

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

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**PROCEDURAL DIRECTIONS AND  
ORDER OF THE TRIBUNAL**

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**THE TRIBUNAL:**

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

Ucheora Onwuamaegbu, Secretary to the Tribunal

4 April 2003

The Tribunal has considered the submissions made by the parties and gives and makes the following directions and order.

**A. PHASING OF THE PROCEDURE**

The Tribunal directs that remaining jurisdictional matters be dealt with along with the merits. Damages will, as appropriate, be dealt with separately after the merits.

**B. DOCUMENT PRODUCTION**

The Tribunal directs as follows:

1. Each party shall submit to the Tribunal and the other party all documents available to it on which it relies, including public documents and those in the public domain, except for any documents that have been submitted by the other party.
2. Each party shall serve its Request to produce by 25 April 2003. The Requests may relate to any issues raised by the Revised Amended Statement of Claim and the Statement of Defence.
3. A Request shall contain:
  - (a) (i) a description of a requested document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist;
  - (b) a description of how the documents requested are relevant and material to the outcome of the case; and
  - (c) a statement that they are not in the possession, custody or control of the requesting party, and of the reason why that party assumes the documents requested to be in the possession, custody or control of the other party.
4. A party to which a Request is made may within 14 days refuse any part of the Request, stating the grounds for the refusal.
5. If the requesting party wishes to dispute the refusal it may make written submissions to the Tribunal within seven days.
6. The parties shall begin to produce documents immediately after receiving the Request or where appropriate immediately after the Tribunal rules on any refusals. If the parties are unable to agree on a timetable for production the Tribunal will establish one.
7. If copies of documents are produced, they must conform fully to the originals. At the request of the Tribunal, the original of any document must be presented for inspection.

8. Within the time ordered by the Tribunal, the parties may submit to the Tribunal and to the other party any additional documents which they believe have become relevant and material as a consequence of the issues raised in the documents, witness statements or expert reports submitted or produced by another party or in other submissions of the parties.
9. Any expert opinions to be tendered will be filed with the parties' written submissions;
10. In this direction a document includes a writing of any kind, whether recorded on paper, by electronic means, by audio or visual recordings or other mechanical or electrical means of storing or recording information.
11. The Tribunal reserves the power to make specific procedural directions to resolve disputes between the parties about document production.

### **C. WITNESSES**

The parties are to make submissions to the Tribunal by 25 April 2003 on their positions on the role of witnesses. Those submissions might usefully make reference to articles 4, 5, 6 8 and 9 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration, subject in the case of article 9 to the confidentiality order (E below).

### **D. INTERROGATORIES**

The Tribunal directs as follows:

1. At any time during the document production process, a party may deliver written interrogatories to the other party. The interrogatories shall, in addition to the questions posed, list the persons or class of persons (the "person") to whom the question(s) are targeted. The procedures relating to refusals to respond to document production shall apply with respect to interrogatories.
2. Upon receipt of an interrogatory, the responding party shall ensure that an answer be provided to the best of the person's knowledge and the person answering may consult the lawyers representing them in the arbitration for general advice. The person to whom the interrogatories are posed should not consult other witnesses of the party. In the event that an answer cannot be made without such consultations, the identity of all such consulted persons must be disclosed.
3. The Tribunal reserves the power to make specific procedural directions to resolve any disputes between the disputing parties about interrogatories.

The Tribunal considers on balance that interrogatories may be useful in narrowing the issues before the parties. It notes the power retained in paragraph 3.

## **E. CONFIDENTIALITY ORDER**

The Tribunal orders as follows:

### **PART I**

#### **Protection and disclosure of confidential information**

1. For the purposes of this Order:
  - (a) “disputing party”, means, in the case of the Investor, United Parcel Service of America, Inc., and in the case of the Respondent, the Government of Canada;
  - (b) “confidential information” means any information designated by a disputing party as confidential. A disputing party may designate as confidential, and protect from disclosure, any information that may otherwise be released under the terms of this Order on any of the following grounds:
    - (i) business confidentiality;
    - (ii) business confidentiality relating to a third party; and
    - (iii) information otherwise protected from disclosure by legislation including Canada’s *Access to Information Act*, *Customs Act* and the *Competition Act*.
  - (c) “business confidentiality” means:
    - (i) trade secrets;
    - (ii) financial, commercial, scientific or technical information that is confidential business information and is treated consistently in a confidential manner by the party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
    - (iii) information the disclosure of which could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the disputing party to which it relates; or
    - (iv) information the disclosure of which could interfere with contractual or other negotiations of the disputing party to which it relates.
2. A disputing party may designate information as confidential in which event the disputing party shall clearly identify on each page of the document containing such information the notation “Confidential information, Unauthorized Disclosure Prohibited” or some variation thereof, and shall take equivalent measures with respect to information contained in other material produced in electronic and similar media.

3. Except as otherwise provided herein, when a disputing party files with the Tribunal material containing confidential information, it shall provide, within five business days of production of an unredacted version of the material, a copy of that material with the confidential information redacted.
4. Confidential information shall not be disclosed except in accordance with the terms of this Order or with the prior written consent of the disputing party that claimed confidentiality with respect to the information and, in the case of materials from third parties, the owner of such confidential information.
5. Except as otherwise provided in this Order, information and materials containing confidential information may be used only in these proceedings and may be disclosed only for such purposes to and among:
  - (a) counsel to a disputing party whose involvement in the preparation or conduct of these proceedings is reasonably considered by the disputing party to be necessary;
  - (b) counsel or employees of Canada Post Corporation and United Parcel Service Canada Ltd., to whom disclosure is reasonably considered by a disputing party to be necessary;
  - (c) officials or employees of the disputing parties, to whom disclosure is reasonably considered by a disputing party to be necessary;
  - (d) independent experts or consultants retained or consulted by the disputing parties in connection with these proceedings; or
  - (e) witnesses who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings but only to the extent material to their expected testimony.
6. All persons receiving material in this proceeding containing confidential information shall be bound by this Order. Each disputing party shall have the obligation of notifying all persons receiving such material of the obligations under this Order. The obligations created by this Order shall survive the termination of these proceedings.
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**

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”.
9. (1) A person is entitled to receive access to information described in paragraph 8 of this Order only if that person:
  - (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;
  - (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.

### **Disclosure of Material Pursuant to Law**

10. If the Government of Canada objects to the disclosure of any information on the basis of a privilege, ground for exemption or non disclosure or public interest immunity arising at common law or by Act of the Parliament of Canada, the Tribunal will decide on the basis of submissions by the disputing parties on the action to be taken.
11. Any request to the Government of Canada for documents under the *Access to Information Act*, including documents produced to Canada in these proceedings, will be governed by the provisions of that Act, except that no information designated by United Parcel Service of America, Inc. as confidential shall be disclosed to any requestor unless prompt notice of such request has been made and United Parcel Service of America, Inc. has been afforded the opportunity to make representations concerning such disclosure.

12. No party shall file any confidential material covered by the terms of this agreement in any Court without first bringing this Order to the attention of the Court and seeking directions concerning the filing of such material in a manner that protects its confidentiality.
13. Notice pursuant to this Order shall be provided to the Claimant by sending notice by fax to the counsel of record for United Parcel Service of America, Inc., while these proceedings are pending, (or after the completion of the proceedings, to the Claimant to the attention of the General Counsel) and to Canada by sending notice by fax to the Principal Counsel of the Trade Law Division of the Department of Foreign Affairs and International Trade (or his or her successor or designate). Notice to a third party to whom the confidential information relates shall be sent by fax and/or registered mail.

## **PART II**

### **Conduct of proceedings and public disclosure of documents**

14. In accordance with UNICTRAL Arbitration Rules Article 25(4), to the extent the disputing parties have agreed as recorded in this Order, the hearings in this arbitration shall not be held in camera.
15. Subject to the terms of this Order, and any further agreement between the disputing parties, the disputing parties agree that either disputing party shall be free to disclose to the public, including by posting on the internet, the following materials:

Pleadings, and submissions of any disputing party or NAFTA Party, together with their appendices and attached exhibits, including the notice of intent, notice of arbitration, amended statement of claim, statement of defence, memorials, affidavits, responses to tribunal questions, transcripts of public hearings, correspondence to or from the Tribunal, and any awards, including procedural orders, rulings, preliminary and final awards
16. Any material disclosed to the public pursuant to paragraph 15 hereof shall not contain any information designated by a party as confidential or restricted access.
17. Except as permitted by this Order, neither disputing party shall publicly disclose material produced by the other disputing party in the course of this dispute.
18. A disputing party has thirty (30) days from the date of notice by the other disputing party of its intent to publicly disclose material referred to in paragraph 15, to object to disclosure on the basis it contains confidential information. Such material may not be released prior to the end of this period unless both parties have confirmed that they do not object to such release or agreed on the redaction of the material containing confidential information.
19. Where counsel for either disputing party reasonably expects that information, whether documentary or oral, designated by a disputing party as confidential information shall

be referred to during the course of any hearing held by the Tribunal, then such portion of the hearing as is reasonably necessary to protect that confidential information shall be conducted in camera, and may only be attended by those persons designated in paragraph 5.

20. Where counsel for either disputing party reasonably expects that information, whether documentary or oral, designated by a disputing party as restricted access information shall be referred to during the course of any hearing held by the Tribunal, then such portion of the hearing as is reasonably necessary to protect that restricted access information shall be conducted in camera, and may only be attended by those persons designated in paragraph 9(1).
21. The proceedings shall not be recorded in any way, except by a court reporter, and shall not be broadcast.
22. Transcripts of the proceedings containing any information designated by a disputing party as confidential information shall be redacted.
23. The obligations created by this Order shall survive the termination of these proceedings.
24. At the conclusion of these proceedings, all material produced hereunder, or otherwise submitted to the Tribunal, and any copy of those materials, and any materials containing any confidential information, are to be returned to the disputing party who supplied the materials, together with certification that no duplicate has been retained.



**APPENDIX “A”**

**CONFIDENTIALITY ORDER**

**TO:** The Government of Canada (and its legal counsel); and United Parcel Service of America Inc. (“UPS”) (and its legal counsel)

**FROM:**

1. IN CONSIDERATION of being provided with materials (“Confidential Information” or “Restricted Access Materials”) in connection with an arbitration between UPS and the Government of Canada over which claims for confidentiality or restricted access have been advanced, I hereby agree to maintain the confidentiality of such material. It shall not be copied or disclosed to any other person nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Tribunal’s Order based on the agreement of the disputing parties regarding confidentiality and restricted access, a copy of which is attached as Schedule “A” to this Agreement, and agree to be bound by it.
3. I will promptly return any Confidential Information or Restricted Access Materials received by me to the disputing party that provided me with such materials, or the information recorded in those materials, at the conclusion of my involvement in these proceedings. All material containing information from Confidential Information or Restricted Access Material will be destroyed.
4. I acknowledge and agree that in the event that any of the provisions of this Confidentiality Agreement are not performed by me in accordance with the specific terms or are otherwise breached, that irreparable harm may be caused to either of the disputing parties to this arbitration. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to seek injunctive relief restraining breaches of this Confidentiality Agreement and to specifically enforce the terms and provisions hereof in addition to any other remedy to which any disputing party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts of the Province of Ontario (in the case of residents of Canada) or the State of \_\_\_\_\_ (in the case of residents of the United States of America) to resolve any disputes arising under this Agreement.

SIGNED, SEALED AND DELIVERED before a witness this \_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Witness))

\_\_\_\_\_  
(Signature)

The Confidentiality Order follows the agreement of the parties which were not however able to agree on paragraphs 10 and 11 and some consequential matters.

So far as those paragraphs are concerned, the Tribunal has considered the submissions made by the parties, relevant rulings made by NAFTA Tribunals in the *S D Myers* and *Pope and Talbot* arbitrations and the Interpretation adopted by the Free Trade Commission on 31 July 2001. It concluded that the better way forward was to provide a procedure to address the issue if and when it arose. That procedure is incorporated in paragraph 10. The notification procedure in paragraph 11 parallels in a general way the notification provisions in the relevant Canadian legislation and in the context of the present proceedings should not cause confusion.

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For the Tribunal