence of any specific inquiry from Mr. Ramlochan of Mr. Davidson respecting the circumstances of the cause of the delay at the First Level Grievance Hearing, the Arbitrator has no basis for concluding, on balance, that Mr. Ramlochan's treatment of the grievance would have been any different had Mr. Ramlochan been advised at the time of the further, fuller and more accurate explanation relating to the Union's role in the late filing of the grievance.

The next significant step in the Corporation's processing of the grievance was the filing of the Corporation's formal Reply to the grievance on February 6, 2012 by Ms. Julie Parent. The Reply was directed to the grievor but was received by the Union as well.

The documentary evidence reveals that on January 31, 2012, approximately a week prior to the issuance of the Corporation's formal Reply of February 6th, Ms. Parent reviewed the Corporation's First Level Grievance Hearing Report that had been written

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up by Mr. Ramlochan, as detailed above. On the lower portion of Management's Grievance Hearing Report, Ms. Parent added the following handwritten, signed and dated notation:

> A review of the facts indicates that [This is part of the form itself]
>
> > Not sure if this grievance ever written up at first level
> > Should be in arbitration process as employee dismissed for AWOL
>
> …
>
> > SIGNATURE "*Julie Parent*"
> > PREPARED BY – Julie Parent
> > DATE: Jan 31, 2012

While Management's Grievance Hearing Report was never sent to the Union, it confirms that the week prior to Ms. Parent's completion of the formal Reply to the grievance, she reviewed, or must be deemed to have reviewed, Mr. Ramlochan's write-up of the First Level Grievance Hearing, which was set out immediately above what she wrote on the same one page form. Less than a week later, on February 6, 2012, Ms. Parent wrote the following as the Corporation's formal Reply to the grievance:

> This grievance has been discussed with your union representative. A review of the facts indicate[s] that the action taken was just and warranted. There was no violation of the collective agreement.

In the face of this sequence of events, the Arbitrator is compelled to conclude that when Ms. Parent issued the Corporation's Reply addressing the grievance on its merits and raising no objection to the timeliness of the grievance, she did so with either the actual awareness, or what must be deemed to have been her awareness, that the grievance had been filed late, since the fact of the late filing was expressly set out on

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the face of the same one page Grievance Hearing Report to which she had added her notation on January 31, 2012.

Accordingly, at the Corporation's Reply stage, which was the next time following the First Level Grievance Hearing that the Corporation formally addressed Mr. Mian's grievance, it again dealt with the grievance on its merits in the face of the clear procedural deficiency that the grievance had not been filed in accordance with the mandatory time limits. Instead of raising a concern about the late filing of the grievance at the Reply stage, notwithstanding its full knowledge of the deficiency, actual or appropriately deemed, the Corporation moved the grievance along on its merits.

Further amplifying the significance of the Corporation's failure to object to the clearly apparent procedural deficiency regarding timeliness in its February 6, 2012 Reply, article 9.26 of the collective agreement stipulates what information should be contained in the Reply. It provides as follows:

> **Content of the Reply**
>
> **9.26** The reply of the Corporation shall be sufficiently clear so as to determine the relationship between the collective agreement, the grievance and the Corporation's decision.

The content of the Corporation's Reply, as noted above, focuses strictly on the merits of the grievance. Notwithstanding the Corporation's clear awareness of the Union's delay in filing the grievance and its breach of the time limits in the collective agreement, the Corporation chose not to raise that defect in the very place where the collective

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agreement stipulates that it is required to detail the relationship between the grievance and the collective agreement. Had the Corporation intended to rely on the procedural defect of timeliness arising from the late filing of the grievance, the Reply was the place where the Union could have expected the Corporation to raise the breach of article 9.10 of the collective agreement since article 9.26 stipulates that the Reply should detail the relationship between the collective agreement and the grievance. However, in its Reply, the Corporation was silent on that procedural deficiency in the grievance and responded solely to the merits of the grievance.

