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### *Damages* — Power of board to award

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#### Résumé de l'article

By a majority, the board in this case holds, first, that the question of whether a board of arbitration may or may not award damages is not one going to jurisdiction, but is a matter of the powers of a board once it is properly seized of the dispute under the collective agreement or under the relevant legislation.

On the question of the power to award damages, it holds that this does not depend on the inclusion of a specific provision in the agreement. The object of the voluntary submission by the parties to arbitration of their disputes is that there shall be a final and binding settlement of the disputes, and a board of arbitration has an inherent power to award damages where any compensable loss is suffered by either party. By submitting to the board's adjudication the parties must be presumed to have intended to submit to a complete adjudication of the matter and a proper redress of any wrong suffered as a result of a breach by either party of its obligations under the agreement.

Polymer Corporation Ltd and Oil, Chemical and Atomic Workers International Union Local 16 - 14 - Arbitration award, Nov. 10th 1959, Bora Laskin, Q.C., C.L. Dubin, Q.C., M. O'Brien.

## JURISPRUDENCE DU TRAVAIL

### DAMAGES — Power of board to award

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At the outset, the board wishes to make it clear that it does not regard the union's objection as one going to its jurisdiction. That the board was properly seized of the dispute which was the subject of its award of September 4, 1958, is unquestionable. The assessment of damages consequent upon a finding of a breach of obligation resulting in compensable loss is a matter of the board's powers. The silence of a collective agreement on a board's remedial authority can no more be taken as excluding such authority than can its silence on procedure be taken to thwart the board in proceeding with a hearing on the merits of a case committed for its determination.

The burden of union counsel's argument against the board's authority to assess damages is that no such relief is stipulated in the governing collective agreement either generally or in particular relation to breach of a no-strike clause such as art. 8.01. Further, for the board to assess damages would be to add to the collective agreement in the teeth of art. 7.03 which forbids the board to alter, or change, or substitute new for any existing terms or to give a decision inconsistent with such terms. The collective agreement itself limits the issues which may be referred to a board, not only by art. 7.03 but also by art. 7.01. On the basis of

(1) Polymer Corporation Ltd and Oil, Chemical and Atomic Workers International Union Local 16 - 14 - Arbitration award, Nov. 10th 1959, Bora Laskin, Q.C., C.L. Dubin, Q.C., M. O'Brien.

*Note:* The substantive question of the union's responsibility for the illegal strike which caused the loss in this case was decided at an earlier hearing before the same board. The union was found as being a legal entity for the purpose of collective bargaining and responsible for the illegal strike. (Lab. Arb. Cases, Vol. 10, pp. 31 et seq.)

the exposition, union counsel takes the stand that damages as a remedy for a collective agreement violation which results in loss to the innocent party cannot be awarded in the absence of clear agreement by the parties in that behalf, either generally in a collective agreement or specifically under a particular submission. Counsel emphasized that the collective agreement is a product of voluntary action, and the parties cannot be deemed to have committed themselves beyond that which they expressed in their contractual undertakings.

For what it is worth this board must reject union counsel's contention that the award of this board is made final and binding only through the election of the parties and not through compulsion of legislation or regulation. Section 19 of the Industrial Relations and Disputes Investigation Act, R.S.C. 1952, c. 152, indicates a legislative policy of final settlement by arbitration of what may be termed contract interpretation disputes; and while it is true that such a requirement depends on whether a party invokes s. 19 to have such a provision included in a collective agreement (where they have not mutually incorporated it), the fact is that its inclusion is not a matter of agreement only; it may be forced upon one party by the other.

