1968
*June 6, 7
Oct. 1

UNION CARBIDE CANADA LIMITED ..... APPELLANT;

AND

PAUL C. WEILER, ROBERT NICOL and LESTER L. PORTER ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Labour relations—Collective agreement—Arbitration—Whether board of arbitration had power to deal with grievance notwithstanding that it was late in time.

On August 22, 1966, an employee of the appellant company filed a grievance through his union representative. The grievance went through the procedure in the collective agreement then in force and on September 30, 1966, the company replied to the third stage of the grievance. On October 18, 1966, the company received notice from the union of its desire to arbitrate the grievance. The company objected

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Spence JJ.

that the notice was too late. This objection was submitted to the arbitration board. The decision of the board was that the union had failed to deliver its notice respecting arbitration within the specified ten-day period as required by the collective agreement, and that the company had not waived the failure to notify in time and had preserved its right to object to arbitration.

The majority of the arbitrators then purported to relieve against the default and held that they had power to proceed to hear the merits. An application by the company to quash the majority decision was dismissed and, on appeal, the decision of the judge of first instance was affirmed by the Court of Appeal. With leave, the company then appealed to this Court.

Held: The appeal should be allowed.

The majority decision was erroneous for the following reasons: (a) The grievance was not timely and the board of arbitration had no power to extend the time. (b) The board of arbitration had no power to go beyond the question submitted in the parties' joint statement. (c) The board of arbitration was in breach of an article of the collective agreement in extending the time and so modifying the terms of the agreement.

Judicial review of this decision was not precluded by s. 34(1) of *The Labour Relations Act,* R.S.O. 1960, c. 202, nor did s. 86, the purpose of which is to require the Courts on motions by way of *certiorari* or otherwise when they are considering proceedings under the Act not to quash such proceedings because of defect of form or technical irregularity, afford any foundation for the decision of the board.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Jessup J. Appeal allowed.

George D. Finlayson, Q.C., and *D. F. O. Hersey,* for the appellant.

W. B. Williston, Q.C., Martin L. Levinson and *J. Sack,* for the respondents.

The judgment of the Court was delivered by

JUDSON J.:—The issue in this appeal is whether a board of arbitration had power under a particular collective agreement to deal with a grievance notwithstanding the admitted fact that it was late in time.

On August 22, 1966, an employee of Union Carbide Canada Limited filed a grievance through his union representative. The grievance went through the procedure in the collective agreement then in force and on September 30, 1966, the company replied to the third stage of the

[1] [1968] 1 O.R. 59, 65 D.L.R. (2d) 417.

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grievance. On October 18, 1966, the company received notice from the union of its desire to arbitrate the grievance. The company objected that the notice was too late. This objection was submitted to the arbitration board. The decision of the board was that the union had failed to deliver its notice respecting arbitration within the specified ten-day period as required by the collective agreement, and that the company had not waived the failure to notify in time and had preserved its right to object to arbitration.

The majority of the arbitrators then purported to relieve against the default and held that they had power to proceed to hear the merits.

The company then applied to a judge of the Supreme Court of Ontario to quash the majority decision. This order was refused. The decision of the judge of first instance was affirmed by the Court of Appeal. Subsequently, the Court of Appeal granted leave to appeal to this Court.

The parties prepared a joint statement, the final paragraph of which sets out the question for determination by the board. This question was:

> Is the grievance timely? and
>
> Should the Board decide in the affirmative then to determine if Article 9, Section 2-4, of the Collective Agreement was violated as alleged by the Grievor?

The grievance procedure that we are concerned with in this appeal is set out in the following sections from the collective agreement:

(a) Article X, Grievance Procedure, Section 6:
Grievances shall be presented for adjustment in accordance with the following procedure:

. . .

Step 4. If the grievance is not settled by the foregoing steps, it may be submitted to arbitration, provided the Company is notified in writing not more than ten (10) days from the date of the Company's third step reply. Such written notification shall contain the name of the Union's Arbitrator and the Company shall name its arbitrator within ten (10) days of the receipt of such notification. The matter shall then be processed to Arbitration as outlined in Section 2 of Article XI.

