

93F600 CRICH ET AL VS FANSHAWE

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND
TECHNOLOGY IN THE FORM OF FANSHAWE COLLEGE
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(FOR ACADEMIC EMPLOYEES)
(hereinafter called the "Union")

GRIEVANCES OF LOU NEWELL, COLLIN PATTERSON, FRANK HASTIE, FRED
FAAS, MORRIS HOOVER, ROSS CRICH, S. HUNT, AND JOSEPHINE PELLER
OPSEU FILE NOS. 93F600 - 93F606
(hereinafter called the "Grievors")

BOARD OF ARBITRATION:

Richard H. McLaren

Jon McManus, Union Nominee

David Guptill, College Nominee

COUNSEL FOR THE COLLEGE:

Barry Brown

COUNSEL FOR THE UNION:

Chris Paliare

A HEARING IN RELATION TO THIS MATTER WAS HELD AT LONDON, ONTARIO, ON
FEBRUARY 4, 1994.

PRELIMINARY AWARD

There are eight (8) Grievors involved in these proceedings. In essence, the grievance for each of them is in similar terms. The grievance of Mr. Lou Newell, dated June 23, 1993, is taken to be representative of the other Grievors and reads as follows:

On November 1, 1991 the Joint Educational Qualifications Subcommittee voted on the following motions:

- (i) That all individuals possessing a B . A. and B. Ed. should get step 16 (maximum salary progression)
- (ii) That individuals with a Teaching Certificate, achieved as a result of 180 hours of study, and therefore comparable to the In Service Training, have maximum Step 16.

On April 20, 1993 Arbitrator McLaren ruled that the two motions became actions of the committee upon which the Colleges are required to act.

When I became aware of the above, I wrote to you in early June and requested that these rulings be applied to me. The College's response was that they refused to do so. I can not agree with this decision.

Therefore, I grieve the College is violating Article 14 and Appendix 2 et al of the Collective Agreement. As remedy I seek that the College apply the rulings of the JEQS and Arbitrator McLaren to me thus recognizing my qualifications as being maximum step qualifications. I seek this retroactive to November 1, 1991, with interest.

The Counsel at the time of the commencement of the hearings in this matter agreed that the grievances had been properly processed through the grievance procedure and that the matter was properly before the Board of Arbitration. The first day of hearings was taken up with a procedural argument with respect to res judicata and issue estoppel from the Union; and, a preliminary jurisdictional point from the College. It is as a result of these submissions that the present preliminary award is written.

On April 20, 1993, a Board of Arbitration issued a majority decision, comprised of the present Chair and Union Nominee Mr. Jon McManus, in respect of a grievance filed between the present parties to this proceeding in the grievance of Mr. Gary Fordyce. In that award a question arose as to the implications of a meeting of the "Joint Educational Qualifications Subcommittee",

known as JEQS, and its impact on the Fordyce grievance. The majority of the Board of Arbitration found at the bottom of page 15 and top of page 16 that:

...Therefore, as a matter of law, this Board of Arbitration ought to conclude that there was a consensus, as the Committee has required in the past, in order for motions to be confirmed. The Board also concludes that the meeting was properly established pursuant to the JEQS Committee's own procedure, in view of its interpretation of the collective agreement. There was a quorum present and it must be concluded, given the findings of law by this Board, that there were two motions approved by the Committee, which must be considered as motions of the JEQS Committee pursuant to Appendix 1, paragraph 4. Therefore, the College is unable to act as it did in denying the grievance of the Grievor. The Board of Arbitration declares that there was a motion of the Committee which entitled the Grievor to its benefits...

The parties were unable to agree as to the implementation of the majority award in respect of the Fordyce grievance as it might affect anyone other than Mr. Fordyce. This resulted in the further re-convening of that Board for the purpose of hearing evidence and argument with respect to the remedies which ought to flow from the declaration made by the majority of the Board in its award of April 20, 1993. A unanimous Supplementary Award as to the remedy was issued in an award dated December 14, 1993.

Between the Supplementary Award and the majority declaratory award in the Fordyce grievance the Grievors before this Board filed their grievances, all dated June 23, 1993, or thereabouts. The Grievors allege entitlement to the benefit of the rulings of the JEQS committee found to have been made as a result of the meeting of November 1, 1991, which were recognized and declared to exist by the arbitration decision of April 20, 1993.

