

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAW COLLEGE OF APPLIED ARTS AND TECHNOLOGY  
(Hereinafter referred to as the College)

AND

ONTARIO PUBLIC SERVICE EMPLOYEES UNION (Hereinafter  
referred to as the Union)

AND IN THE MATTER OF THE GRIEVANCE OF C. ARANTON REGARDING WORKLOAD

BOARD OF ARBITRATION: Gail Brent  
E. Brady, College Nominee  
L. Robbins, Union Nominee

APPEARANCES:  
FOR THE COLLEGE: W. J. Hayter, Counsel  
D. L. Busche, Personnel Assistant  
C. L. McWilliam, Chairman, Nursing Program

FOR THE UNION: Michael Pratt, Grievance Officer  
Jeremy Gurofsky, Chief Steward, Local 110

HEARING HELD IN LONDON, ONTARIO ON FEBRUARY 22, 1982.

DECISION

The matter before this board arises out of a grievance dated June 30, 1980 (Ex. 1). The grievance as submitted to us is five pages long, and covers areas not relevant to the issue before us; the parties agreed that only paragraph 1(a) set out the substance of the complaint before us:

Workload

The College has not taken into consideration all the variables listed in Article 4 of the Collective Agreement to ensure that my workload is equitable with the workloads of my colleagues and to ensure that it conforms to the requirements of Article 4.01. Specifically,

(a) You admit in your memo of 1980 05 20 that I was scheduled, even by your calculations, to a rolling average in excess of the contractual limits during the April-May-June period of 1980. I believe your .5 hour finding does not reflect the true situation or account for the real contractual

overage. From March 21 to June 20, for example, you could have assigned a maximum of 276 hours, but you actually directed me to teach 296 hours. From June 9 to June 30, the contractually possible maximum is 66 hours, but you have directed me to teach 82.5 hours. More demonstrations can be provided of a clear breach of Article 4.01 of the Collective Agreement by the College.

There are certain facts which were agreed to by the parties. At the time of the grievance, the grievor was a full-time teaching master employed by the College and, in regard to her instructional assignments, was covered by Article 4.01 Option A under Group 2. The schedules given to the grievor for the six months beginning January, 1980 and ending June, 1980 (Exs. 3 & 4) form the basis for the Union's grievance. For the purpose of calculating the maximum teaching hours per week permissible under Option A, the College used three month periods and "rolled" on a monthly basis.

The Union does not challenge the College's right to pick a three month period for the purpose of making the calculation; it does challenge the College's right to "roll" on a monthly basis. The Union asserts that the "roll" must be done on a weekly basis. The Union also asserts that, as one gets to the end of the academic year, the averaging period decreases until there is just one week left.

The College objected that the Union was trying to enlarge the scope of the grievance, and that the issue as stated was not that put forward in the grievance. That issue will be dealt with later in the decision.

The Union relied on the statement of facts; however, the College called witnesses. The evidence of each witness will be summarized below.

Mr. Doug Busche testified that ever since January, 1976 the College has been using a three month base for its calculations and has been

"rolling" every month. Article 4.01 first appeared in the agreement which affected the 1975-76 academic year. He said that he believed that the College's method of calculation is well known in the bargaining unit, and that the teaching schedules of all academic personnel are distributed as follows: one copy to the teaching master, two copies to the Planning and Development Department (one of those copies is then forwarded to the Union). He said that that was not discussed in the course of discussing the grievance.

Mr. Busche agreed that the form of the schedule has changed over the years, and that it originally showed all of the figures used to perform the calculation of the average number of hours per week.

Mr. Howard Rundle, the Director of Planning and Development at the College since 1972, testified that he was involved in determining how to implement the "rolling" average. He said that a number of possibilities were considered for the "roll", including monthly, weekly, daily, etc. "rolls", and that it was finally determined that a monthly "roll" was what the words in the collective agreement called for. Mr. Rundle said that over the years he has had a number of discussions with the Union about the method of calculating the "roll", and that he has often received requests from the Union to explain the College's position. He also said that in 1979 he was on a committee with some members of the Union executive, including Mr. Gurofsky, and had explained the method of calculation used by the College at that time, at the request of the Union members on the committee

Each year Mr. Rundle's department sends a memorandum (Ex. 5) to all heads of teaching departments explaining how to prepare the individual teaching schedule summaries. He said that at one time the heads were required to calculate the averages themselves; however, in order to

eliminate the possibility of mathematical errors, the department now produces a table showing the "maximum permissible teaching hours per 3 months" (Ex. 5 page 2) so that the head can see what the maximum number of hours will be.