...It seems to this board that fundamental to any approach to the issue is some understanding of the history and purpose of resort to « final » or « binding » arbitration, to use the terms which appear respectively in s. 19 of the Industrial Relations and Disputes Investigation Act and art. 7.04 of the governing collective agreement. As a matter of history, collective agreements in Canada had no legal force in their own right until the advent of compulsory collective bargaining legislation. Our Courts refused to assume original jurisdiction for their enforcement and placed them outside of the legal framework within which contractual obligations of individuals were administered. The legislation, which is the context of encouragement to collective bargaining sought stability in employer-employee relations, envisaged arbitration through a mutually accepted tribunal as a built-in device for ensuring the realization of the rights and enforcement of the obligations which were the products of successful negotiation. Original jurisdiction without right of appeal was vested in boards of arbitration under legislative and consensual prescriptions for finally and for binding determinations. In short, boards of arbitration were entrusted with a duty of effective adjudication differing in no way, save perhaps in the greater responsibility conferred upon them, from the adjudicative authority exercised by the ordinary Courts in civil cases of breach of contract. That the adjudication was intended to be remedial as well as declaratory could hardly be doubted. Expeditious settlement of grievances, without undue formality and without excessive cost, was no less a key to successful collective bargaining in day to day administration of collective agreements than the successful negotiation of the agreements in the first place. Favourable settlement where an employee was aggrieved meant not a formal abstract declaration of his rights but affirmative relief to give him his due according to the rights and obligations of the collective agreement. In some jurisdictions, as for example, Ontario, this view was emphasized by the fact of statutory withdrawal of the application of Arbitration Acts from labour arbitrations, thus excluding the kind of curial review which was open to the parties to commercial arbitration. To have proposed to union negotiators that collective agreements, so long ignored in law and left to « lawless » enforcement by strikes and picketing, should continue to be merely empty vehicles for propound-

ing declarations of right when the right to strike during their currency was taken away, would be to mock the policy of compulsory collective bargaining legislation which envisaged the collective agreement as the touchstone of the successful operation of that policy.

What was true in the case of aggrieved employees or aggrieved union could be no less true in the case of aggrieved employers. They too were sensitive to the need for stability which collective agreements could produce, and no less alive to the need for effective machinery to resolve disputes arising in the day-to-day administration of such agreements. In admitting their own responsibility for due observance of collective agreement obligations they could not be expected to agree to any lesser standard of performance by unions and employees. These considerations are aptly summed up in that par of art. 1 of the agreement between the parties herein which recites «their desire to provide orderly procedure for collective bargaining, and for the prompt and equitable disposition of grievances».

This board agree that a reference of an alleged collective agreement violation to arbitration cannot ipso facto include the assessment of damages to redress the violation if established. What this view suggests is that the assessment of damages is no less a substantive issue and no less a separate one than the determination of the existence of a violation. It is, of course, possible for these matters to be separated, but they are not ordinarily treated in this way in either civil contract litigation or in commercial arbitration.

...The mutual acceptance of arbitration by the parties is not a matter of the undertaking of obligations towards each other but a remission of their disputes to final and binding adjudication by an external tribunal. The central question is hence not one of construing the limits of rights and obligations inter but rather of determining what is involved in arbitration. This determination must take account of the role that arbitration is designed to play in collective agreement administration. It is immaterial in the assessment of this role whether the class of disputes referable to arbitration is large or small.

...The pivotal issue is simply whether the exercise of arbitral authority encompasses the effectuation of the right and the enforcement of the obligation which are submitted for both original and final adjudication. One would ordinarily think, especially if seises of any knowledge of the history of collective bargaining and its legislative implementation, that if there is any area of adjudication where abstract pronouncements, devoid of direction for redress of violations, would be unwelcome it would be in labour arbitration. Such attenuation of arbitration authority must surely be found in explicit restriction rather than in implicit limitation. Whatever may be the intention of the parties as to the binding effect of their reciprocal rights and obligations, the statutory prescription of s. 18 of the Industrial Relations and Disputes Investigation Act makes the collective agreement terms binding on the union as well as on employer and employees covered thereby. Moreover, s. 19 carries the statutory policy further by reinforcing the binding character of a collective agreement with binding adjudication of disputes concerning its interpretation or violation. It seems to this board that whether one appraised the situation in terms of the statutory effects alone, or in terms of the intention of the parties (which must be viewed in the light of the statute), the result is the same; and

there is nothing in the language of the agreement in this case to suggest that the parties have in any way tried to qualify this result. Indeed, they could not if they tried; and we are remitted again to a consideration of the scope or meaning to be given to their (compelled) intention that the collective agreement shall be binding and that any alleged violation shall be submitted to binding arbitration.

...One fairly ancient legal rule is that breach of contract is compensable by damages if loss results therefrom. This is a proposition which a County or District Judge does not doubt when sitting on the bench; and he requires no legislative direction to persuade him to apply it. Why then is it doubted in arbitral adjudication of labour disputes? Collective agreement arbitration is today more than a matter of strict contract. As previously pointed out, it operates in Canada by legislative direction which obliges the parties to vest original jurisdiction in an arbitration board empowered to give a final and binding decision.

