

94B925 DAILEY VS ST LAWRENCE

IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

- and -

ST. LAWRENCE COLLEGE OF APPLIED ARTS AND TECHNOLOGY

Grievance of **Campbell Dailey**
OPSEU Nos. 94B925, 94B926, 94B927, 94B928 (Support)

Before: R. O. MacDowell	- Chairman
Larry Robbins	- Union Nominee
Hugh John Cook	- Employer Nominee

Appearances:

For the Union:	Gavin Leeb, Grievance Officer Sara Manoll Betty Downing
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For the Employer:	Catherine L. Peters, Counsel Blayne Mackey Cynthia Bleakney
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For Erna Finlay:	David J. McMurray, Counsel
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Hearing held in Kingston on November 25, 1994 and April 11, 1995.

A W A R D

I - What this case is about

This is the grievance of Campbell Dailey ("the grievor") who contends that he has been improperly laid off. The grievor asserts that when his layoff was being considered, the College miscalculated the seniority of certain other employees, with the result that he was disadvantaged in the layoff/bumping procedure set out in Article 15.4.3 of the collective agreement. The grievor argues that the College either failed to apply, or misapplied, Article 14.3 of the agreement, and credited those other employees with more seniority than they were entitled to under the terms of the agreement.

The College replies that there has been no breach of the collective agreement. It did not "misconstrue" Article 14.3, because that section has no bearing on the seniority status of the individuals to whom Mr. Dailey refers. The seniority rights of those employees are determined by Appendix B of the collective agreement, not Article 14.3 and Appendix B makes their seniority credit equivalent to their length of continuous service as an employee. On that basis, these employees had more service and more seniority than the grievor.

The College further contends that this grievance is "untimely", because it was not filed within the time limits prescribed in Article 18.6.1 of the agreement. The College maintains that these time limits are "mandatory" and that the grievor's failure to follow them results in the deemed abandonment of his complaint. In the College's submission, Mr. Dailey's grievance is not arbitrable.

Finally, the College contends that even if the grievance is timely, and even if there is some arguable case that Article 14.3 applies, the-grievor is estopped from pressing his present claim because in 1991 and 1993 the union agreed that Appendix B of the collective agreement is the one which applies to the employees whose seniority Mr. Dailey challenges. The College submits that, whether or not Article 14.3 might be applied to these individuals, the union has consistently warranted that it does not apply, and that Appendix B does. In the College's submission, the union cannot now resile from those repeated representations.

II - Jurisdiction and the terms of the agreement

The parties are agreed that this arbitration panel is properly constituted and that it has jurisdiction to hear and determine the matters in dispute between them.

Third-party notices were given to the individuals whose seniority status is potentially under review in this proceeding. One of those individuals appeared with counsel. Another appeared as "an observer", but did not take an active part in the proceeding. The position of these third parties was the same as that of the College.

In the result, however, we have found it necessary to deal only with the College's "timeliness" and "estoppel" arguments. We shall have more to say about that below.

The provisions of the collective agreement to which reference will be made are as follows:

1.1 Exclusive Bargaining Agent

The Union is recognized as the exclusive bargaining agent for all Support Staff employees of the Colleges, save and except:
[list of exclusions]

1.4 Excluded Persons

Persons who are found to be bargaining unit employees as a result of specific decisions of the Ontario Labour Relations Board or by agreement of the Council/College and the Union, and whose former status was administrative or excluded staff, shall be governed by this Agreement and Appendix .

18.2.1 Time

If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

18.6.1 Grievances

A complaint shall be taken up as a grievance in the following manner and sequence provided it is presented within fifteen (15) days after the circumstances giving rise to the complaint have occurred, or have come or ought reasonably to have come to the attention of the employee.

APPENDIX B INCLUSION PROCEDURES

The parties recognize that the question of whether or not a particular person is or is not a member of the bargaining unit has not traditionally been dealt with at the bargaining table, and has normally been resolved by direct discussion between the Council/College and the Union or by the Ontario Labour Relations Board based on the existing duties and responsibilities of the person in question.