(b) Article XI, Arbitration, Section 4:
A joint statement, or separate statements, by the Company and the Union covering the grievance or dispute and outlining the matter to be settled by the Arbitration Board shall be submitted to all members of the Board within three (3) days after their appointment.

(c) In arriving at a decision, the Arbitration Board shall be limited to the consideration of the dispute or question outlined in this

statement, or statements, referred to in Section 3 and shall not in any way amend, modify or change any of the provisions of this Agreement, or change any decision of the Management unless the Board finds that the Company has violated the express terms of this Agreement.

My opinion is that the majority decision was erroneous for the following reasons:

(a) The grievance was not timely and the board of arbitration had no power to extend the time.

(b) The board of arbitration had no power to go beyond the question submitted in the joint statement.

(c) The board of arbitration was in breach of Article XI, s. 4, above quoted, in extending the time and so modifying the terms of the collective agreement.

The joint statement makes it clear that the decision on the merits is only to be made if there is a preliminary finding that the grievance was timely. Once the board found that the grievance was out of time, this should have been the end of the matter. By assuming to relieve against the time limit and imposing a penalty as a condition for the exercise of this power, the board amended, modified or changed the provisions of the collective agrement in spite of the express provision contained in Article XI, s. 4.

The Court of Appeal[1] held that the appeal failed on the following ground:

> This Court is of the opinion that the appeal fails on the following ground which can be put shortly. It is apparent from the two questions submitted to arbitration that the arbitration board was called upon under the first of those questions to determine whether the substantive issue raised by the grievance was arbitrable. This was a matter which, having regard to section 34(1) of *The Labour Relations Act*, R.S.O. 1960, c. 202, the board was entitled to decide. The submission to the the board was wholly in this respect on a question of law and the board's decision thereon is not reviewable.

Section 34(1) of *The Labour Relations Act*, R.S.O. 1960, c. 202, reads:

> 34 (1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

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I cannot accept the opinion of the Court of Appeal that s. 34(1) of *The Labour Relations Act* precludes judicial review of this decision. There was no problem here relating to the "interpretation, application, administration, or alleged violation of the agreement, including any question as to whether a matter is arbitrable". The plain fact, so found by the board, was that the union is out of time with stage 4 of its grievance procedure. The subject-matter of the grievance (seniority rights of a particular employee) was plainly arbitrable. We come back to the only issue, namely, whether the board had power to extend the time.

Nor do I think that s. 86 of *The Labour Relations Act* affords any foundation for the decision of the board. Section 86 reads:

> 86. No proceedings under this Act are invalid by reason of any defect of form or any technical irregularity and no such proceedings shall be quashed or set aside if no substantial wrong or miscarriage of justice has occurred.

Section 86 is directed solely to the Courts. The whole purpose of the section is to require the Courts on motions by way of *certiorari* or otherwise when they are considering proceedings under the Act, for example, hearings before and decisions of the Labour Relations Board, not to quash such proceedings because of defect of form or technical irregularity. Section 86 does not enable a board of arbitration, as the majority thought in this case, to ignore the plain and emphatic language of the written contract. *Galloway Lumber Co. Ltd. v. Labour Relations Board of British Columbia et al.*[2] does not decide to the contrary. That case affirmed a board's action because there was evidence before the board that the grievance procedure had been complied with. In this case there is the only possible finding of the board that the union had not complied with the grievance procedure.

I would allow the appeal and quash the decision of the board of arbitration. The order for costs in this Court will be in accordance with the condition of the order granting leave that Union Carbide pay the costs of the respondents Paul C. Weiler, Robert Nicol and Lester L. Porter in this Court. The company is entitled to the costs of the motion

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[2] [1965] S.C.R. 222, 51 W.W.R. 90, 48 D.L.R. (2d) 587.

before Jessup J. and the appeal to the Court of Appeal of Ontario against the United Steelworkers of America.

Appeal allowed.

Solicitors for the appellant: McCarthy & McCarthy, Toronto.

Solicitor for the respondent: Martin L. Levinson, Toronto.