...Most of the opposition to exercise of power to award damages for loss occasioned by breach of a collective agreement came originally from employers' lawyer nominees to boards and from employers' counsel at board hearings. Indeed, the nominees and the counsel were, as any survey of the recorded cases will show, one and the same group. This was perhaps to be expected during a period when employers were on the receiving end of grievances as defendants. This board would be faithless to his mandate if it did not point out that similar opposition developed among counsel for unions when the latter became defendants in grievance arbitration, and there is at least one illustration of this opposition by a union lawyer nominee to a board. It is somewhat ironic that calls from lawyers and lawyer groups for responsibility in labour-management relations — certainly a laudable objective — should be coupled with efforts in concrete cases to reduce the art of adjudication in collective agreement administration to an innocuous exercise. This reduction is sought by a mechanical reiteration of warnings against extending « jurisdiction », a term which they never bother to define or analyse, and by joining to this reiteration a specialized and selective canon of contract interpretation drawn from sources which were concerned neither with arbitration at common law nor with the kind of arbitration prescribed by today's labour relations legislation. We have, thus, the unedifying spectacle of an undermining of collective agreement which in sense and in legislation are instruments for promoting stability in labour-management relations and for subjecting such relations to rational legal order.

One of the submissions of union counsel appears to be that there is a difference in an arbitration board's remedial authority where an employee claims redress under the collective agreement and where a company claims redress. The only differences, so far as this board can see any, are in the nature of the obligation which is allegedly violated and in the readier measure of loss, if loss is shown. The fact that a collective agreement stipulates the worth of an employee's labour in a wage schedule merely simplifies a tribunal's assessment of damages. It adds nothing to its powers. There is no need to emphasize that the difficulty of assessing damages has never been a reason for denying a claim thereto based on an established breach of contractual or other obligation owed to the claiming party.

...It follows from what has been said that the union's challenge to this board's power to award damages for breach by the union of art. 8.01 is rejected and the

board will proceed to assess the company's damages at a hearing to be convened by the board upon advice from the company that particulars as mentioned at the outset of this award have been furnished to the union and upon receipt of copies by members of the board.

**Damages awarded by Arbitration Board — Application for certiorari to quash award — Whether board has power to award and assess damages**

*The union had the capacity to incur liability for damages and the Board of Arbitrators were within their powers in proceeding to assess and award damages. The arbitrators had the same jurisdiction with respect to damages as they had to hear and dispose of the grievance which had arisen from a breach of the agreement. Moreover, since the union had the legal capacity to enter into a collective agreement, it was fastened with the responsibility that arose from a breach thereof and, therefore, it had the capacity to incur liability for damages.<sup>1</sup>*

Two main points are raised for consideration by the Court: 1) Under the terms of the agreement and the provisions of the Industrial Relations Act has the Court any jurisdiction to interpret the agreement or is that jurisdiction vested solely in the Board of Arbitration? 2) If the Court has power to interpret the agreement, was the Board right in holding that it had power to award and assess damages? In my view it would require much clearer language that is used in the collective agreement to oust the jurisdiction of the Court to determine the scope of the jurisdiction of the arbitrators and to restrain them from going beyond their jurisdiction. I think the Court has power to construe the agreement and delineate the jurisdiction of the arbitrators.

...The jurisdiction of the arbitrators to award damages must be found in the language used by the parties as an expression of their intention. The contract here in question is not in the nature of an ordinary commercial contract. Although the precise terms of a collective agreement are not imposed by law, the law requires that it shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all disputes between the employer and employees concerning the meaning of the agreement or violation of the agreement.

The statute goes further and provides that if such a clause is not in the agreement the Labour Relations Board established under Act shall upon the application of either party « prescribe a provision for such purpose and a provision so prescribed shall be deemed to be a term of the collective agreement ». The intention of the statute is clearly expressed in sec. 19(3) which I repeat:

Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement and give effect thereto.

(1) In the matter of an arbitration between Polymer Corporation Ltd. and Oil Chemical and Atomic Workers International Union, Local 16-14 Ontario High Court of Justice, January 23, 1961; McRuer, C.J.H.C.