The relevant provisions of the predecessor collective agreement as set out in the Fordyce award at page 1 and 2 read as follows:

In Appendix 1 of the extended agreement under the heading "Guidelines", in paragraph 4 beginning at page 70, the collective agreement provides:

The parties agree to the establishment of a Joint Educational Qualifications Subcommittee to consider and rule on further formal educational qualifications for the purpose of maximum salary level identification under the salary scale. Such Committee shall be composed of three (3) representatives of the Union and the Council of Regents respectively and shall decide the Committee's procedures. Any further qualification must be agreed to by the representatives of both the Council of Regents and the Union and shall be in writing.

Pursuant to this provision and its predecessors there has been a JEQS Committee in existence since June of 1975. It was formed "as an off-shoot of the C.A.A.T. Academic Negotiating Teams". The interpretation the JEQS Committee placed upon the provision in the Collective Agreement is found in its manual (Exhibit #5). In the closing paragraph of its history at page 3 the Committee provides its interpretation of the Collective Agreement provision under which it has operated over the years. It reads as follows:

"The JEQS meets on a regular basis to consider individual submissions. Committee decisions are made only at meetings which are attended by a minimum of two representatives of each party. Decisions are made on a consensus basis and are final and binding."

(Exhibit #6 in this proceeding)

The provisions of the predecessor collective agreement expired on August 31, 1991. That agreement was extended until a new collective agreement was assigned on November 9, 1992. In the meantime, the JEQS met on November 1, 1991, during the extension period of the predecessor collective agreement. The Fordyce grievance was filed under the extended collective agreement on December 2, 1991. Therefore, the Fordyce award was issued in response to a grievance filed under the predecessor collective agreement and relates to its interpretation and application to the grievance.

The relevant provisions of the renewal collective agreement read as follows:

Article 14
SALARIES

14.03 A 4 Employees with the following qualifications shall be entitled to progress to the maximum step on the salary schedule:

- (i) A General Pass University degree plus a Bachelor of Education degree;
- (ii) Three year CAAT Diploma or General Pass University Degree or Certified Journeyman holding equivalent qualifications, plus a valid Ontario Teacher's Certificate granted before 1992 or equivalent as may be ruled on by Joint Educational Qualifications Subcommittee (JEQS);
- (iii) A General Pass University Degree, plus a valid Ontario Guidance Specialist's Certificate granted before 1992 or equivalent as may be ruled on by the JEQS; or

- (iv) The In-Service Teacher Training Program Certificate. As this is a unique in-service College program, equivalencies are not considered.

APPENDIX II JOINT EDUCATIONAL QUALIFICATIONS SUBCOMMITTEE

- the provisions of this Appendix are identical to those quoted from Appendix I of the predecessor collective agreement and are not repeated here but set out above at p. 4.

As is noted in the Fordyce award at page 5/6 the first motion of the JEQS meeting of November 1, 1991, is now incorporated into the renewal agreement by the parties as a result of their collective bargaining in clause (i) of Article 14.03 A 4. The second motion of the JEQS is the subject of clause (iv) of Article 14.03 A 4. Their motion made a Teaching Certificate comparable to in-service training. The collective agreement in clause (iv) states that the in-service training is unique and therefore no equivalencies are considered. The difference between the word "comparable" and "equivalencies" is made much of in the argument of the Union.

In support of its position it is argued on behalf of the Union that the JEQS is an ad hoc collective bargaining arm of the parties whose purpose is to determine comparable educational qualifications amongst members of the bargaining unit to ensure some measure of uniformity across the community college system in the province of Ontario. It is submitted that the determination that there was a JEQS meeting on November 1, 1991, and what it decided is either *res judicata*; or, issue estopped from being re-determined by this Board in this award. In essence it is submitted that the College cannot add new or different evidence on these issues in these proceedings. In support of the primary position of the Union reference was made to the following case:

Re CUPE and Extendicare Health Services Inc. (1993), 14 O.R. (3d) 66 (C.A.).

