AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

B E T W E E N

UNITED PARCEL SERVICE OF AMERICA INC

AND

GOVERNMENT OF CANADA

DECISIONS OF THE TRIBUNAL RELATING TO DOCUMENT PRODUCTION AND INTERROGATORIES

THE TRIBUNAL:

Dean Ronald A Cass, Arbitrator
L Yves Fortier CC, QC, Arbitrator
Justice Kenneth Keith, President

Ucheora Onwuamaegbu, Registrar

21 June 2004

INTRODUCTION

1. The Tribunal has considered and now rules on procedural issues relating to document production and interrogatories. It would of course prefer that the parties resolve these issues between themselves, as at one stage appeared to be in prospect. They and their advisers are in a much better position than the Tribunal to know the shape of their cases and the detail of the evidence and argument that they intend to provide support of it.

2. The Tribunal is conscious of the need for the parties, particularly the respondent, to know the case they are to make and meet and of the requirements of equality of the parties and of natural justice. It urges the parties to attempt to resolve any remaining procedural matters so that the arbitration may proceed with due expedition to the merits. In particular, it requests the parties to propose a timetable for the remaining stages leading to the merits hearing, by agreement if at all possible.

A INVESTOR'S REFUSAL TO PRODUCE CERTAIN DOCUMENTS

3. Canada in its document request to the Investor sought documents under 61 headings. The Investor agreed to respond to all the requests but with five exceptions. The disputed requests are as follows:

> 54. Documents evidencing UPS' reduced profit by reason of the "benefits and privileges set out above, which are not correspondingly made available by Canada to UPS, and the US subsidiaries";
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> 55. Documents evidencing UPS' reduced market share by reason of the "benefits and privileges set out above, which are not correspondingly made available by Canada to UPS, and the US subsidiaries";
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> 56. Documents evidencing UPS' increased out-of-pocket expense by reason of the "benefits and privileges set out above, which are not correspondingly made available by Canada to UPS, and the US subsidiaries"; [these three relate to para 31 of the Revised Amended Statement of Claim]
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> 58. Documents evidencing that UPS has suffered harm by reason of the alleged breaches in paragraphs 32-34 of the Revised Amended Statement of Claim;
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> 61. Documents evidencing UPS' "harm, loss and damage", as set out in paragraph 44 of the Revised Amended Statement of Claim, by reason of the allegations made in paragraphs 40-43.

4. The Investor

> refused these requests as they sought evidence of reductions in profits, market share or out-of-pocket expenses "by reason of" certain breaches of NAFTA alleged in the Revised Amended Statement of Claim. Rather than simply requesting profit market share and expense information, as Canada had done elsewhere in its document request, Canada's disputed requests sought explanations of how these financial results were influenced by breaches of the NAFTA. These explanations will be properly provided through expert evidence filed with the Investor's memorial. Accordingly, Canada's disputed requests were premature.

5. This refusal must be seen against the direction given by the Tribunal in its procedural decision of 4 April 2003 to divide the proceedings, with damages, as appropriate, being dealt with separately from the merits. On 1 August 2003 the Tribunal directed, in relation to document production, that "although [it] has divided the arbitration, leaving any issues of damages for the later stage, UPS will have to demonstrate in terms of article 1116 [of the NAFTA], that it has incurred loss or damage".

6. The Investor says that it has produced all of its documents relating to loss or damage in response to requests 8 to 23 and 37.

7. Those requests seek financial statements and all documents relied upon to produce them, including revenues and costs of all UPS companies and each UPS product or service that competes with Canada Post's product or service; documents describing UPS products that compete or could compete with Canada Post parcel services, small package express services and electronic services; documents concerning market share and competitors including Canada Post; documents defining the Canadian parcel market, small package express market and electronic services market, by revenue or volume; studies evidencing any variation of UPS market share by reason of competition with Canada Post; documents describing UPS services that compete with Canada Post services; and documents relating to the impact on UPS of the Postal Import Agreement. The "documents [consisting] of detailed financial, cost, market share and competitive environment information were marked as responsive to requests 8 through 23 and request 37, as applicable, of Canada's document request".

