Date: 20021206

Docket: T-425-02

Neutral citation: 2002 FCT 1268

BETWEEN:

TELUS MOBILITY

(the "Employer")

AND:

TELECOMMUNICATIONS WORKERS UNION

(the "Union")

REASONS FOR ORDER

ROULEAU, J.

[1] Pursuant to an Arbitrator's decision dated January 30, 2002, entered with this Court on March 11, 2002 and filed pursuant to subsection 66(1) of the *Canada Labour Code* by which it became an Order of this Court, the Telecommunications Workers' Union (the "Union") by application sought a determination that Telus Mobility (the "Employer") and David Wells, the Executive Vice-President Employees Services of Telus Mobility, were in contempt of the Order.

[2] The proceeding was initiated pursuant to an Order issued by John A. Hargrave, Prothonotary, dated June 10, 2002, in which he determined that Telus Mobility and David Wells should appear before a judge of the Federal Court to hear proof of the contempt alleged by the Telecommunications Workers Union.

[3] The Order which is now filed with the Court reads as follows:

"The Employer is in violation of the Letter of Agreement between the Union and the Employer dated December 4, 1992. I direct that the violation of the Letter of Agreement dated December 4, 1992 by the Employer come to an end; that Remote Dealer Activation (RDA) and Interactive Voice Response (IVR) not be used in such a way that excludes bargaining unit employees; and that TELUS Mobility computer system remain completely under control of TELUS Mobility and operated only by TELUS Mobility employees.

The Order applies only to dealers in the Province of British Columbia."

[4] The issue to be dealt with is the reduction of tasks performed by activation representatives and the eventual phasing out of involvement by these bargaining unit employees.

[5] The Union submits that the changes to the system introduced by the Employer on July 1, 2002 called Apollo.02 does not comply with the decision of the Arbitrator, that in fact this new process excludes bargaining unit employees; as well, the Employer inordinately delayed implementation.

[6] Many mergers of various corporations were undertaken over the years by the Employer but were not clearly defined nor identified by any of the parties appearing before me. My attempt to clarify the events may not be completely accurate but I am nevertheless satisfied that the main question which was to be determined in these contempt proceedings is perfectly clear in my mind.

[7] Telus Mobility is a division of a complex corporate conglomerate made up of numerous divisions. Following the merger of the business of Telus Corporation in Alberta and B.C. Telecom in British Columbia affecting some 17,000 employees, BCT.TELUS and others, in February, 1999, filed an application with the Canada Industrial Relations Board addressing the rights of four affected unions, the reconfiguration of bargaining units and the intermingling of affected employees.

[8] Pursuant to the decision of the Canada Industrial Relations Board issued in November, 2001, with the consent of all parties, employees were merged into one bargaining unit with some exceptions. The group concerned in this dispute are referred to as "activation representatives" whose function was to process new subscribers and activate cellular telephones. They were located and were part of B.C. bargaining unit and dealt with the activation of mobile telephones only in the Province of British Columbia.

[9] Under the terms of the collective agreement there had been established a committee called the Contracting Out and Technological Change Committee (the "COTC") made up of members of the Union and the employer, Mr. Wells being the primary representative. In a Letter of Agreement dated December 4, 1992, the following became part of the collective agreement:

LETTER OF AGREEMENT

WRITING UP OF BC TEL MOBILITY CELLULAR

SERVICE ORDERS

The Company and the Union agree that BC TEL Mobility Cellular agents or dealers do not have the ability to access BC TEL Mobility Cellular computer systems (e.g. billing records, activation

and/or other customer records). The systems are to remain completely under the control of BC TEL Mobility Cellular and operated only by their employees.

The Company agrees to discuss any change taking place. The discussion will be brought to the TWU members of the Joint Standing committee on Contracting Out and Technological Change.