The following conditions are applicable to persons who are employed by a College of Applied Arts and Technology (hereinafter called "the College") in positions designated as Administrative Staff or otherwise excluded from the Support Staff Bargaining Unit and who are found to be bargaining unit employees as a result of specific decisions of the Ontario Labour Relations Board or by agreement of the Council College and the Union:

1. **Terminology**

...

(ii) "Employee" or "Employees" shall refer to persons who are employed by a College in positions designated as Administrative Staff or otherwise excluded from the Support Staff Bargaining Unit and who are found to be Bargaining Unit employees as a result of specific decisions of the Ontario Labour Relations Board or by agreement of the Council/College and the Union.

2. Application

This Appendix shall apply to any persons included in the Support Staff Bargaining Unit by decisions of the Ontario Labour Relations Board or agreement between the Council/College and the Union, from January 1, 1980, and thereafter.

5. **Seniority**

Employees will be accorded full seniority based on length of service with a College calculated in accordance with Articles 14.1 and 14.2.

* * *

14.3 Transfer Into Union

A person employed by the College, who is transferred into the bargaining unit, will be accorded full seniority upon completion of the probationary period, based on length of service. Part-time support staff employees transferred into the bargaining unit, after November 14, 1991, shall have their seniority prorated, upon completion of their probationary period, based on a proration of hours of the part-time position to the hours of the full-time position using 1820 hours per year as constituting the hours of the full-time position.

It is understood, however, that for the purposes of the application of Article 15.4, supervisory personnel and employees in the academic staff bargaining unit, who are transferred into the bargaining unit shall be entitled to exercise only that portion of their seniority, if any, accumulated as an employee in the bargaining unit or what formerly was the bargaining unit.

(emphasis added)

The general background for this case is not substantially in dispute.

III - Background

Under the Colleges Collective Bargaining Act and Article 1.1 of the collective agreement, the Ontario Public Service Employees Union ("OPSEU") is recognized as the exclusive bargaining agent for a bargaining unit of support staff employees at each College. However, the perimeter of that bargaining unit is defined in very general terms, so that from time to time, there can be questions about whether particular employees are in the bargaining unit or excluded from it. When those issues arise, they are either resolved between the parties, or are referred to the Ontario Labour Relations Board for a final and binding determination (see Article 1.4 and Appendix B).

In early 1990, John Molleson, President of OPSEU Local 418, questioned whether certain individuals were properly excluded from the support staff bargaining unit. As he put it at the time:

I believe that employees of the College who are currently excluded from the Bargaining Unit may in fact be-bargaining unit members.

He requested that the College provide him with a list of excluded individuals so that the union could investigate the situation and pursue the matter at the Union College Committee ("UCC"). The UCC is a joint consultation and problem-solving body, that includes members of management, the Presidents of Union Locals 418 and 419, and certain other union officials.

The debate about the number of exclusions continued for almost a year after Mr. Molleson's letter. The inquiry began with a list of 75 disputed individuals, however that list was subsequently reduced to about 35-40 who became the focus of particular consideration. Ultimately it was determined that there were 18 "excluded" individuals who should really be in the bargaining unit, because their actual job duties did not support their exclusion.

Cindy Bleakney is an employee in the College's Human Resources Department. Ms. Bleakney was involved in the 1990-91 discussions about who should be included in the bargaining unit. Ms. Bleakney was a candid and credible witness.

Ms. Bleakney testified that the College was quite reluctant to reconsider the position of the excluded individuals, if the result might be prejudicial to them. Accordingly, before reaching agreement with the union, the College sought the agreement of the disputed individuals, assuring them that it would seek an "official ruling" (i.e. from the OLR13) if that was their wish. The College did not

want to see them disadvantaged, even if their exclusion was in error. That is why it was eventually agreed that the terms and conditions of employment for these people would be "green-circled" (i.e. maintained at their "Administrative" level) so long as the incumbent remained in his/her position. It was also agreed that their seniority would be dealt with in accordance with Appendix B, item 5 of the collective agreement (reproduced above) - that is, that they would receive full seniority credit equivalent to their length of service with the College.