At or about the same general time that the Corporation's Reply was issued, Mr. DeAbreu, a labour relations officer for the Corporation, and Mr. Charles, the Scarborough Local Union representative, engaged in discussions relating to Mr. Mian's grievance, as the arbitration hearing date of February 28, 2012 approached.

According to Mr. Charles, he and Mr. DeAbreu had an initial conversation about the grievance in late January, in which they exchanged information regarding their files, such as the identity of their respective legal counsel, and made initial efforts to try to settle the matter through discussion of Mr. Mian's medical evidence and his readiness to return to work. Mr. DeAbreu has no recollection of this discussion but conceded that it is possible that it occurred since he and Mr. Charles had frequent conversations regarding multiple labour relations issues. According to Mr. Charles, Mr. DeAbreu raised no issue regarding time limits during this discussion. If the conversation did in fact take place, Mr. DeAbreu would agree that he did not raise any question regarding the late

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filing of the grievance, since by his own evidence, he first brought up the time limit issue a week before the arbitration hearing.

The parties have agreed that approximately a week following the Corporation's February 6th Reply, referred to above, Mr. DeAbreu and Mr. Charles, on February 14 and 15 engaged in an exchange of emails relating to the possible settlement of the grievance. It is common ground that during their email correspondence, neither party raised the issue of delay or time limits. Mr. DeAbreu observed that he had not yet read the grievance file at the time of the email exchange.

Approximately a week after the email exchange, which would have been approximately a week before the first arbitration date, Mr. DeAbreu testified that he read the file for the first time and immediately saw that the grievance was out of time. It is common ground that when he and Mr. Charles then had a telephone conversation, Mr. DeAbreu advised Mr. Charles that the Corporation had an issue with the time limits on the grievance. The way Mr. Charles put it was that Mr. DeAbreu advised in this conversation that the Corporation had to go in a different direction and, for the first time, asserted that the grievance was out of time as a basis for the Corporation not pursuing settlement.

Mr. DeAbreu contends that he never waived the time limits. The Arbitrator accepts that he did not do so overtly. Moreover, the Arbitrator accepts that he did not

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engage in a processing of the grievance on its merits after he read the file and saw that the grievance was filed in breach of the time limits.

The question becomes, though, whether Mr. DeAbreu must be deemed to have waived the time limits or whether he extended a waiver of the time limits that had already been set in motion at the First Level Grievance Hearing on March 10, 2010 and reconfirmed in the Corporation's formal Reply to the grievance dated February 6, 2012.

As set out in the Re Grantmeyer decision between the parties, referred to above, not having read the file does not operate to absolve responsibility for knowledge of the basic information within the file, such as when the grievance was filed. Arbitrator Jolliffe expressly rejected the position of the Corporation that it should not be found to have waived the time limits when it only became aware of the defect shortly before the arbitration hearing. Instead, what Arbitrator Jolliffe concluded at page 12 was that, "The knowledge and intention factor of which the cases speak can be a matter of legal inference to be drawn from the factual circumstances presented…" As further stated by Arbitrator Jolliffe, continuing on page 12, the full facts relating to the timeliness issue were on the face of the file:

> The factual background of the matter speaking to the timeliness issue was within the corporation's knowledge and control in the form of the resignation letter, the written request for rehire, indeed the grievor's entire personal file.

At page 13, he continued with the following determination:

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> The knowledge and intent of which the cases speak and as it applies to the doctrine of waiver merely means that by not making an appropriately timely objection and by continuing to treat a grievance on its merits despite a clear procedural defect on the available facts of the matter it will be taken to have impliedly waived the other party's non compliance and any objections to arbitrability will not be sustained.

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Accordingly, having regard to the reasoning in Re Grantmeyer, particularly as it is a decision between the parties, the Arbitrator must find that because the breach of the time limits was abundantly clear on the face of the file, as Mr. DeAbreu readily stated, and because, thereby, it was within the Corporation's knowledge and control, the "knowledge and intention factor of which the cases speak" appropriately becomes a "matter of legal inference to be drawn from the factual circumstances …", to use Arbitrator Jolliffe's words.