[10] Mobile telephones were introduced to the market during the 1980's and, in the initial stages, company owned and operated stores were distributing and selling mobile telephone units. A prospective customer would attend to purchase at an outlet, a clerk or someone representing the company would obtain particulars from the customer such as name, address, etc. After obtaining these particulars, he would then telephone an activation representative providing the information submitted by the customer; he would also indicate to the activation representative the 11 digits electronic serial number ("ESN") stamped on the handset. The activation representative would enter the data in his or her computer and initiate a credit check; if approved, and if all particulars received from the dealer were adequate, he or she would then process the data through the computer system, provide a billing number, select a telephone number from a telephone number inventory, register the ESN, enter the rate plan and activate the subscriber and the telephone became functional. This process would take from one to three days to complete.

[11] Over the years the process became more automated, new billing systems were introduced, the dealer completed the contract with the customer and sent it in, a new simplified billing system was introduced, updated data bases were perfected by Telus Mobility; as a result of evolution and advancement, the company introduced Electronic Transfer of Contract ("ETOC").

[12] Rather than Interactive Voice Response ("IVR") or facsimile transmission of the particulars required, the dealer keyed in the information necessary for new customers and this data was sent via the Internet to what is referred to as an electronic buffer. The buffer held the information on a series of files on the computer and they were retrieved by activation representatives and processed on a first in first out basis. The representative used a single point of entry gateway to send the information to the switch and billing records as well as other company records. Approximately 80% of the dealers were processing new subscribers with the more advanced ETOC system.

[13] The Union took issue with the introduction of ETOC and, in a ruling dated May 20, 1998, an Arbitrator upheld the company's position. He found that retrieving the data from the buffer replacing the paper facsimile or IVR transmission was not an important distinction. The nature of the work remained the same. He found that the processing of information was more efficient and quicker. He went on to write:

"The company is entitled under the collective agreement, as I read it, to take advantage of any new equipment it can acquire to shorten the processing of information, providing that the work necessary to do so continues to be done by the bargaining unit... While the retrieving process has changed under the new ETOC system the fact remains that the activation representatives continue to do the retrieval work. There has been no contracting out by the company of the ultimate processing of the electronic data transmitted by its mobility dealers to the Customer Activation Centre."

[14] Some time during the year 2000, the employer introduced a system in Alberta to activate mobile telephones called Remote Dealer Activation ("RDA"). This process bypassed the involvement of activation representatives. The dealers continued to transmit data via the Internet and, if there were no errors, the information proceeded to the Telus Mobility switch and the customer service data bases and the telephone was activated within five to ten minutes. Only if problems occurred such as lack of particulars or credit difficulties would an activation representative have to contact the dealer to clarify any issue.

[15] In June, 2001, Telus Mobility transferred all B.C. dealers' activations to the new system in place in Alberta ("RDA"), thus completely bypassing the activation representatives in the B.C. bargaining unit. This transfer of the RDA to the Alberta Processing Centre became the subject of the arbitration and these contempt of court proceedings.

[16] Even though there was a merger of various unions into one bargaining unit as ordered by the Canada Industrial Relations Board in November, 2001, the collective agreement governing Telus Alberta union members were not included in the Letter of Agreement of December 4, 1992 which prevailed in British Columbia and hence the employees in the Alberta Customer Activation Centres were not affected.

[17] As a result of introducing RDA for B. C. dealers, the Union took the position that this amounted to contracting out, that it could not take place without the authorization of the COTC Committee and that this move was inconsistent with the Letter of Agreement dated December 4, 1992. This alleged breach is at the centre of this dispute; it went to arbitration and it is as a result of the Arbitrator's decision that the Union alleges both Telus Mobility and Mr. Wells were in default.

[18] Pursuant to the collective agreement and the rules of the COTC Committee, the chairperson serves as an arbitrator. Hearings were held on May 31, June 1 and 8, 2001 and a decision was rendered by the Arbitrator on June 26, 2001. After analysing the Letter of Agreement, the Arbitrator then proceeded to describe the evolution of the activation process, describing in detail ETOC where the data was transferred via the Internet to an electronic buffer;

that after the activation representative posted the information on the screen, he or she then used a single point of entry gateway to send the information to the switch and billing records as well as other company records. He refers to the fact that 80% of the Telus Mobility dealers used ETOC.