We might observe, at this point, that Ms. Bleakney's testimony concerning the result of these discussions is totally uncontradicted, and completely consistent with the text of letters sent to the employees concerned shortly after the agreement with the union was concluded in the spring of 1991. Copies of those letters were sent simultaneously to the President of Local 418. However, no one from the union suggested at the time that this was not the parties' understanding. Nor did the union call evidence to rebut Ms. Bleakney's recollection of the substance of the agreement even though one of the union officials involved in 1990-91 was present throughout the arbitration proceeding. On the other hand, the parties did not reduce that agreement to a single written document, and had that been done, it might have avoided some of the controversy that arose later.

Since 1991, the master seniority lists have reflected this calculation of seniority for the successfully challenged employees. Those lists are posted every four months with a copy to the local union president. Until the instant grievance (and with one exception discussed below), no one has ever questioned the use of Appendix B to calculate the seniority of the individuals whom the union had successfully argued should have been treated as part of the support staff bargaining unit all along. And that is the way they were treated: their seniority and service were considered to be the same. They were not treated as if they had been newly hired in 1991.

On the basis of the evidence, we conclude that Ms. Bleakney's recollection of events was accurate: the parties' understanding was that persons whom the union said should have been in the unit all along would have their seniority determined pursuant to Appendix B - not Article 14.3 - and accordingly they would get full credit for their years of service at the College. And that was the understanding that the parties acted upon when a layoff was contemplated in 1993.

Under Article 15 of the collective agreement, the College is obliged to notify the union whenever it contemplates any action that may result in a layoff. Under Article 15.3, a union/management committee is struck to explore alternatives to layoff and to consider measures to minimize any dislocation to the employees potentially affected. The committee and/or its members may make recommendations to the College President, and if the College determines that a layoff is still necessary, employees must receive at least 90 days written notification "except in circumstances beyond the reasonable control of the College".

In the spring of 1993, the College was contemplating a layoff, and advised the union of its concerns, as it was obliged to do under Article 15. The College also generated a master seniority list so that the "section 15 committee" members would have a reference document when they began to consider how bumping options (Article 15.4.6) might relate to the various alternatives to layoff contemplated by Article 15.3.4. On the master list, the seniority for the "green-circled employees" was calculated in accordance with Appendix B - that is, seniority = length of continuous service.

In the course of these discussions in 1993, there was some controversy about the calculation of seniority for the "green-circled employees", and some dispute about whether Article 14.3 applied to them. That matter surfaced at the UCC as well. The UCC minutes for April 13, 1993 record the dispute this way:

Jeanie Sawyer raised that the College's position is that Article 14.3 does not apply to those employees included in the bargaining unit under Appendix B. Appendix B, Item 5, states, "Employees will be accorded full seniority based on length of service with a College calculated in accordance with Articles

14.1 and 14.2." The College has received a legal opinion that since Appendix B specifically references only two sections of Article 14, only those sections apply and not the entire Article.

Local 418 stated that they believe Article 14.3 does apply to these employees. The fact that Article 14.3 is not referenced in Appendix B, does not exclude these employees from that Article.

Agreement could not be reached. Jeanie Sawyer explained the urgency of settling this disagreement as it does have an impact on several employees who were perhaps inappropriately affected by Article 15 discussions and asked that both parties seek outside advice and retable this issue as soon as possible.

ACTION:

Jeanie Sawyer and Local 418 to seek outside/legal opinions, including checking with other Colleges regarding actions taken by them in similar circumstances. Jeanie Sawyer to review arbitration awards to see if this issue has gone to arbitration before

As will be seen, the question raised by the union in 1993 is not unlike the one underlying the current grievance. However, by memo dated August 30, 1993, the President of Local 418 conceded that the College was right in its interpretation of the parties' agreement, and withdrew the union's claim that the green-circled employees had only limited seniority. He wrote, in part:

With regards to the Appendix B persons who were brought into the Bargaining Unit in 1991.