In the factual circumstances of this matter, the Corporation's objection to timeliness was clearly not made at its earliest opportunity, which would have been at the First Level Grievance Hearing when the Union, on its own initiative, advised the Corporation that the grievance was filed out of time. Instead of responding to the procedural defect, the Corporation addressed the grievance on its merits and asserted that the action taken against the grievor was "just and warranted".

Similarly, when the Corporation later issued its formal Reply on February 6, 2012, it, once again, declined to raise an objection based on the mandatory time limits

contained in article 9.10 of the collective agreement and, once again, dealt with the grievance on its merits. As set out above, it did so with clear awareness, or appropriately deemed awareness, of the procedural defect. Failure to raise the timeliness defect at this juncture is particularly significant in light of article 9.26 of the collective agreement, which directs that the Reply should set out the relationship between the grievance and the collective agreement,

Still again, when Mr. DeAbreu and Mr. Charles entered discussions regarding the grievance as the arbitration date approached, inclusive of an email exchange on February 14 and15 focused on settlement, the Corporation, again, declined to mention the time limit problem and addressed the grievance on its merits. It was not until a week before the arbitration hearing that the Corporation, through Mr. DeAbreu, raised its objection to timeliness when he first read the file and readily saw the procedural deficiency.

Having regard to the foregoing, the Arbitrator must find, in line with the jurisprudence, as summarized by Brown and Beatty, as set out above, that by not objecting to a failure to comply with mandatory time-limits until just before the grievance came on for hearing, the Corporation, which could and should have raised the defect earlier, must be held to have waived the non-compliance, such that its objection to arbitrability based on timeliness cannot now be sustained.

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In the result, the Arbitrator determines for the reasons set out that the Corporation must be held to have waived its objection to the Union's breach of the time limits for the filing of the grievance by failing to raise its objection until a week before the hearing, notwithstanding its clear knowledge of the breach, both actual and/or appropriately deemed, at each step of its processing the grievance up to a week before the arbitration hearing.

In the event that the Arbitrator is in error regarding the due application of the doctrine of waiver, the Arbitrator turns to determine the Union's alternative assertion that, in any event, the Arbitrator should exercise her discretion under section 60(1.1) of the Canada Labour Code to extend the time limits.

DECISION REGARDING THE EXERCISE OF DISCRETION UNDER SECTION 60(1.1) OF THE CANADA LABOUR CODE:

Section 60(1.1) of the Canada Labour Code, RSC 1985, c. L-2 provides an arbitrator with the discretion to extend time limits, 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.**
>
> [emphasis added]

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In Re Greater Niagara General Hospital and Ontario Nurses' Association (1981), 1 L.A.C. (3rd) 1 (Schiff), the board of arbitration rejected the proposition that an extension of time limits may be given only where there is a justifiable reason for the failure to meet the time limits. Instead, it concluded that the board should evaluate a variety of relevant factors. At page 4-6, the board listed 6 factors of particular relevance in determining whether discretion to extend should be exercised and stated, in part, the following:

> …we reject the proposition put in some awards that an extension may be given only if the defaulting party establishes justifiable reason for the delay…Instead, we agree with the majority of arbitrators who have held that, **while the reason for the delay is one factor to be considered, the board should examine as an interrelated group all factors relevant to the decision of reasonable grounds:** … In the present case we look to these interrelated factors:
>
> **(1) The nature of the grievance**
> The grievance here is not so serious as one challenging discharge…
>
> **(2) Whether the delay occurred in initially launching the grievance or at some later stage**
> When the grievance is launched out of time, the employer will not learn what the grievor alleges nor have an opportunity to prepare argument or marshall evidence until after the time limit has expired. But, when the defect in time comes later – particularly after steps of the pre-arbitration procedure have been completed – the employer knows precisely what the union alleges and will have a full opportunity to prepare … and gather its evidence. …
>
> **(3) Whether the grievor was responsible for the delay**
> If the grievor has personally caused any of the delay there is stronger reason for arbitrators to refuse to remedy the defect barring hearing on the merits …
>
> **(4) The reason for the delay**

