

IN THE MATTER OF an Arbitration

BETWEEN:

THE TORONTO TRANSIT COMMISSION
(the Commission or the Employer)

- and -

AMALGAMATED TRANSIT UNION, LOCAL 113
(the Union)

AND IN THE MATTER OF a Union Group/Policy grievance regarding
Change/Reduction in Benefits Following Change in Benefit Providers.

Before: Daniel Harris, Sole Arbitrator

Heard at: Toronto, Ontario July 7, 2021

Decision Date: February 11, 2022

Appearances:

For the employer: Steve Lavender and others.

For the Union: Josh Phillips and others.

DECISION

1. This matter involves a grievance filed by correspondence dated June 8, 2017. That correspondence resulted in a meeting on July 21, 2017. By correspondence dated August 17, 2017, the TTC responded to the matters raised at the meeting as follows:

The meeting began with the Union indicating that there have been several issues as a result of the transition to new carrier Green Shield Canada. The Union discussed several specific plan member issues. As the Union continued to raise specific plan member issues, the TTC requested that following the meeting, the ATU Executive Board forward these specific claim issues to the TTC for further review and response.

Following the meeting, the Union provided further information and the TTC is investigating these claims, but has already determined resolution and/or action required for all but two. The TTC has set out its position on these 13 cases below.

2. The letter went on to respond to the concerns that the Union had raised at the meeting. There were subsequent exchanges of correspondence regarding production of documents, etc., including a consent order. The matter was scheduled for a hearing on October 3, 2018, which was adjourned on consent. The parties continued their discussions regarding the matters at issue in the grievance, being the Union's allegation that the change of insurance carriers had resulted in a change in the benefit coverages mandated by the collective agreement.

3. The discussions appear then to have gone stale.
4. On July 7, 2021, the matter was brought back on for directions as to its continuation. In the mean-time there had been a change in counsel having carriage of the matter for the Union.
5. The Employer resisted the continuation of the matter, pleading *laches*, and, at the hearing on July 7, 2021, it submitted that it would be prejudiced by the continuation of the proceedings due to, *inter alia*, changes in responsible TTC personnel in the interim, its inability to access documents from the two insurance carriers and, as well, as the general fading of memories due to the passage of time.
6. The Union submitted that there was a joint obligation on the parties to move the litigation forward. Both having failed to do so, the Union said that it would be unfair for it to bear the consequence of not having the matter heard on its merits. The Union submitted that the Commission had waived any delay, had not established that it was prejudiced by any purported delay, and that the Union should not bear the consequence of counsel's inadvertence.
7. The Employer called evidence related to the prejudice it said that it would suffer. Its witness was the current Manager of Benefits. She testified that she was not an employee of the TTC when the grievance was filed. She said that the

responsible employee at the time the benefits changed from Manulife Financial to Greenshields was no longer employed by the TTC. She also testified that many of the documents relating to the transfer were in the hands of one or the other of the carriers.

8. In my view, the detail of who did what, and when, relating to the transfer of the benefits programme administration will not affect whether the change in carriers deprived any members of the bargaining unit of the benefits promised under the collective agreement. The Union will have to prove that members of the bargaining unit were deprived of specific benefits that they were previously entitled to, and in receipt of, pursuant to the provisions of the collective agreement.

9. The Employer relied on the following authorities: *Canadian Encyclopedic Digest II.5.(b) Laches; Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC [majority decision only]; *Perry, Farley & Onyschuk v. Outerbridge Management Ltd.*, 2001 CarswellOnt 1564; *Brown and Beatty 2:3210 – Delay; 2:3212 – The Delay and Its Causes; 2:3214 – Prejudice.*

10. The Union relied on the following authorities: *Schlegel Villages v. Service Employees International Union, Local 1 Canada*, 2015 CanLII 67643 (ON LA); *Essar Steel Algoma Inc. v. United Steelworker, Local Union 2251 (Evans Grievance)*, [2012] O.L.A.A. No. 651; *Ontario Secondary School Teachers'*

Federation District 1 v. District School Board Ontario North East (Presley Grievance), [2015] O.L.A.A. No. 291; *Board Ontario North East (Presley Grievance)*, [2015] O.L.A.A. No. 291; *Wabi Iron & Steel Corp. v. U.S.W.A., Local 2020*, 2009 CarswellOnt 6535; *Re Clements and The Crown in Right of Ontario (Liquor Control Board of Ontario)*, [1981] O.G.S.B.A. No. 10; *Fiberglas Canada Ltd., Sarnia Plant v. O.C.A.W., Local 9-14*, 1976 CarswellOnt 1464; *Geraldton District for Community Living v. C.U.P.E., Local 3426*, 1994 CarswellOnt 1293; *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission (Operation Training Centre Grievance)*, [2021] O.L.A.A. No. 15; *Windsor (City) and CUPE, Local 543 (07/11)*, 2014 CarswellOnt 6409; *Brown & Beatty 2:3233 – Withdrawal and abandonment*; *Finlay v. Van Paassen*, [2010] O.J. No. 1097

11. In my view, this matter is one where in the lead up to the present juncture there was a give and take between the parties dealing with the difficulty of martialing the facts. However, the delay has not created an unreasonable burden on the Employer to continue the proceedings. I have not found the *Manitoba Metis* decision helpful, dealing largely as it does with the “Honour of the Crown. Nor was *Perry, Farley & Onyschuk, supra*, of much assistance, dealing as it does with laches in the context of the *Fraudulent Conveyances Act*. Nonetheless, its formulation of the ingredients necessary to found a claim of laches is determinative, and reads in paragraph 36, in part as follows:

What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches . . . Rather, the doctrine considers whether

the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

12. I have also considered the passages from *Brown & Beatty* referred to by the Employer. In my view, comparison of what benefits were provided before and after the change in carriers is not such as would make the continuation of the grievance unreasonable for the Employer at this stage, and there is nothing to indicate that the Union has acquiesced in the discontinuation or abandonment of the grievance. There is no prejudice to the Employer in hearing the grievance. Accordingly, this matter will proceed to a hearing on a date to be set.

DATED at Toronto this 11th day of February 2022.



Daniel A. Harris, Sole Arbitrator