I have been informed that my interpretation of APPendix B and Art. 14.3 was not correct in this instance. Since the Union challenged the positions and was successful in its challenge all persons involved entered the Bargaining Unit with full security for all intense [sic] and PurPoses under the Collective Agreement. Art. 14.3 does not apply to these people. However, Art. 1.4 of the Collective Agreement does apply. It states: "Persons who are found to be bargaining unit employees as a result of specific decisions of the Ontario Labour Relations Board or by agreement of the Council/College and the Union, and whose former status was administrative or excluded staff, shall be governed by this Agreement and Appendix B." ...

The Local will withdraw its claim that these persons in Appendix B positions have limited seniority. (emphasis added)

Based upon this common understanding of how seniority should be calculated, the parties then set about determining how reorganization might occur in a way that would minimize any adverse impact on employees. There was a degree of employee movement, bumping, and reshuffling based upon seniority. However, in the result, economies were achieved in 1993 without any involuntary layoffs.

In 1994 the spectre of layoffs surfaced once again; and the union and the College were again obliged to engage in the same exercise, based upon the same seniority lists. As before, there was a degree of bumping, reorganization, and reshuffling of the employee complement, in accordance with the employees' seniority. In 1994, however, there were actual layoffs - including the grievor who was displaced as the result of an exercise of "Appendix B seniority" by several green-circled employees.

The green-circled employees were aware of their situation in 1991 and after, but there is no evidence that the College ever addressed employees generally about the terms of the green-circling arrangement that it had concluded in 1991. Nor was there any reason why other employees would be familiar with the particular rights or privileges of those who had been green-circled. Mr. Dailey testified that he knew there was some issue about the inclusion of persons in the bargaining unit, the calculation of their seniority, and the resulting terms and conditions of

employment. However, he did not know the details. He said that the green-circled employees were rather secretive about that - presumably because they retained certain advantages that they were not inclined to advertise.

Mr. Dailey did check his own position on the seniority lists that were posted from time to time. His seniority date was accurately recorded. He had no basis for checking the recorded seniority dates of other individuals on the list. He did not have any reason to do so, because his position was not then jeopardized, and there was no need to undertake a comparative exercise. Nor could Mr. Dailey have readily forecast his relative seniority position even if he had had the inclination to do so. It would not have been easy to foresee the various combinations or sequence of bumps that might lead to his displacement or the identity of the individuals with whom he should compare himself. For as we have already noted, in 1993, a downsizing and reorganization were accomplished without any involuntary layoffs at all. No one could accurately predict the necessity or magnitude of any layoff until the committee had explored the alternatives.

IV - The various arguments: timeliness and estoppel

Timeliness

The College contends that if there was a breach of the collective agreement at all (which is denied), it occurred in the spring of 1991, when the union and the College first agreed that the green-circled employees should be considered part of the support staff bargaining unit with full seniority rights. The College asserts that Mr. Dailey should have been aware of the situation at the very least by the time one or more seniority lists were posted - that is within a few months of the green-circling arrangement in 1991. If the grievor had been paying close attention to the seniority lists, he would have noted the addition of persons already in the College's employ but not on previous lists. By comparing their seniority dates with his own, he should have noted their seniority credits and foreseen that his job might be in jeopardy in any future layoff situation. In the College's submission, the alleged breach of the collective agreement should have come to Mr. Dailey's attention long before the instant grievance was filed. The College argues that the grievance is untimely and is not arbitrable.

We do not agree.

We do not doubt that the time limits in the collective agreement are "mandatory", and that any failure to comply with them will result in the grievance being deemed to have been abandoned. Matters that are not raised in a timely manner will not be arbitrable; moreover, the words "ought reasonable to have come to the attention of the employee" embody an objective test, not a subjective one. It is not enough for an employee to say s/he was ignorant of any alleged breach of contract. To find that individual ignorance or inattention is a complete answer to timeliness objections would rob these words of meaning.