It was also Mr. Rundle's view that the College's method of calculation was approved in a 1977 arbitration case between the parties and has been unchanged since its initiation.

The board also heard evidence from Ms. Carol McWilliam, the Chairman of Nursing at Woodstock. She said that the grievor did not work the .5 hour beyond the maximum allowable as alleged in the grievance, because Mr. Rundle's office caught the mistake and the grievor's schedule was reduced accordingly.

Ms. McWilliam also said that in June the hours are very high in the nursing programme because of the increased clinical component which requires one teacher for every eight or nine students. She said that, because of this, she must look at the whole year and use the hours efficiently in order to have sufficient hours to meet the needs of the schedule in the May - June period.

The provision in the collective agreement with which we are concerned is Article 4.01 Option "A" which is reproduced below:

#### INSTRUCTIONAL ASSIGNMENTS

4.01 The College will establish teaching schedules that adhere to the following:

	Group 1 (Academic Post Secondary)	Group 2
Maximum teaching hours per week	19	21
Maximum teaching hours per year	700	900

Maximum teaching hours for Nursing per year		775
Maximum contact days per year	130	190

The maximum teaching hours per week shall be determined on a rolling average for a period not exceeding three months.

.....

It is understood that no teacher shall be assigned teaching hours in excess of the maximum teaching hours provided for herein except by voluntary agreement between the teacher and the college providing fair compensation (which may be by way of equivalent reduction in other teaching or non-teaching assignments or by way of monetary payments). If there is no such agreement or if there is a dispute arising out of such agreement a claim by an employee concerning compensation as referred to above for teaching hours in excess of the maximum teaching hours is subject to the grievance and arbitration procedure.

.....

The Union submitted that the grievance reflects the grievor's concern about the rolling average calculation, and that the fundamental problem to be dealt with is whether or not Article 4.01 is being properly applied. It cited Niagara College and Ontario Public Service Employees Union, (1977) unreported (Weatherill) as setting out the proper method of calculating the "roll". In connection with Fanshawe College and Ontario Public Service Employees Union, (1977) unreported (Brown), it was the Union's submission that the rolling average was not challenged there, and so it is the Niagara award alone which is crucial to the determination of this issue. It was argued that the language is clear that the "roll" should be every week because it is the weeks which are crucial in the provision. It was further submitted that the "roll" should be a smooth process - one which moves steadily onwards and that

as one gets to the end of the academic year the College must continue averaging in ever decreasing periods until it gets to the final week, to prevent a heavy back end load.

The College met these arguments with four alternative positions. Its first argument is that the determination of the period of the "roll" is not specified in Article 4.01, and therefore is a management right which has been exercised pursuant to Article 7.01 and cannot be reviewed. If it is not a management right, then the College's second argument is that Article 4.01 contemplates rolling on a monthly basis and so there has been no breach. This argument is based on the fact that a weekly "roll" would not provide maximum flexibility, because the College would be constrained to assign no more hours than it had assigned in the week being dropped. As a third alternative, the College has argued that the provision is ambiguous and so the consistent past practice of the College should determine the issue. The College's final alternative argument is that this is a case where the doctrine of estoppel should apply. This argument has two facets to it. It is argued that implicit in the Fanshawe decision (supra) is the assumption that the method of calculation was correct, even though the particular issue was not placed directly before that board. It was also argued that the Union ought to be estopped from raising the issue outside of negotiations, because it has known of the College's practice and the College has relied upon the correctness of its method to its detriment in the face of the Union's silence over the years.

Upon reading the grievance, it must be agreed that it is capable of being construed as raising the fundamental question of how the rolling average should be calculated. Clearly, the grievor's examples of what she considered to be the excessive hours she was scheduled to work

depend on a method of calculation which is different from that employed by the College. Although we were told that that was not specifically discussed in the grievance procedure, we were not told what was discussed, and have no way of judging to what extent the issue does differ from the issue which the Union argued at the hearing. At the request of counsel for the College, the board gave him as much time as he needed to consider his position in light of the Union's initial statement of the issue and to prepare his response to the Union's argument. In view of the reasonable construction which can be placed on the grievance, and taking all other relevant factors into consideration, it is our decision that the issue raised by the Union can be properly considered and determined by the board.