[19] The Arbitrator then turned his mind to the dispute and the ruling of May, 1998, when ETOC was first introduced and challenged by the Union. He reiterates the finding that this new process did not amount to contracting out.

[20] He profiled the introduction of RDA; that the data is submitted via Internet and, if there are no complications, it proceeds on to Telus Mobility switch and customer service data bases. He wrote that the changes for the bargaining unit amounted to the activation representative no longer retrieving data from the buffer and transmitting it to the company data base; the involvement of the activation representative is no longer required except on a default basis. He concluded that the Letter of Agreement is binding and that the company should have brought the matter to the Union's attention because of the second paragraph of the Letter of Agreement; that the company's introduction of RDA without prior discussion is inconsistent with the December 4, 1992 understanding.

[21] The Arbitrator wrote:

"Is it contracting out? In my view the contracting out occurred when dealers were first engaged to provide a retail outlet for Telus Mobility products. Part of the engagement was that the dealer would provide all pertinent information to the company. The dealer is now doing, in substance, no more than that. The change is the gradual introduction of technology to the point that there is now activation without the intervention of an activation representative.

The question which must now be addressed is the consequences of the conclusion that the introduction of RDA is inconsistent to the Letter of Agreement of December 4, 1992.

I am prepared to hear submissions on this matter and to discuss whether an appropriate resolution can be found."

[22] Following the decision, meetings of the COTC committee were held and once again the parties returned to the Arbitrator on August 9 and 16, 2001 and a decision issued on September 17, 2001. During the hearing, counsel for Telus Mobility argued that the Arbitrator had no jurisdiction to consider the RDA matter since it included both Alberta and British Columbia employees. The Union asserted that it was too late to raise the jurisdictional question; that the bargaining unit involved only British Columbia employees and dealers and that therefore the Arbitrator had jurisdiction.

[23] The Arbitrator concluded that he had the capacity to rule since they were dealing exclusively with British Columbia dealers and British Columbia employees. He reiterated that the introduction of RDA was inconsistent with the Letter of Agreement and requested further submissions on a remedy (i.e. the matter of jurisdiction was settled by the B.C. Superior Court in May, 2002. It rejected the employer's submissions as to jurisidiction.).

[24] In January, 2002, since the parties were unable to amicably resolve the dispute or propose a remedy, the Arbitrator reconvened to hear submissions on the issue of remedy.

[25] On January 30, 2002, the Arbitrator issued a decision and ordered the following:

"I have already made a final and binding decision. The company is in violation of the Letter of Agreement. The parties have had an opportunity to find some accommodation or agreement on the issue but have not done so. I therefore direct that the violation come to an end; that RDA and IVR not be used in such a way that excludes bargaining unit employees. I direct that TELUS Mobility computer system remain completely under the control of TELUS Mobility and operated only by TELUS Mobility employees."

[26] Meetings of the COTC Committee were held in February, March and April, 2002, and much correspondence between the Union and the Employer ensued in an attempt to resolve the issue and arrive at a solution satisfactory to both parties. Two suggestions were advanced by the Union's representatives: that members of the bargaining unit be placed with dealers in British Columbia to process new subscribers; in the alternative, create a new Customer Activation Centre in British Columbia.

[27] Dealing with the first proposal, there was evidence before the Court that from the outset the Employer owned and operated some 40 outlets. Including outside sources, there are now in excess of 250 dealers throughout British Columbia. Considering the number of dealers, the hours of business operations, the fact that most were independent entrepreneurs and only some 1,500 subscribers were purchasing mobile telephones, this proposal was rejected. I cannot accept this as a reasonable proposal to resolve the dispute. When one considers 250 outlets activating some 1,500 subscribers on an average of 6 per day per dealer, considering the store hours that outlets would be keeping in shopping malls, etc., and considering that bargaining unit employees do not generally work more than 40 hours per week, this option does not appear to be viable.