On the other hand, we must still determine, from an objective perspective, when it was "reasonable" for Mr. Dailey to conclude that there was a breach of the collective agreement adversely affecting his rights under the agreement; and in the circumstances of this case, we do not think that the mere posting of a seniority list was sufficient notice to him. The problem raised by this grievance is not Mr. Dailey's own seniority, but rather its relationship to the seniority of one or more other individuals with whom Mr. Dailey might be compared - if there was a layoff at some time in the future, and if alternative measures under Article 15 were insufficient, and if there was a sequence or pattern of bumps that put Mr. Dailey in competition with a green-circled employee (or perhaps someone who was himself displaced by a green-circled employee).

We do not think that it is reasonable to expect an employee to engage in this entirely speculative exercise. In our view, the issue concerning the interpretation of the collective agreement "reasonably" came to the grievor's attention when he actually faced the prospect of layoff after being bumped by another worker. It was only at that point that the green-circling arrangement had operational significance for the grievor, thus crystallizing "the

circumstances giving rise to the complaint". That is when time begins to run, and Mr. Dailey filed his grievance well within the 15-day time frame following that benchmark.

We are satisfied therefore that the grievance is timely and arbitrable.

However, we are not persuaded that it can succeed.

When the situation is reviewed as a whole, we find that the union is estopped from asserting the present claim. In effect, it has waived any reliance on Article 14.3 by abandoning its earlier contention that it applied to the greencircled employees, and by confirming both the applicability of Appendix B and the way in which seniority was to be calculated for the green-circled employees.

Estoppel

It is now fairly well established that an arbitrator can apply the principle of estoppel in determining how a collective agreement should be administered (see for example: Re CNR Co. et al v. Beatty et al (1981), 34 O.R. (2d) 385 (Dis. Ct.), and Re Metropolitan Toronto Civic Employees' Union Local 43 and Municipality of Metropolitan Toronto et al (1985), 50 O.P. (2d) 18. In CN/CP the arbitrator and the Courts approved the following definition of estoppel, first enunciated by Denning L.J. in Coombe v. Coombe (1951), 1 All E.R. 767:

The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

Lord Denning later restated the principle in layman's terms:

It comes to this: when a man by his words or conduct has led another to believe that he would safely act on the faith of them - and the other does act on them - he will not be allowed to go back on what he has said or done when it would be unjust or inequitable for him to do so.

Similar language can be found in Canadian Court decisions. Thus, in John Burrows Ltd. v. Subsurface Surveys Ltd. et al (1968), 68 D.L.R. (2d) 354, our own Supreme Court observed:

... if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have thus taken place between the parties.

And in Re City of Penticton (1978), 18 L.A.C. (2d) 307, Paul Weiler (then Chair of the B.C. Labour Relations Board) made these observations from a labour relations perspective:

... The union and the employer deal with each other for years and years through successive agreements and renewals. They must deal with a wide variety of problems arising on a day-to-day basis across the entire spectrum of employment conditions in the workplace, and often under quite general and ambiguous contract language. By and large, it is the employer which takes the initiative in making operational

decisions within the framework of the collective agreement. If the union leadership does not like certain management actions, then it will object to them and will carry a grievance forward about the matter. The other side of that coin is - that if management does take action, and the union officials are fully aware of it, and no objection is forthcoming, then the only reasonable inference the employer can draw is that its position is acceptable. Suppose the employer commits itself on that assumption. But the union later on takes a second look and feels that it might have a good argument under the collective agreement, and the union now asks the arbitrator to enforce its strict legal rights for events that have already occurred. It is apparent on its face that it would be inequitable and unfair to permit such a sudden reversal to the detriment of the other side. In the words of the Board in District of Burnaby [District of Burnaby and C.U.P.E., Local 23, [1978] 2 Can. L.R.B.R. 99 at p. 103], "It is hard to imagine a better recipe for eroding the atmosphere of trust and co-operation which is required for good labour management relations, ultimately breeding industrial unrest in the relationship - all contrary to the objectives of the Labour Code": see also the observations of Mr. Justice Hutcheon in Larson et al. v. MacMillan Bloedel (Alberni) Ltd. [[1978] 1 W.W.R. 749] at p. 764. To return to the metaphor which was used earlier, it is equally as unacceptable to watch someone go out on the end of the limb, as it is to invite that person out on the limb before sawing it off.

