

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

BETWEEN:

UNITED PARCEL SERVICES OF AMERICA , INC.

Claimant /Investor

and

GOVERNMENT OF CANADA

Respondent/Party

**REBUTTAL OF THE GOVERNMENT OF CANADA
TO THE INVESTOR'S SUR-REPLY**

(13 August 2004)

**Department of Justice
Room 1012, East Tower**

I. Introduction

1. Canada files this *Rebuttal* to the investor's *Sur-Reply* on its motion concerning Canada's alleged failure to respond to its information request.

2. The investor continues to make unsubstantiated claims critical of Canada's conduct.

Canada does not intend further to address these issues, other than to state that the record should demonstrate that notwithstanding Canada's concern that the investor is engaged in a fishing expedition, Canada has attempted to meet its obligations in the discovery process. Canada relies on the arguments contained in its Reply of 29 June 2004.¹

3. As well, Canada will not re-visit its individual answers to questions. The investor's appendices suggest that Canada has changed its answers to a number of questions. Except where Canada has expressly corrected an earlier answer, Canada has not changed any of its answers.

The letter of 17 May 2004 and the *Reply* of 29 June 2004 simply contain additional explanations.

Canada cannot be criticized for making further efforts as a result of the investor's demands.

Again, Canada relies on its existing answers, and will not revisit them now.

4. Canada has answered the vast majority of the investor's questions, and all of its legitimate ones. Subject to claims of privilege, Canada has produced the documents it has, in the form in which it has them, except where documents were clearly marked as redacted. In addition, most additional documents found as a result of Canada's further searches have now also been produced; the investor should have the remainder within days of this *Rebuttal*.

5. Canada will restrict its arguments to a rebuttal of three groups of new arguments the investor raised in its *Sur-Reply* dated 6 July 2004.

¹ In particular, Canada refers the Tribunal to the descriptions of the work already undertaken (paragraphs 7 through 23), of Canada's efforts to find additional documents (paragraphs 24 through 36), and of Canada's correspondence with the investor (paragraphs 37 through 41).

6. In the first group, the investor claimed that some of Canada’s jurisdictional objections have already been dismissed. This is not the case.

7. In the second, the investor purported to justify the relevance of questions on the basis of allegations in the pleadings. However, it is clear from the investor’s own arguments that the questions seek to expand the original allegations. Such questions are outside the scope of the Tribunal’s orders on document production.

8. In the third, the investor made it clear that its questions seek sufficient information to allow its experts to “generate” the annual cost study.² The investor has alleged that Canada has failed to accord to it treatment that is no less favourable than the treatment Canada accords, in like circumstances, to Canada Post. It does not need to “generate” the annual cost study to prove this allegation, assuming it falls within the Tribunal’s jurisdiction.

II. Jurisdictional Issues

9. At paragraph 22 of the *Sur-Reply* the investor claimed that the Tribunal has rejected Canada’s jurisdictional arguments relating to allegations of improper cost accounting.

10. The passage the investor cited in support of this claim, paragraph 102 of the *Award on Jurisdiction*, dealt with paragraphs 16(f) and 29 of the *Amended Statement of Claim*. These paragraphs essentially alleged that Canada Post denied UPS access to its “monopoly infrastructure”.

11. The investor appears to suggest that as a result of this decision, the Tribunal has already found it has jurisdiction over paragraph 27 of the *Revised Amended Statement of Claim*.

However, the allegations there are not the same as those in the *Amended Statement of Claim*:

they do not relate to access, but to unnamed “inappropriate accounting devices”. Paragraph 27 is a new allegation, not found in the *Amended Statement of Claim*.

² Investor’s *Sur-Reply* at paragraph 29.

12. Although Canada takes the position that the Tribunal has already held that the question of an alleged cross-subsidy is outside its jurisdiction³, Canada has proceeded on the basis, (as directed by the Tribunal in its August 1, 2003 ruling) that documents are to be produced if they are relevant on the face of the pleadings.