Having read both the Fanshawe and Niagara awards to which counsel referred, it seems clear that there is no one accepted method of calculating the rolling averages referred to in Article 4.01. In the Fanshawe case, it is quite clear that the Union was not challenging the method of rolling on a month by month basis (see page 5); the issue there appeared to be whether the College could calculate the averages using calendar weeks and months as the basis for the calculation, without deducting therefrom time when no teaching is assigned. The award upheld the College's method of calculation as being consistent with the Article. In so doing, though, it can be taken as finding that, insofar as the matter in dispute was concerned, the College was correct in interpreting the Article as allowing calendar months and calendar weeks to be used for the purpose of making the rolling average calculations. That is, it can be given a narrow interpretation and one which does not depend on the assumption that it accepted the monthly "roll" as an

integral part of the system which had to be accepted in order to make the decision on the matters in dispute.

The Niagara case is one in which the method of calculating the weekly average was totally different than that used in the Fanshawe case, and where the period of the "roll" was also different than in the Fanshawe case. The Union's position there appeared to have been that each employee could select an averaging period to maximize his teaching hours. It would appear that there are three separate opinions expressed by the members of the board in that case on the propriety of the method chosen by the college for the calculation of the rolling average, although it is clear that the chairman, Mr. Weatherill, believed that it was consistent with the manner approved of in the Fanshawe case. The weekly "roll" did not seem to be an issue in that case, although the addendum filed by the Union nominee does take issue with the fact that "weeks 4 through 13 are averaged five times", which could suggest that the weekly "roll" was part of the complaint.

In short, it does not appear that either case is of much help in resolving this matter.

The collective agreement demands that the teaching hours be determined on a "rolling average" but it does not specify the period to be used for the "roll". It does not even specify a maximum "roll" period as it does for the period to be averaged. The language used in Article 4.01 seems to be broad enough to support either a monthly or a weekly "roll" period, and it is possible to appreciate both the merits and the common sense of either period.

I do not think that it can be said that a monthly "roll" is not a "roll" within the meaning of the article. It seems to me that the basic consideration in a "roll" is that a given period of time is removed from

the equation and replaced with an equivalent period of time, provided that all periods of time used in the equation must be contiguous. A monthly "roll" as applied by the College satisfies that definition - as would a bimonthly, weekly or daily "roll" of the same sort.

It therefore appears to me that this is a case where the collective agreement is silent about the periods to be "rolled" at the time of making any one calculation. That is not to say that the collective agreement is necessarily ambiguous, but rather that the Article does not restrict the College to determining any particular period as being an appropriate "roll". Accordingly, I would have to agree with the submission made on behalf of the College that the determination of the period to be "rolled" is an exercise of management's functions within Article 7 of the collective agreement and cannot be overturned by this board. The College validly determined what the "roll" would be a number of years before this grievance arose, and so gave meaning to the Article in the collective agreement. That meaning has not varied over the years, and it would be irresponsible of this board of arbitration to upset such a long, established practice unless there was a clear violation of the collective agreement.

This board was not asked to consider what the situation would be should the College unilaterally determine that it would like to re-define the "roll" period, and the board considers that that is a totally different matter which must be considered in the light of the facts and representations made should such a case arise. This case deals only with a situation where the College validly exercised its management's rights in connection with establishing the various components of the "roll" period and then continued to apply the same method of calculation

for a number of years.

If the Article had been found to be ambiguous, then the result would have been the same in the face of the consistent practice of the College; a practice known to the Union ever since the Article came into force. In view of the finding contained herein, I do not believe that it is necessary to deal with the other issues raised by counsel. The finding does, I believe contain a full and complete answer to the grievance and to the issues raised therein. This is certainly not a case where the College has kept its method of calculation a secret from the Union; indeed there seem to have been a number of explanations of the method of calculation made over the years to various members of the Union executive, and the one arbitration case concerning the Article makes it clear that the Union knew how the College was making its calculations. It seems strange that, after all those years without any evidence of a complaint about that aspect of the method of calculation, the Union would now claim that the method is contrary to the Article. If the matter had had to be decided on the basis of the estoppel argument put forward by counsel for the College, under the circumstances it would have been difficult to ignore the force of the argument.

For all of the reasons set out above the grievance is dismissed.