In support of the College's position in response to the Union's primary argument it is submitted that the Fordyce award misconstrued a provision of the collective agreement and, therefore, its interpretation is in error. Where this is the case the arbitral jurisprudence indicates that there is no requirement that a subsequent Board of Arbitration must apply the prior decision particularly where that subsequent Board of Arbitration is constituted under a different and revised collective agreement. Therefore, the College can call appropriate evidence to argue this case unaffected by any prior evidence and any prior proceeding because the matter is not *res judicata*. It can call further new and different evidence in regard to the JEQS meeting of November 1, 1991 and is not issue estopped. In support of these propositions reference was made in the submission of the College to the following jurisprudence:

Isabelle v. Ont. Public Service Employees Union (1981), 122 D.L.R. (3d) 385 (Ont. S.C.C.); Re Manitoba Food Union and Canada Safeway (1981), 120 D.L.R. (3d) 42

(Man.C.A.); Re Artcraft Engravers Ltd., 12 L.A.C. (4th) 363 (Brent, 1990); Re Steel Co. of Canada Ltd. and U.S.W., 27 L.A.C. (2d) 252 (McLaren, 1980); and, an unreported decision between Loyalist College of Applied Arts and Technology and Ontario Public Service Employees Union (For Academic Employees), chaired by Arbitrator Howe, in an award dated January 26, 1994.

In support of its position the College also raised a preliminary point. It was submitted in this preliminary aspect that the collective agreement was signed in November of 1992 and it ended the continuing agreement under which the JEQS decision of November 1, 1991 was made. It was submitted that the changed and revised collective agreement applied and not the committee determinations of JEQS. In support of its preliminary position reference was made to the following arbitration decisions:

Re Goodyear Canada Inc., 28 L.A.C. (2d) 196 (Picher, 1980); Re Parkwood Hospital, 4 L.A.C. (3d) 215 (Weatherill, 1984); Re Romi (A Division of Ault Foods Ltd.), 25 L.A.C. (3d) 377 (Weatherill, 1986); Re F.B.M. Distillery Co. Ltd., 31 L.A.C. (3d) 122 (Brown, 1987); Re Mack Canada Inc., 2 L.A.C. (4th) 304 (Burkett, 1988); Re International Nickel Co. of Canada Ltd., 22 L.A.C. 286 (Weatherill, 1970); and, an unreported decision between St. Lawrence College of Applied Arts and Technology and Ontario Public Service Employees Union, chaired by Arbitrator Burkett, in an award dated December 31, 1991.

In reply to the preliminary argument as to the jurisdiction of this Board, the Union submitted that the College was attempting to shut down the Board's jurisdiction to determine the matter under Article 14.03 A 4 (iv). It was further submitted that a distinction is to be drawn between the language of the collective agreement which states entitlement to "progress" with no "equivalencies" to the in-service teacher training programme and the JEQS motion, which decides that an in-service teaching certificate is "comparable to the in-service program" and therefore, "have a maximum of step 16" Therefore, the motion of JEQS deals with a different subject matter than the collective agreement and is res judicata or issue estopped with respect to this different determination. In the alternative, if the College is somehow correct in its position on clause (iv) the Grievors are entitled to be paid as they now request as a result of the November 1, 1991 determination of the JEQS. They had a vested right and Article 14.03 A 4 cannot take that away. All that is required is a determination in a retrospective order that they were entitled to be paid as per the JEQS decision of November 1, 1991. In support of that proposition, reference was made to the following cases:

Re Dayco (Canada) Ltd. (1993), 102 D.L.R. (4th) 609 (S.C.C.); and Re Regional Municipality of Ottawa-Carleton, 16 L.A.C. (4th) 353 (Haefling, 1990).

DECISION

1. The Jurisdiction of this Board of Arbitration

These grievances were brought in June of 1993 under the current collective agreement which was signed on November 9, 1992 and, not under that of the predecessor collective agreement under which the Fordyce declaratory arbitration and supplementary remedial award were issued. They were brought after the Fordyce award as a result of its existence. The basis for filing them stems from the interpretation of a prior collective agreement by the Fordyce award. If the Grievors are entitled to be paid as they allege; then their rights must arise under the present collective agreement under which they filed the grievances and not under its predecessor and the interpretations of it by way of the Fordyce award. They had the opportunity to have filed their grievances under the predecessor collective agreement as did Mr. Fordyce. They chose not to do so. They are, as a consequence, required to apply the current provisions of the collective agreement in the determination of their grievances.