13. Within that context, Canada's position is that the only question before this Tribunal is whether Canada Post's accounting practices are inappropriate. Assuming that this question has anything to do with an issue that may properly arise under NAFTA Articles 1502(3)(a), 1503(2) or 1102, it can be fully explored by examining the documents Canada has already produced.

14. While Canada's jurisdictional objections remain outstanding, Canada's objections to UPS' questions are not based on jurisdictional grounds. As demonstrated below, all of Canada's objections stem from the questions' irrelevance to the pleadings. Such objections are consistent with the Tribunal's Order of 1 August 2003.⁴

III. Questions seeking to expand the pleadings

15. The *Sur-Reply* demonstrated that many of the investor's questions would expand the scope of the claim. Most of the questions relating to Purolator Courier, for example, are not related to an allegation in the pleadings.⁵

16. The investor's justifications for these questions only emphasise their lack of relevance. The UPS response to question 5 stated that the *Revised Amended Statement of Claim* alleged that Canada Post receives more favourable treatment under the Postal Imports Agreement. The

³ Canada objected to the Tribunal's jurisdiction over paragraph 27 of the Revised Amended Statement of Claim, in its Motion of 7 February 2003. In its Order of 4 April 2003, the Tribunal joined this objection to the merits.

⁴ At paragraph 3.

⁵ Questions 5, 6, 19, 55, 56, 73, 156 and 223. Canada acknowledged in its *Reply* that the investor had made some allegations concerning Purolator; however, it argued that none of the questions to which it objected related to these allegations. See footnote 13 of the *Reply*.

investor admitted that question 5 is intended to elicit whether Purolator also receives treatment under that agreement.

17. The *Revised Amended Statement of Claim* made no allegations concerning treatment Purolator may have received under the Postal Imports Agreement. Purolator is a separate legal entity from Canada Post – allegations made against one do not *ipso facto* include the other. The investor is therefore seeking additional information, perhaps in the hope of expanding its case.

18. The other Purolator-related questions to which Canada objected are similarly irrelevant. Several other questions also fall into this group.⁶

19. Canada submits that each of these questions is an impermissible attempt to expand the pleadings, contrary to the Tribunal's Orders of 4 April 2003 and 21 June 2004. If the investor is permitted to use these questions to bring new allegations in its Memorial, after the close of the information-gathering period, it would prejudice Canada's ability to mount a full defence.

IV. Questions irrelevant to the pleadings

20. The investor's original information request included a series of document requests dealing with Canada Post's annual cost study.⁷ Although Canada provided numerous documents in response to these questions, the investor has objected in some fashion to all but three of Canada's answers.

21. Canada submits that between its original production of 26 February 2004 and the additional documents produced since,⁸ it has responded to the investor's proper questions. Once again, Canada produced the documents it has, in the form in which it has them. Except where

⁶ Also falling into this group are questions 39 and 48(a) (dealing with provincial taxes, which the investor has dropped from its claim), 63 (dealing with the Advanced Cargo Information programme, which did not exist during the time period relevant to this arbitration), 194-204 (dealing with life and dental insurance plans, about which there are no allegations) and 235 (dealing with GD Express, which UPS linked to its allegations relating to e-commerce, despite the fact that GD Express is not an e-commerce provider).

⁷ Questions 82-93.

⁸ Including those following this *Rebuttal*.

documents are marked as redacted, Canada provided the document requested, in exactly the form Canada has it, notwithstanding apparent gaps in pagination.

22. Canada continues to object to the investor's original question at 82B(1) and to the wholly new questions found at Schedule A of Appendix B to the investor's motion.⁹ In particular, Canada submits that the new arguments in the *Sur-Reply* concerning the need to "generate" the annual cost study demonstrate that the investor is seeking information that is irrelevant to the pleadings in the apparent hope of finding something to attach to its broad allegations.

23. In its original document request, the investor linked these questions to paragraphs 27, 28(b) and 28(c) of the *Revised Amended Statement of Claim*, as well as paragraphs 50 to 51 of the *Statement of Defence*.