8. The Tribunal repeats that it will be for the Investor, if it is to establish breach of article 1115, to demonstrate that it has suffered loss or damage. That will be a matter which it will have to address at the merits stage in its written and oral argument by reference to the record then before the Tribunal. The record will include the documents referred to in para 7. The Investor will not at the merits stage have to establish the extent of any such loss or damage.

9. The Tribunal accordingly dismisses Canada's application for a direction that the Investor produce documents in response to the disputed items in its document request.

B INVESTOR'S REFUSAL TO DELIVER THE CONFIDENTIALITY AGREEMENTS TO CANADA

10. The Confidentiality Order made by the Tribunal on 4 April 2003, with the consent of the parties, provides in part as follows:

> 7. It shall be the responsibility of the disputing party wishing to disclose material containing confidential information to any person pursuant to paragraphs 5(d) or (e) to ensure that such person executes a Confidentiality Agreement in the form attached as Appendix "A" before gaining access to any such material. Each disputing party shall maintain copies of such Confidentiality Agreements and shall make such copies available to the other disputing party upon Order of the Tribunal or upon the termination of this arbitration. Where material containing confidential information is to be disclosed to a firm, organization, company or group, all employees and consultants of the firm, organization, company or group with access to the material must execute and agree to be bound by the terms of the attached Confidentiality Agreement.
>
> **Restricted Access**
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> 8. Where a disputing party wishes confidential information, as described in paragraph 1(b), to be kept confidential from the other disputing party, the disputing party shall clearly identify on each page of the material containing such information the notation –"Restricted Access – Dissemination Prohibited".
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> 9. (1) A person is entitled to receive access to information described in paragraph 8 of this Order only if that person:
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> (a) is legal counsel employed or retained by Canada, Canada Post Corporation, United Parcel Service of America, Inc. or United Parcel Service Canada Ltd., and their support staff;
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> (b) is an expert or consultant retained by a disputing party in connection with this proceedings; and, in either case
>
> (c) their access to the information is necessary for the preparation or the conduct of the case
>
> (2) Information provided under this section shall only be used for the purpose of these proceedings and shall only be given to persons referred to in subsection (1) if such persons:

(a) execute a Confidentiality Agreement in the form attached as Appendix "A";
(b) undertake not to disclose the information or permit to be disclosed the information in whole or in part, except for the purposes of use during the course of this proceeding; and
(c) return the information and file a certificate to the effect that any notes or copies, in paper or electronic format, have been sealed or destroyed.

11. The Tribunal reads para 9 as dealing with a subset of the documents already covered by para 7. The provisions of para 7, including those about making copies of the confidentiality agreements available to the other party, apply to the documents covered by para 9 along of course with the additional requirements of that paragraph. Under the clear terms of para 7, the confidentiality agreements which are to be executed are to be made available only at the end of the arbitration or by order of the Tribunal. There is no immediate automatic obligation to make them available on the execution of the agreements.

12. Canada contended that the Investor should make copies of all the agreements available to it before it released the documents it was to disclose to the Investor. It filed a Motion to that effect.

13. The Investor, while submitting that it is not obliged, in terms of paras 7 and 9, to make the agreements available has in fact made those executed by its two counsel of record available to Canada. Canada as a result, on 1 March 2004, gave instructions to her escrow agents to deliver the documents to Mr Appleton, Counsel for the Investor.

14. Because of the disagreement between the parties over the interpretation of the order of 4 April 2003 and because the Tribunal's Order contemplates further dissemination, Canada maintains its request that the Tribunal rule on its Motion. It also asks the Tribunal to order counsel for the Investor not to further disseminate the restricted documents pending a decision on the Motion.

15. Counsel for the Investor confirmed in a letter to Canada of 26 September 2003 that it would strictly comply with the provisions of the Confidentiality Order. It objected to providing all the agreements since that would effectively disclose the names of all potential expert witnesses or consultants retained by the Investor. That information at this time is privileged and confidential, a point accepted by Canada in its submissions.