[28] The other suggestion was the creation of a new Customer Activation Centre in British Columbia. Based on the evidence adduced, this would have required the creation of 50

new positions. The unchallenged evidence of Mr. Kevin Salvadori, Executive Vice-president and Chief Information Officer of Telus Mobility, may be summarized as follows. He testified that there were no facilities available in British Columbia to accommodate the additional employees, that it would take some 4 months to prepare plans, create a design, build the furniture, install the equipment. He further stated that since they had no excess employees they would have to recruit and train new activation representatives and he felt that this was a step backwards and sought a technological solution rather than the one proposed by the Union.

[29] Mr. Salvatori, on behalf of the Employer, initiated an internal study in early February, 2002, in an attempt to find a technological solution to conform with the Arbitrator's decision, some six months following the decision, on July 1st, 2002, a new process called Apollo 2.0 was launched. This new activation system was instituted with a view to meeting the requirement that activation representatives be involved in the process. RDA remained in place for all Alberta dealers but this new scheme was to handle dealer requests for activations and ESN changes for British Columbia dealers only. When a B.C. dealer enters an order it is put into a queue. The request then "pops up" on a representative's screen within 10 seconds seeking approval. The representative who receives the request on his or her screen approves it. All the activations personnel is required to do is press the approval button. As many as 10 pending requests could be displayed at any one time. After clicking the approval button the box disappears from the screen within 20 seconds. Should a request remain pending on a representative's screen too long, it disappears and reappears on another representative's screen for him or her to approve.

[30] As pointed out in the Apollo 2.0 version, the only extra step is the buffer holding the submission until the approval button is pressed. The RDA process already on line, the dealer is free to complete the request. The only additional involvement requiring the assistance of an activation representative is when a system error occurs or that the data provided is incomplete. Then the representative would contact the dealer by telephone.

[31] One of the issues to be resolved is the use of RDA (and IVR) by the dealer in such a way that excludes bargaining unit employees. The other matter is that the Telus Mobility computer system remain completely under the control of Telus Mobility and operated only by Telus Mobility employees.

[32] The Arbitrator in dealing with the second issue in his decision of June 26, 2001, analysed the December 4, 1992 Letter of Agreement and came to the conclusion that the first clause was ambiguous and chose not to express an opinion. Nevertheless, I am satisfied on the

evidence that dealers do not have access to Telus Mobility cellular computer systems. They may input data with an application for activation but they do not alter billing records or any other customer records, nor can they input or alter company data bases. This has always remained under the control of employees of Telus Mobility.

[33] Further, in his decision of June 26, 2001, the Arbitrator determined that, in light of the wording of the second paragraph of the Letter of Agreement of December 4, 1992, the Employer should have brought the matter to the ETOC Committee and that the introduction of RDA without prior discussion was inappropriate. He was satisfied that there was no contracting out since this had already occurred when dealers and retail outlets began processing applications for Telus Mobility products (ETOC) and that the dealers in substance were still providing the material information, no more no less than what was occurring in the past.

[34] I find the analysis almost contradictory. The Arbitrator chose to determine that paragraph 1 of the Letter of Agreement was ambiguous and failed to express an opinion, and on the evidence I am satisfied that the computer systems owned and operated by B.C. Telus Mobility always remained under the control of company employees. He had to conclude that what the clause implied was that all data bases controlled by the company should not be accessed directly by dealers.

[35] All decisions, going back to the year 1998, found that the activation process became more automated. It went from telephone calls to activation representatives to IVR and then to ETOC; from paper, voice or facsimile to Internet. The activation representatives began by taking particulars over the telephone to transcribing paper contracts to their computers to a single point of entry gateway from their computer screens. It was never suggested that this was contracting out.

[36] The issue may be summarized as the Arbitrator wrote in his decision of June 26, 2001:

"The change for the bargaining unit is that the activation representatives will no longer retrieve data from the buffer and transmit it to the company's data base. ... After the introduction of RDA, activation representatives no longer do the retrieval work. In a single personal order with no complications, the activation representative is no longer involved. ... The bargaining unit employees' participation was reduced to retrieval by ETOC and now eliminated by RDA, except for the simple pressing of the approval button."