24. In these paragraphs, the investor alleges, and Canada denies, that Canada Post somehow violated the national treatment standard found in Article 1102 through its accounting and business practices. Canada maintains its jurisdictional objections to these allegations, but that is not the basis for Canada's objections to the questions.

25. In order to meet its burden under Article 1102, the investor must demonstrate that Canada Post has accorded treatment to an investment of a Canadian investor that is not "no less favorable" than the treatment it accorded, "in like circumstances", to UPS Canada.

26. Canada does not admit that any of the allegations UPS made, even if true, could establish a violation of Article 1102. This is why they are outside the Tribunal's jurisdiction.

Notwithstanding this objection, Canada provided documents that are relevant to the allegations as pleaded. It provided the information needed to establish how Canada Post accounts for its

⁹ Canada stated in its *Reply* at paragraph 67 that Schedule A seeks documents not covered by the original question 82A. As such, it is a supplementary document request, for which there was no provision in the Tribunal's Orders. This alone is sufficient reason to deny the investor's request.

costs. Canada also provided the complete methodology of the annual cost study, the numbers it generated in each of the relevant years, and the annual audit reports.¹⁰

27. Nevertheless, UPS continues to ask that Canada provide, *inter alia*, the “full and complete” annual cost study. As Canada stated in its *Reply*, the annual cost study is not a document, or even a group of documents. It is an externally audited process for verifying Canada Post’s cost allocations, designed to allow third-party verification (in other words, an audit).¹¹

28. Thus, while the auditors can verify every step of the annual cost study by sampling inputs and by verifying for adherence to the methodology, the information is not documented in the manner the investor suggests. To satisfy the investor’s demands, Canada Post would have to create documents that do not otherwise exist.

29. This is not to say that there are no documents concerning the annual cost study. As already noted, Canada has produced those relevant documents that the investor sought in its original document request: it has produced the numbers generated by the annual cost studies, the external audits of those numbers, as well as the documents containing the methodology behind them.

30. The Tribunal does not need to in effect audit Canada Post’s auditors. In the submission of Canada, this would take a minutia examination of Canada Post’s accounting system, requiring many months of written and oral evidence before the Tribunal. Quite apart from the scope of the

¹⁰ This information is found in Canada’s responses to questions 82 through 89. For the Tribunal’s convenience, Canada has attached to this *Rebuttal* copies of some of the documents it provided to UPS – specifically, one year’s Methodology and Process handbook, and the auditors reports from all relevant years. While UPS is also asking that Canada provide it with “management” letters from Canada Post’s auditors, the attached reports contain the only such letters in Canada’s possession. They are found at tabs 82A 1-4, 6, 8 and 9 of Canada’s production.

¹¹ See paragraphs 53-55.

relevant provisions of NAFTA and the scope of the Tribunal's jurisdiction, the questions in 82B(1) that would require Canada Post to surrender its accounting system to the investor and to produce documents that do not yet exist are irrelevant to the pleadings.


31. The information Canada has already provided is more than adequate for the comparison required by Article 1102. Precisely because that Article is a comparison, relevant information is limited to the treatment accorded to the respective investments, and the circumstances under which that treatment is accorded. There is no reason why this Tribunal would have to recreate the annual cost study, unless it accedes to a suggestion by the investor to expand the pleadings as they presently stand. This motion has not been brought, and should the investor make such a motion it will be vigorously opposed by Canada.

32. The remaining questions relating to the annual cost study are similarly irrelevant to the pleadings. Once again, if the investor is permitted to use these questions to bring new allegations in its Memorial, after the close of the information-gathering period, it would prejudice Canada's ability to mount a full defence. Canada submits that it properly refused to answer them.

V. Order Requested

33. Canada repeats its request that the Tribunal deny all of the relief sought in paragraph 36 of the investor's motion.

Submitted this 13th day of August 2004, at Ottawa, Ontario, Canada.

A handwritten signature in black ink, consisting of two large, overlapping loops followed by a horizontal line that extends to the right and then curves back under the loops.

Ivan G. Whitehall, Q.C.
Agent for the Attorney General of Canada