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> We agree that, if the Union acted in bad faith or simply ignored applicable time-limits, arbitrators should not find good reason to extend the time: … **But we do not agree … that mere negligence in processing the grievance is enough.** …
>
> **(5) The length of the delay**
> **Perhaps more than all others, this factor is conditioned by the total circumstances.** We see from some previous awards that, in particular circumstances, two months' delay in filing a grievance (albeit a discharge grievance) is not too long: … Nor is a delay of two and a half months in referring a grievance to arbitration: …
>
> **(6) Whether the employer could reasonably have assumed the grievance had been abandoned**
> Union inaction lulling an employer into a false sense of security may be a weighty factor. …
>
> [emphasis added, other than on headings]

Both parties agree that these are relevant factors.

Addressing each of the factors set out above as they relate to the instant matter, the Arbitrator concludes the following: The nature of the grievance, factor #1, carries substantial weight in this situation since the grievance involves not only a termination but also the dismissal of a long service employee who carries upwards of 10 years' seniority. Regarding factor #2, when the delay in timeliness occurred, it is clear that it occurred at the outset of this matter with the filing of the grievance. As a result, for approximately 5.5 months, the Corporation was not aware that Mr. Mian would be filing a grievance, with the consequence being that it would be required to face the impact of a 5.5 month lag in the handling and preparation of its case. Accordingly, the nature of the grievance weighs heavily in favour of the exercise of discretion while the point at

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which the delay occurred tilts to the Corporation's position and away from the exercise of discretion.

Regarding factor #3, whether the grievor was responsible for the delay, and factor #4, the reason for the delay, the situation is somewhat mixed. Without question, the primary responsibility for the delay was that of the Union. But for the failure of the Union's newly elected vice-president to understand the import of the termination letter that was faxed to her in a timely manner by the grievor, but for her failure to bring the letter to the attention of someone else on the Union executive who would have acted on it, and but for her immediate placement of the termination letter in the depths of the grievor's WSIB file where it would go unseen by anyone else from the Union until after the first day of the arbitration hearing, the evidence establishes to the satisfaction of the Arbitrator that the grievor's termination grievance would have been filed on time.

The grievor clearly does not bear primary responsibility for the late filing of the grievance. He did, however, play a secondary role. As noted in factor #3, "[i]f the grievor has personally caused any of the delay there is stronger reason for arbitrators to refuse to remedy the defect …" Had Mr. Mian followed up with the Union to inquire about action that was being taken regarding his termination, the vice-president's failure to act, in all likelihood, would have been discovered and repaired.

Having fully reviewed the evidence and submissions, however, the Arbitrator cannot adopt the submission of the Corporation that the grievor treated his grievance

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and his termination with a lack of urgency or concern. The Arbitrator is persuaded that the reason the grievor failed to follow up with the Union about the fate of his termination letter that he had faxed to Ms. Hartanu shortly after his dismissal was due, primarily, to a compromised mental state that was overwhelming him at the relevant time. While no medical evidence was presented to provide a professional diagnosis regarding his mental capacity during the period in question, the Arbitrator, for the purposes of understanding why the grievor did not follow up on his termination letter, is prepared to give weight to Mr. Mian's own uncontradicted and persuasive evidence regarding how he was feeling during the relevant time.

Whatever the formal medical diagnosis may have been, the Arbitrator accepts the veracity of Mr. Mian's assertion that at the relevant time, from July of 2010 until at least January of 2011, Mr. Mian felt depressed, was unable to focus, concentrate or decide things properly, and found himself generally "out of his senses", to use his words. He commented that these feelings were exacerbated by the fact that at the time he was facing a separation and financial difficulties.