The Salary Schedule of the prior collective agreement provided:

APPENDIX 1 SALARY SCHEDULES (Effective September 1, 1990)

(a) Professors and Counsellors and Librarians

The salary maxima are established in terms of relevant formal education levels and equivalencies as listed below:

| | |
|---------|---|
| Step 16 | 58,710 Maximum Salary - 4 year Canadian University Degree or more; C.G.A; P.Eng; C.A.; or C.M.A. (formerly R.I.A.); In-Service Teacher Training Program Certificate |
|---------|---|

NOTE: Formal educational qualifications not specified above will be subject to evaluation by the Joint Educational Qualifications Subcommittee.

(Exhibit #5)

At p. 29 of the current collective agreement the present applicable provision is found described as "Maximum Salary Table". It provides:

"Maximum Step on the 4-year Canadian University salary schedule (maximum) Degree or more; C.G.A.; P.Eng.; C.A.; C.M.A. (formerly R.I.A.)

A comparison of the applicable provisions reveals that the parties have radically restructured all the collective agreement provisions relating to salaries. In so doing they have specifically deleted the reference at Step 16 to the "In-service Teacher Training Program Certificate" reference in

Appendix 1 of the prior collective agreement. Instead they have inserted into the present collective agreement Article 14.03 A 4.

Article 14.03 A 4 in clause (i) provides for entitlement to progress to the maximum with a "General Pass University degree plus a Bachelor of Education degree". The first motion of the JEQS committee on November 1, 1991 read "...all individuals possessing a B.A. and a B.Ed. should get step 16 (maximum salary progression)" (Exhibit #6 at p.5). Under Article 14.03 A 4 in clause (iv) the parties provided entitlement to progress to the maximum step on the salary schedule for those employees with the "... In-Service Teacher Training Program Certificate". In so providing they also stated that "As this is a unique in-service College program, equivalencies are not considered" (emphasis that of this Board). The second motion of the JEQS committee on November 1, 1991 read "That individuals with the teaching certificate, achieved as a result of 180 hours of study, and therefore comparable to in-service training, have maximum step 16".

The above examination of the salary table and the collective agreement article reveals that the parties have by their collective bargaining chosen to incorporate, but not in identical terms, the motion of the JEQS committee as a provision of the renewal collective agreement in the form of Article 14.03 A 4 (i). They also chose to reverse the JEQS committee in its second motion when it determined that a teaching certificate achieved with 180 hours of study was comparable to in-service training. The parties were completely free to act in the fashion in which they have done. What is the effect of their actions?

The JEQS committee is merely an emanation of the parties. In the Fordyce award it was described at p. 1 as:

It was formed 'as an off-shoot of the C.A.A.T. Academic Negotiating Teams'.

In the current collective agreement at p. 29 the "Maximum Salary Table" Article 14.03 A 1 (b) the Note indicates:

Formal educational qualifications not specified above will be subject to evaluation by the Joint Educational Qualifications Subcommittee, as described in Appendix II.

Appendix II is identical to a paragraph in the predecessor collective agreement in Appendix 1 under the heading "Guidelines" in paragraph 4 which is quoted in the Fordyce award at p. 1. The JEQS committee is an emanation of the parties. As the Note to the Maximum Salary Table indicates, it evaluates formal education qualifications where they have not been specified by the parties themselves. It is an ongoing ad hoc extension of the parties bargaining which is empowered to make final and binding decisions on qualifications where the parties have not done so themselves in the collective agreement. It is an inferior body to them and is only intended to have effect where the parties collective agreement is silent. The JEQS committee has effect under a collective agreement to the extent it acts within its jurisdiction, which the Fordyce award held it had done under the predecessor collective agreement. When the parties come to

bargain and choose to elevate one of its motions into the collective agreement they are completely free to so act. They are also free to reverse the effect of an earlier motion. In either case the motion no longer exists. Instead, there is a provision in the collective agreement replacing the motion. The JEQS committee in effect fills in the gaps where required. It is not empowered to amend the collective agreement by putting in place or continuing earlier motions contradictory to the collective agreement.