To avoid any misconception about that conclusion, let me immediately add these two caveats. I am assuming in this analysis that responsible union officials are aware of what the employer in fact is doing. Estoppel is a concept that is borrowed from the common law but also makes "labour relations sense" (see generally: **Brown** and Beatty Canadian Labour Arbitration Third Edition, chapters 2:2200, 2:2210, and 2:2220).

We do not think that it is necessary to multiply the examples or burden this decision with more case references. It suffices to say that the principle of estoppel is available to avoid the inequitable application or administration of a collective agreement, and may be applied where:

1. there is a representation by words or conduct that a particular legal regime will be maintained; and
2. the other party relies upon that representation and, expecting the status to continue, governs its behaviour accordingly or acts to its detriment.

We should note that the principle of estoppel is reciprocal. It is available whether it is an employer, relying on union behaviour, seeking to confirm a state of affairs less generous than the negotiated terms, or whether it is a union, relying upon employer behaviour, seeking to maintain a state of affairs more generous than the agreement provides (as in CN/CP above). Both parties can and do rely upon the principle of estoppel when the requisite elements can be established.

In our view, the elements of estoppel are established in this case.

The green-circling arrangement was concluded in the face of a union threat to take proceedings before the Labour Relations Board, and an employer determination to seek its own "official ruling" from the OLRB if the interests of the green-circled employees were not protected. The parties settled their dispute and gave up these litigation alternatives, on the express understanding that the green-circled employees would have full seniority - an understanding that was communicated to them at the time. The parties agreed, in effect, that since the union was claiming that the green-circled employees should have been part of the bargaining unit all along, their seniority would be calculated as if they had been in the bargaining unit all along. The application of Appendix B and the non-application of Article 14.3 were further considered, and confirmed again in August 1993, in the course of the 1993 layoff discussions.

Throughout this entire period, the employer, the trade union, and the green-circled employees have conducted their affairs on the basis of this agreement and shared understanding of the status of the green-circled employees -

an understanding which was applied in the 1993 bumping sequence and in the 1994 layoff as well. In other words, choices were made, options were explored, and decisions were taken on the basis of understandings concluded in 1991 and confirmed in 1993. We do not think that the union can repudiate or resile from those representations now.

Is the College precluded from relying on the principle of estoppel because no one from "OPSEU head office" was involved in these discussions, or because of the decision of the Supreme Court of Canada in Isabelle v. OPSEU (1981), 122 D.L.R. (3d) 385. In our view the answer is no.

It is clear on the evidence before us that the local union president is authorized to speak for the union in matters such as this, and to conclude agreements of the kind now before us. The local union president has both the actual and ostensible authority to make arrangements of this kind, and it it was entirely reasonable for the College to acknowledge that authority, and to negotiate in good faith with a view to resolving these issues. Indeed, to put the matter starkly: why would the College ever deal with local union officials if their position could later be repudiated at the instance of an employee claiming that the "head office" was not involved?

We also note, parenthetically, that there is no evidence that the "head office" disapproved of the greencircling arrangement or supports the grievor's claim; moreover, the inference from the 1993 events is that local officials sought clarification from higher authority and concluded that Appendix B was the applicable provision (see the memo from Mr. Molleson reproduced above).

Finally, Isabelle decided only that one College could not **be found "in contempt" for failing to abide** by an arbitrator's decision respecting another College bound by the provincial collective agreement. That is hardly a surprising result when arbitrators are not bound to follow each other's awards, and the College in question was not a party to the proceeding in which the arbitrator's ruling was made. Nothing in Isabelle touches upon, let alone precludes the application of estoppel at the local level where, as here, the requisite elements are established.

VI - Conclusion

For the foregoing reasons, the board concludes that the union (and therefore the grievor) is estopped from pressing this claim.

It is unnecessary to express any opinion about the relationship between Appendix b and Article 14.03.

The grievance is therefore dismissed.

Dated at Toronto this 26th day of June, 1995.

I CONCUR: "Larry Robbins"
UNION NOMINEE

I CONCUR: "Hugh John Cook"
COLLEGE NOMINEE