In these circumstances regarding the grievor's mental state, and given that the grievor, initially, did fax his termination letter to the Union in a timely manner, the Arbitrator declines to hold the grievor culpable in respect of the delay in a manner that would weigh against the exercise of the Arbitrator's discretion to extend the time limits.

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The jurisprudence supports the conclusion that the fact that it was a member of the Union executive, and not the grievor, who was responsible for the delay weighs in favour of the exercise of discretion, unless the Union acted in bad faith or simply ignored the time limits. As stated in Re Greater Niagara under factor #4, the reasons for the delay, "mere negligence in processing the grievance is [not] enough."

Concerning the Union's conduct in causing the delay, the Arbitrator declines to accept the submission of the Corporation that the Union demonstrated a lack of urgency or seriousness about Mr. Mian's termination grievance. The evidence clearly establishes the authenticity and depth of the Union's concern over not only the termination of the grievor but also its own failure to properly handle the termination letter that he had faxed to a member of the executive in a timely manner.

Vice-president Hartanu testified to the circumstances under which she improperly buried the grievor's termination letter in his WSIB file. The Arbitrator accepts the veracity of her straight-forward and convincing evidence that in her newly elected position on the Union executive, she was overwhelmed by the weight of her responsibilities. Moreover, as of the time when she was faxed the grievor's termination letter, she had had training only in the WSIB aspect of her job and not in the processing of grievances. Contrary to the submission of the Corporation, the Arbitrator does accept the vice-president's evidence that she gave the termination letter only a brief scan when she received it and did not comprehend its import. Given her anxious and overwhelmed state of mind at the time she received the letter and given the dearth of her prior

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experience in the processing of grievances, the Arbitrator accepts the truthfulness of her assertion that since she was then involved in the WSIB aspect of Mr. Mian's employment situation, and since the letter simply noted on the top, "ATTN: Joanna", she assumed, wrongly and without justification, that Mr. Mian was sending her another document relevant to his ongoing WSIB issues. It was with humility that Ms. Hartanu admitted that she had done the grievor a disservice by what she described as her "arrogance" for not understanding that she needed help in learning and carrying out the responsibilities of her job.

The Corporation asserted that the lack of seriousness with which the Union treated the grievor's termination letter is demonstrated by the fact that when the Union finally did find the termination letter in the WSIB file after the first day of the arbitration hearing, Ms. Hartanu suffered no adverse consequences for her improper handling of the termination letter. To the contrary, however, the Union's reaction to discovering the mistake demonstrated the highest regard for the grievor and for its responsibility to its membership. Once Mr. Charles found the letter in the depths of the WSIB file, he "read the riot act to the executive", to use his words, and immediately set in place procedures that would prevent a repetition of the mistake that had been made and would ensure the timely filing of a termination grievance.

The seriousness with which the Union takes its responsibility not only for its members but also for its obligations under the collective agreement was demonstrated by the fact that once the grievor finally approached the Union about his termination in

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January of 2011, Mr. Davidson, on behalf of the Union, on his own initiative, advised management at the First Level Grievance hearing on March 10, 2010 that the grievance had been filed out of time. The evidence of Mr. Davidson, an executive officer of the Scarborough Local, which was confirmed by Mr. DeAbreu, a labour relations officer for the Corporation, establishes that over the years very few of the Union's grievances have been filed late. Mr. Davidson testified that in his career of 45 years, he could remember only three other grievances that had been filed late. Mr. DeAbreu stated that over the past four years he is aware of only two other grievances that the Scarborough Local has filed outside the time limits.

Accordingly, while the Union was at fault for the late filing of the grievance, there is not one scintilla of evidence to suggest bad faith or a general lack of concern for adherence to time limits. To the contrary, the evidence fully demonstrates that the Union places the utmost importance on its obligation to abide by the time limits for the filing of grievances. Accordingly, the Arbitrator concludes that the circumstances of the delay, in their totality, support the exercise of discretion to extend.