The provision of the current collective agreement which would apply to the grievances is clause (iv). For those who do not otherwise have entitlement under the preceding clauses of 14.03 A 4 they can achieve it by way of the "In-Service Teacher Training Programme Certificate". However, if they have not achieved that qualification the clause goes on to provide that "equivalencies are not considered". The second motion of the JEQS committee of November 1, 1991 would have permitted those individuals with a "...teaching certificate, achieved as a result of 180 hours of study. . . ." to be considered as a " . . . comparable to in-service training, have maximum step 16". The second motion contradicts the language of the current collective agreement. The current collective agreement achieves this contradiction by the use of different language of no "equivalencies" rather than a specific comparable. Nevertheless, its effect is to render the motion of the emanation of the parties' bargaining relationship nugatory in its impact because the renewal collective agreement has a provision within it which deals with the subject, albeit in slightly different language. The fact that the language is different in the collective agreement from that of the JEQS committee motion is immaterial to the conclusions here because it is the parties change as a result of the bargaining process which renders the earlier motion nugatory. Therefore, it is unnecessary to compare the variations in language despite the able argument of Union counsel as to the significance of those variations.

All of the foregoing means that the jurisdiction of this Board only goes to interpreting and applying the current collective agreement. The grievances were brought after the new collective agreement was in place. The salary structure created in the new agreement had been the subject of bargaining between the parties. The grievors had an interest in what occurred at the bargaining table. A motion of the JEQS committee under the predecessor collective agreement which contradicts that agreement cannot affect the interpretation or application of the current agreement.

The situation which arises in this case is a variant of the Re International Nickel Co. of Canada Ltd. and Re GoodYear Canada Inc. cases, supra. In those cases it was held that an employee could not bring a claim under an existing collective agreement by way of a claim to entitlement arising under an expired agreement. It is submitted that this case is not subject to this principle because it is either res judicata; issue estopped; or, there are vested rights so as to make it a continuing grievance of an ongoing breach of the current agreement which is a recognised exception to the principle just stated.

2. Res Judicata

The principle of res judicata as it applies in arbitration decisions was described by the present Chair in the decision of Re Steel Co. of Canada, Ltd., *supra*, at p. 257:

... [it] arises where a board is called upon to decide an issue that is identical to one decided by an earlier arbitration board, involving the same parties and under the same or an unaltered collective agreement...

As has already been discussed above the language of the current and predecessor agreements are not identical. While the same parties are involved and the facts would appear to be identical the agreement is a different one. The issue of whether the Grievors are being correctly paid under the current collective agreement is not identical to the issue decided under the predecessor agreement because the language has changed and the JEQS committee motions have been inserted into the current agreement. The Fordyce award is dependent on the JEQS committee motions. The current grievances are dependent upon an interpretation of the revised and different current collective agreement. In the course of interpreting the collective agreement the Union argues that the factual determinations as they relate to the JEQS committee cannot be redetermined by this Board That is more in the fashion of an argument as to issue estoppel than res judicata. The principles of res judicata do not apply to the present grievances. This is the case regardless of the argument of the College that the Fordyce award is incorrect and ought not to be followed. This line of reasoning only applies if res judicata is found to be applicable but discretion will not be used to apply the principle because it is thought the prior decision was manifestly wrong. That question of interpretation of the prior award does not have to be determined here because the principle itself is found not to apply.

3. Issue Estoppel

The question of issue estoppel is fully discussed in a judgment of the Divisional Court in Re Greater Niagara Transit Commission and Amalgamated Transit Union, Local 1582 (1987) 61 O.R. (2d) 565. The Commission had suspended an employee charged with theft from its fare boxes and monies received for other purposes. The suspension was to remain in effect pending the disposition of the criminal charges and/or further review. In statements to the police made prior to the charges the employee admitted to having taken monies from the employer. The trial judge in the criminal hearing excluded the statements pursuant to s. 24(2) of the Canadian Charter of Rights and Freedoms because it infringed the accused's right in s. 10(b) to retain and instruct counsel without delay. After the dismissal of the charges, the Commission dismissed the employee. A board of arbitration was constituted in accordance with the terms of the collective agreement with the present chairperson as its chair. A majority held that the employee ought to be reinstated to employment although not necessarily to the particular job or any other one of trust. It did so because the majority held that the evidence excluded by the trial judge was

inadmissible in the arbitration proceedings. That being the case there was insufficient evidence to uphold the discharge. See Re Greater Niagara Transit Commission, 26 L.A.C. (3d)

1 (McLaren, 1986).