[37] It seems evident that the Arbitrator was undoubtedly aware of the technological advancements and did his utmost to urge the parties to find an amicable solution to this dispute. In June, 2001, he concluded with the hope that an appropriate resolution could be found and left it open for further meetings without issuing an Order. Similarly, in his decision of December 17, 2001, he was seeking assistance in fashioning a remedy and did not issue an Order. Finally, it was not until January 30, 2002, even after urging the parties to resolve the dispute, that he felt he had to render a binding decision which translated into the Order which is the subject of these contempt proceedings.

[38] The burden on the Union in the present case is to prove a breach of the Arbitrator's order beyond a reasonable doubt. What this entails is that whatever violation is alleged must be found within the order and not by some assumption from the surrounding circumstances. Further, any ambiguity on the face of the order can go both to the issue of its enforceability and to proving a breach "beyond a reasonable doubt".

[39] Courts have consistently refused to enforce, by way of contempt, the decisions of inferior tribunals such as labour arbitrators when the orders issued by them do not contain specific directions of a mandatory nature directing a party to a collective agreement to take specific steps to redress a breach of the agreement: *United Steelworkers of America, Local 663 v. Anaconda Co. (Canada) Ltd.* (1969), 3 D.L.R. (3d) 577 at 581 (B.C.S.C.); *C.A.L.P.A. v. Canadian Airlines International* (1989), 27 F.T.R. 61 (F.C.T.D.); *Distillery, Brewery, Winery, Soft Drink & Allied Worker's Union, Local 604 v. British Columbia Distillery Co.* (1975), 57 D.L.R. (3d) 752 (B.C.S.C.). The underlying reason for this, of course, is that an order must be precise so that the party allegedly in breach can make a reasonable attempt to comply with it and, if he fails to do so, explain the reasons for its failure before any conviction for contempt can be found: *C.U.P.W. v. Canada Post Corp.*, [1987] 16 F.T.R. 4 (F.C.T.D.).

[40] On its face, the Arbitrator's order can be broken down into three constituent elements: (1) a requirement that the violation of the Letter of Agreement come to an end; (2) a requirement that RDA and IVR not be used in such a way to exclude bargaining unit employees; (3) a requirement that the system remain under the control of Telus Mobility and operated by Telus Mobility employees.

[41] With respect to the first component of the order, it is really nothing more than a statement of principle declaratory in nature. To a person reading the order, such a requirement does not give any direction or assist in how to comply in a meaningful way. Regarding the

second arm of the order, it invites the continued use of RDA and IVR but with a change, so as not to exclude bargaining unit employees. In fact, the wording comes close to assuming that RDA and IVR would continue with some alteration, that alteration being that there must be bargaining unit involvement. The Arbitrator found that the violation of the Letter of Agreement was that there is now activation without the intervention of an activation representative, and that is reflected in the second limb of the order which requires that RDA and IVR not be used in such a way as to exclude bargaining unit employees. However, there is nothing suggested with respect to the degree or quality of inclusion expected of bargaining unit employees. As to the third component of the order, it is noteworthy that the only fault found by the Arbitrator is the total exclusion of the bargaining unit members. There is no suggestion that continued use of RDA or IVR was in violation of the Letter of Agreement. Finally, the evidence is clear to the effect that Telus Mobility still maintains control and operates the system.