16. The Tribunal will proceed on the basis of the statement by counsel for the Investor that it will comply strictly with the provisions of the Confidentiality Order; that undertaking includes in particular paras 7 and 9 and the provisions in the latter relating to restricted documents. In terms of para 7 of that order, the agreements which have not been disclosed will be made

available to Canada at the latest at the end of the arbitration. The parties, and Canada in particular, will have the benefit of those agreements when the Tribunal no longer exists. Those agreements would appear to provide Canada with the assurances and legal remedies against disclosure which it seeks.

17. Further, para 7 of the Order enables the parties to ask the Tribunal to order release at an earlier time.

18. As the Tribunal understands the matter, Canada does not at this stage seek the release of any further confidentiality agreements. It also understands that the documents held in escrow have been released.

19. Accordingly it sees no need at this stage to make any order or direction in this respect.

C INVESTOR'S REFUSAL TO ANSWER CERTAIN INTERROGATORIES

20. The Investor refused to answer more than half of the 197 interrogatories submitted to it by Canada. The Investor submits that those interrogatories are not proper and are not consistent with international arbitral practice under NAFTA chapter 11 and the UNCITRAL Arbitration Rules. That was so for one or more of four reasons: the questions

    (a) relate to the presentation of the Investor's case;
    (b) are irrelevant to the proceeding;
    (c) ask for documents; or
    (d) seek information within Canada's knowledge.

21. A number of the Investor's refusals depend on more than one of the reasons and it accordingly it lists some of the disputed questions under more than one heading; and Canada in its submissions and listing of the questions divides Reason (a) into two.

22. Canada asks the Tribunal to direct the Investor to answer fully 105 questions which it lists. It also asks the Tribunal to direct that

    (a) the failure by the Investor to answer a question about facts additional to those already supplied to Canada to establish UPS Canada as an investment of UPS would prevent UPS from adducing evidence or making submissions in support of such allegation; and

    (b) the failure by the Investor to answer questions in all other categories will be a ground for the Tribunal to drawn an adverse inference in respect of such allegations.

23. Those additional requests, especially the second, highlight one type of difficulty the Tribunal faces at this stage in ruling on those matters. It will always be open to the parties and in particular to Canada to submit at the oral stage that the failure of the other party to produce evidence or other information in support of a pleaded allegation means that the allegation is not established; the drawing of an adverse inference is frequently an aspect of such a submission and of any ruling on it. These are not matters which can sensibly be ruled on in the abstract. For one thing, there may be evidence or answers to other interrogatories which will bear on the unanswered interrogatory.

24. The point is a broader one. As indicated above in paras 3 and 8 in a different context, it is for the Investor to make out its claim. It must assess for itself whether its failure to adduce evidence including the disclosing of documents or the answering of interrogatories will prejudice its ability to make out its case.

25. Canada makes the point that although the Tribunal's direction relating to document production requires a description of "a narrow and specific " category of documents, no such limiting language appears in the direction relating to interrogatories. While that is so, the Tribunal did express the view that " on balance . . . interrogatories may be useful in narrowing the issues [between] the parties", and noted its power to give specific directions to resolve disputes about interrogatories. Further, " the procedures relating to the refusals to respond to document production shall apply with respect to interrogatories"; and the overall purpose , as the parties agree, is to facilitate the process of arbitration by narrowing the issues and giving proper notice to the other party. The initial pleadings, the documents disclosed, the later pleadings and further evidence are, of course, all part of that process.

26. At this stage, the Tribunal considers that it can best contribute to that overall purpose and process by directing Canada to submit more specific interrogatories which

    (1) are more clearly directed to matters of fact (bearing in mind in particular the second sentence of Para D.1 of the direction of 4 April 2003),

    (2) will help narrow the scope of the claim as pleaded, and

    (3) do not require documents to be disclosed.

27. It directs that those reformulated interrogatories be submitted by 6 July 2004 and that any objection of the Investor be submitted no later than 20 July 2004.

28. The Tribunal repeats its preference that the parties resolve this matter by agreement if they possibly can.

For the Tribunal

21 June 2004