As a result of this decision an application for judicial review was made and granted. In that decision it was said at p. 581:

There is one final matter of general principle which ought to be here mentioned ... As a general rule, interlocutory findings of fact made in one proceeding, as for example a criminal trial, do not engage the operation of the doctrine of issue estoppel in subsequent proceedings, whether of the same or different type, between different parties, in view of the absence of elements of finality and identity of issues critical to the operation of the doctrine.

The court then noted that an arbitration board is not strictly confined in its reception of evidence to admit only that which is receivable in a court of law because of the provisions of the Labour Relations Act which confers discretionary powers to receive evidence whether admissible in a court of law or not. Therefore, to treat the ruling in the criminal proceeding as determinative of the admissibility issue as it emerges in the arbitration proceedings, is inimical to the underlying principle and meaning of the evidentiary provision of the Labour Relations Act.

The Board of Arbitration in a subsequent decision admitted the evidence found the grievor to have committed theft and upheld the discharge in a decision reported at 34 L.A.C. (3d) 283 (McLaren, 1988).

The very able argument of the counsel for the Union amounts to the submission that the College is estopped from relitigating the findings of fact as to the existence of a meeting of the JEQS committee on November 1, 1991 and what motions were passed as a consequence. The principles set out above require this Board to exercise its discretion to determine if the evidence ought to be heard again concerning the JEQS committee and its meeting of November 1, 1991 or determine that the issue is estopped from being relitigated. The submission is that public policy of the justice system, and here of the arbitral system, requires that the matter be litigated fully once and then not relitigated. While if these eight grievances were not heard together it might be possible to apply issue estoppel in the seven arbitration hearings subsequent to the first hearing and determination. However, that is a different situation than what is asserted to be estopped here. In essence it is said that no other finding of fact as to the JEQS committee matters is to be made than that contained in the Fordyce award. The Board has already determined that the matter is not res judicata which means that the Board is not required to apply the prior Fordyce decision to the issues before it. In view of the Board's disposition of the vested rights arguments of the Union set out below; and the jurisdictional discussion above it is inappropriate for this Board to apply issue estoppel to the findings of fact contained in the Fordyce award. It will, therefore, in any further evidentiary proceedings in these grievances decline to exercise its

discretion to apply issue estoppel to the facts as to the JEQS committee matters as set out in the Fordyce award.

4. Vested Rights from Predecessor Agreement

It is submitted by the Union that when the Fordyce award retrospectively declared that there was a JEQS committee meeting and that it passed two motions on November 1, 1991 it had the effect of establishing rights in the present Grievors. Their grievances are a claim under the current collective agreement to enforce an entitlement arising under the prior agreement and continuing to be violated under the current one.

On November 1, 1991, with the benefit of the Fordyce award, it could be said that the present Grievors had entitlement to step 16 of the maximum salary progression. They did not grieve under the predecessor collective agreement. The parties drafted revised language to deal with the issue of equivalent or comparable qualifications to the In-service Teacher Training Program Certificate in the current collective agreement. The JEQS committee motions under the predecessor agreement were merely the actions of an emanation of the parties which they were free to change in collective bargaining and did not in fact so do. In that bargaining process resulting in the current agreement the claims the Grievors might have had under the predecessor agreement were altered by action of the parties. For this Board to determine that they held vested rights carrying forward under the collective agreement is to rewrite the collective agreement contrary to the parties specific collective bargaining. There were no vested rights. The Grievors had rights under the predecessor agreement which they did not pursue. It is too late for those vested rights to be pursued under the revised current agreement.

This case is not like the cases cited to the Board by the Union where reference back to a prior agreement is made in the process of determining a starting position for calculating things such as seniority, pension rights, or vacation entitlement under a current agreement. The employment relationship is a continuing one and from time to time it is necessary to review an individual person's position under a prior agreement in order to determine either how to treat them under the current agreement or determine entitlements under it. In that sense there can be reference back to prior agreements. What is desired here is reference back to establish a right no longer in existence under the current agreement because it was taken away in collective bargaining. There can be no reference to the predecessor agreement in order to establish a claim under the current one.