[42] The Arbitrator found that Telus Mobility had not complied with the Letter of Agreement but did not outline specific nor mandatory steps to be taken to remedy the breach. In my opinion, such an order suggesting an undefined course of conduct is not sufficient. Consequently, there can be no compulsory enforcement of an award which is merely declaratory

[43] Further, courts have consistently held that an order of contempt will not issue where time for compliance has not been specified: *International Brotherhood of Electrical Workers, Local 529 v. Central Broadcasting*, [1977] 2 F.C. 78 at para. 79 (F.C.T.D.); *Tardif v. Verrault Navigation Inc.*, [1978] 1 F.C. 815 at para. 7 (F.C.T.D.). In the case at bar, there was no specific direction in the order as to the time period for compliance. No one could instruct Mr. Salvadori or the Employer as to specific time for compliance failing which it would be in contempt. Without setting a time frame, there arises two possible interpretations of the order. The first, that it was immediately applicable, which would in effect render it incapable of being complied with. The second, and the more plausible, is that the Arbitrator intended that the order be complied with within a "reasonable period of time". However, the Employer's understanding of what is a "reasonable time" may differ from the Union's. Conflicting construction with respect to the requisite time form compliance can only lead me to conclude that the order is not susceptible of enforcement by this Court. The fact that Telus Mobility subsequently took it upon itself to comply by July 1, 2002 does not, as counsel for the Union suggests, indicate an inordinate time to comply nor does it support an allegation of disrespect for court orders.

[44] The evidence reveals that the only difference between ETOC and RDA is that under the latter, there could be an activation or a change to electronic serial numbers ("ESN") without the intervention of a bargaining unit employee. However, under the Apollo 0.2 system, a change was introduced requiring some intervention into the process, thus fulfilling the second component of the Arbitrator's order. Regardless of how mundane the task of pressing or not the

approval button may be, it is now a necessary and critical step in both activation and ESN changes. It does not add value to the existing system, but the buffer was inserted to comply with the order. Further, Telus Mobility has never conceded control or operation of its computer system to any third party. If anything, the changes brought about by Apollo 0.2 increased control through enhanced security measures that were introduced.

[45] Though alluded to, no evidence was called comparing tasks performed by bargaining unit employees between the ETOC and Apollo 0.2 systems. The greater or lesser tasks performed by an employee is an essential element to the Union's case for non-compliance. How can one conclude that clicking a mouse four times under ETOC is essentially different from clicking it once under the Apollo 0.2 system? As stated before, there is no direction in the order as to the quality and/or quantity of bargaining unit involvement. This ambiguity coupled with the changes introduced by Telus Mobility raises at least a reasonable doubt as to whether they are in breach of the order.

[46] Was there timely compliance by Telus Mobility with the Arbitrator's order? The pertinent date at which the Court should determine a breach and, therefore, contempt is not March 11, 2002 but rather when notice was served on Telus Mobility, March 25, 2002: see *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at 224-225 (S.C.C.).

[47] The Arbitrator delayed issuing an order until January 30, 2002; work on compliance by Telus Mobility was initiated no later than February 15, 2002. The company was served on March 25, 2002 at which time the compliance strategy was already ongoing and continued prior to any contempt proceedings being taken. By that date, it became obvious that negotiations to find solutions were futile; the solutions proposed by the Union were not practical, and only technological change was viable. I am satisfied that a change to Apollo 0.2 effective July 1, 2002 was not an inordinate delay.

[48] Telus Mobility intended to comply with the Arbitrator's order and in good faith spent considerable time, care and money to remedy the breach. Its rationale in the interpretation of the order was reasonable. To say the least, the Arbitrator's order could give rise to ambiguity and as a result, this gives rise to a reasonable doubt which should be resolved in favour of the company and Mr. Wells.

[49] Proof beyond a reasonable doubt must be established to sustain an order for contempt. That order is quasi-criminal in nature and should only be granted in the clearest of

circumstances. Having carefully reviewed the wording of the Arbitrator's order, I can only conclude, based on the evidence, that the Union has failed to overcome its onus to enjoin Telus Mobility and David Wells for contempt. The application is therefore dismissed.

[50] The Court has absolute discretion in the awarding of costs. Because of the surrounding circumstances as well as the diverse interpretations that one could attribute to the Arbitrator's order, I have determined that there should be no award as to costs.

JUDGE

OTTAWA, Ontario

December 6, 2002

FEDERAL COURT OF CANADA

TRIAL DIVISION

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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