Turning to factor #5, the length of the delay, the Arbitrator agrees that a 5.5 month delay in filing the grievance is significant. Taken in isolation, the significant length of delay would favour the Corporation's submission against the exercise of discretion to extend the time limits. In the circumstances, however, the evidence does not reveal any significant prejudice that would flow to the Corporation from that length of delay. First, the Union undertook not to seek damages for the 5.5 month period of delay. Second,

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while one of the potential witnesses may no longer be employed with Sun Life, there is no evidence to suggest that she cannot be located and brought to testify, if such is deemed necessary by the Corporation. Additionally, while the Corporation asserted that the length of delay heightened evidentiary problems that may result from fading memories, and cited Mr. Ramlochan's total absence of an active memory regarding the First Level Grievance Hearing on March 10, 2011, the action Mr. Ramlochan took at the Grievance Hearing was supported by the Corporation's documentary evidence of the meeting, as recorded in the Corporation's Grievance Hearing Report by Mr. Ramlochan's own hand.

Accordingly, while the Arbitrator agrees with the Corporation that the length of the delay is significant, the evidence reveals that the prejudice that otherwise might arise from the time lag, has been modified by the Union's undertaking not to claim damages for the period of the delay and by the existence of documentary evidence. The Arbitrator has been made aware of no significant prejudice that would fall on the Corporation through the 5.5 month delay in filing the grievance.

The final consideration relevant to the exercise of discretion, factor #6, is <u>whether the employer could reasonably assume the grievance had been abandoned</u>. The Corporation asserted that it could so assume but, apart from the mere passage of time, it brought forward no evidence to support an assertion of a reasonable assumption of abandonment.

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In the result, having weighed the interlocking factors relevant to the Union's delay in the filing of the grievance, as discussed above, the Arbitrator finds that the circumstances are appropriate for the exercise of discretion under section 60(1.1) of the Canada Labour Code to extend the time limits in the collective agreement.

Highly persuasive among the various factors is the fact that the grievor is a long service employee with a termination grievance, the most serious among grievances. Moreover, it is the Union, not the grievor, who carries the primary responsibility for the delay. But for the negligent actions of the Union, the grievance would have been filed on time. While the grievor might have been able to correct the Union's error if he had followed up his faxed termination letter, he carried out his initial responsibility to fax the letter to the Union in a timely manner. Moreover, the evidence establishes that the reason he did not follow-up flowed from the compromised mental capacity under which he was operating at the relevant time. Additionally, once the error was discovered, the Union immediately put in place the procedures that would prevent its repetition. Of further persuasion for the exercise of discretion is the circumstance that, over the years, the Union has demonstrated the utmost respect for the time limits in the collective agreement, as revealed by its record and the totality of the evidence.

Those factors that weigh in favour of a decision not to exercise discretion, such as the fact that the delay occurred at the outset of the process, upon the filing of the grievance, and that the delay was of the significant length of 5.5 months, have been found by the Arbitrator through the analysis set out above, not to be of sufficient weight

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in the combined circumstances of this matter to counteract the strong pull of those factors that weigh heavily in favour of the exercise of discretion, as detailed above.

Accordingly, on the basis of the foregoing, the Arbitrator concludes as follows: First, that the Corporation, through consistently processing the grievance on its merits notwithstanding its awareness, actual and/or appropriately deemed, of the late filing of the grievance, waived its entitlement to raise an objection to the timeliness of the grievance; and, second, that whether or not its actions in the processing of the grievance gave rise to a waiver of its rights, the circumstances surrounding the late filing of the grievance establish an appropriate foundation for the Arbitrator to exercise her discretion under article 60(1.1) of the Canada Labour Code to extend the time limits for the filing of grievances in the parties' collective agreement.

In the result, for the reasons set out, the Arbitrator dismisses the Corporation's preliminary objection based on the Union's late filing of Mr. Mian's grievance. Accordingly, the arbitration hearing will resume, as previously scheduled, to address the merits of Mr. Mian's termination grievance.

Dated in Ottawa this 30th day of April, 2013.

Pamela Cooper Picher
Arbitrator
s.c.

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