In so determining the Board rejects the alternative argument of the Union that the grievors possessed vested rights under which they are entitled to be paid as per the JEQS

determination as of November 1, 1991. This Board is constituted under the current collective agreement which it must interpret and apply to the grievances.

Conclusions

The Grievors' grievances are to be determined under the provisions of the current collective agreement which is the only one this Board has jurisdiction to interpret and apply. In so determining them the interpretation issues are not res judicata because of the Fordyce award. To the extent that the JEQS committee was found as a fact to have met on November 1, 1991 and to have passed two motions, these facts have been determined but are not estopped from being redetermined in this proceeding to the extent that those facts may arise in resolving the present grievances.

With the foregoing conclusions the matters giving rise to this preliminary award have been disposed of. The grievances are to be determined under the current collective agreement using the principles enunciated in this award. If the parties wish to proceed to have the grievances heard they are to advise the Chairperson of this Board in writing of that desire within thirty days of the date of this award. If no such advice is received it is ordered that the grievances be dismissed because there had been no violation of the collective agreement.

DATED AT LONDON, ONTARIO THIS 30th DAY OF MARCH, 1994.

Richard H. McLaren, C.Arb.

I dissent

See Attached Dissent

Signed "Jon McManus"

Jon McManus, Union Nominee

I concur

Signed "David Guptill"

David Guptill, College Nominee

DISSENT

I have had the opportunity of reviewing the award of the majority and with respect I must dissent. My comments are restricted to the issue of vested rights from a predecessor agreement and the application of the analysis from the Re Regional Municipality of Ottawa Carleton case

What the Fordyce award determined was that people in Mr. Fordyce's position (including the present grievors) should have progressed to Step 16 on the salary grid as of November 1, 1991. In other words, as a matter of law, as of that date these grievors should have been at Step 16.

In the Ottawa-Carleton case, the grievors were entitled to grieve their current vacation credits by an examination of their incorrect treatment under past collective agreements. There was no dispute that the employer was currently accruing vacation credits properly in accordance with the collective agreement in respect of their current service. Rather, it was determined that the grievors' total accrued service was incorrect because of past improper accruals. Further, this was an appropriate subject matter for a grievance under the present collective agreement.

The majority here distinguishes the Ottawa-Carleton case on the basis that in Ottawa-Carleton, the collective agreement language did not change. With respect, I must disagree. In our case, the issue is not the application of the current collective agreement language to past periods. That would be entirely inappropriate. Rather, the current collective agreement provides a current right to have certain entitlements. In some cases, a current entitlement may be subject of the accumulation of prior accruals, including accruals over periods of time covered by prior collective agreements. In Ottawa-Carleton, it was the accrual of vacation credits. Here it is the accrual of pay steps in the salary progression.

If the accruals were improperly calculated in the past, the current entitlement will also be in error. To determine the correctness of past accruals, the standard to be applied must be the collective agreement in force at the time the accrual occurred (or should have occurred). Otherwise, the result is grossly unfair to the individual employee and the employer becomes the beneficiary, in perpetuity, of failing to properly apply new pay increments.

It can not be disputed that as of November 1, 1991 the grievors should have been at the top step of the pay grid. Based on the majority's analysis, the new collective agreement arguably removed the ability of such persons to progress to the top step as of the date it came into force. However, as a matter of law, the grievors already had the right to be at the top step. The grievors do not seek to progress to the top step under this collective agreement. Rather this progression (or accrual) was wrongfully denied them under the prior collective agreement. Because their current place on the grid is simply a product of their past accruals, their correct current entitlement must be at the top step.

The change in the collective agreement determines entitlement to progress on a prospective, not a retrospective basis. The current collective agreement took away the right to progress to the top step for persons who would have otherwise acquired this right after that date. But for the

wrongful conduct of the employer, these grievors should already have been at that step. Had that progression been accrued correctly, these grievors would have been at the top step today. That is their correct current entitlement under the current collective agreement. That is something which they are entitled to grieve.

In the result, I would have dismissed the Employer's preliminary objection and allowed the matter to proceed.

JON McMANUS