DATED AT LONDON, ONTARIO THIS 8<sup>th</sup> DAY OF April, 1982

  
\_\_\_\_\_  
Gail Brent

I concur / ~~dissent~~

"E Brady" *is*  
E. Brady, College Nominee

---

I concur / dissent

L. Robbins, Union Nominee

---

IN THE MATTER OF AN ARBITRATION

BETWEEN: FANSHAWE COLLEGE OF APPLIED ARTS AND TECHNOLOGY

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND IN THE MATTER OF THE GRIEVANCE OF C. ARANTON

D I S S E N T

I have read the award of the Chairman, and regret that I am unable to concur.

The Chairman has concluded that the language in Article 4.01 is broad enough to support either a monthly or a weekly "roll" period. From that starting point, she concludes that the Article does not restrict the College to determine any particular period as being an appropriate "roll".

With respect, I disagree with that view of a rolling average. The key sentence in Article 4.01 reads as follows:

"The maximum teaching hours per week shall be determined on a rolling average for a period not exceeding three months."

It is clear to me that when weekly maximum hours are set down, and the Employer is required to determine a rolling average, it would follow that that average must be calculated every week, to test whether or not the rolling average is in fact being maintained under the limit. The Employer is in fact delaying the calculation of

...../2

the average by only applying the "three month calculation" at the end of each calendar month. In my view, this is a practice which is not provided for in the collective agreement, and is not consistent with the language.

Management is given certain leeway and discretion by the clause, but that discretion is in terms of setting out the averaging period itself. That period cannot be greater than three months. On the other hand, it may be less than three months (it may be two months, one month, two weeks, etc.). Whatever the period selected however, the Employer must calculate the hours worked at the end of every week and work backwards.

The Employer has in effect added words to the collective agreement to delay the calculation of the rolling average until certain points in time are reached, namely the end of each calendar month.

In fact, what the Employer is doing is simply using three month calculations to determine weekly averages with only some amount of overlap. The Employer should be no more able to select a one month period for these calculations than to select a two month period (e.g. Jan. 1 - Mar. 31; Mar. 1 - May 31; May 1 - July 31; etc.) or a ten week period for that matter. The longer the gap between calculations, the lower the amount of overlap in the periods being calculated. In the extreme example, the College would simply calculate

three month averages with no overlap at all (i.e., Sept. - Nov., Dec. - Feb., Mar. - May, June - Aug.). That would clearly violate the collective agreement. On the other hand, the fact that the three month periods overlap to some degree does not make this a true rolling average to calculate and determine hours per week.

To be a true rolling average, the Employer must calculate every week using the appropriate amount of time (in this case three months) in taking an average. Because the Employer has failed to do this, they have in fact violated Article 4.01(a).

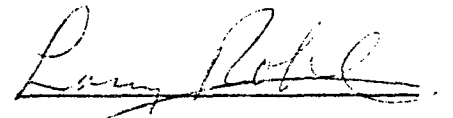
Having stated what the proper meaning of rolling average in this context should be, I must add that I can understand the Chairman's unwillingness to challenge a long established practice that the Union had been well aware of. The comments on page nine of the Award are of particular importance in this regard, especially where it states that this Award is not intended to give the Colleges the right at any time to alter the period to be rolled to their advantage. That would in fact be a totally different question altogether. In this case, the long standing existing arrangement was a major factor in leading to the majority Award.

On the other hand, I must make it clear that the evidence falls far short of what is required to successfully argue an estoppel. There is no evidence of anyone in a position of leadership in the Union making any specific representations to the Employer that they accepted the Employer's method of interpretation of the collective

agreement. We do have the simple fact of the system existing, and everyone apparently being aware of it, and no grievance being filed for several years. On the other hand, we have no way of knowing the extent to which such a dispute over the method of averaging would have brought people into a situation where they were adversely affected. In many cases, the employee's workload might be within the maximum whichever system of calculation is used. Only if they were adversely affected, would employees be likely to grieve. For that reason, one must be very careful in drawing inferences of estoppel from a simple past failure to grieve. Therefore, the Employer's practice, however longstanding it may be, should be struck down if it is in conflict with the collective agreement.

For all of the above reasons I would have allowed the grievance.

Respectfully submitted

A handwritten signature in cursive script, appearing to read "Larry Robbins", written over a horizontal line.

Larry Robbins

Dated this 30th day of March, 1982  
at Toronto, Ontario

