

94A770 GEORGE BROWN VS DE SIMONE

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GEORGE BROWN COLLEGE OF APPLIED ARTS AND TECHNOLOGY
[The Employer]

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
[The Union]

IN THE MATTER OF GRIEVANCE OF: GIOVANNI DE SIMONE
OPSEU # 94A770 / 94A767

BOARD OF ARBITRATION:	Kevin M. Burkett	-Chairperson
	Fred Cowell	- Employer Nominee
	Sherril Murray	- Union Nominee

APPEARANCES FOR THE EMPLOYER:	Stephen Raymond	- Counsel
	R. Lapworth	- Manager, Labour
	Ann Lillipold	- Relations
	P. Stevens	- Chairperson
		Department of Computer Science & Mechanical Engineering Technology

APPEARANCES FOR THE UNION:	Nelson Roland	- Counsel
	Carmine Tiano	- Counsel
	K. Kaszuba	- Steward
	G. De Simone	- Grievor

A Hearing in this matter was held in TORONTO on October 30, 1995

A W A R D

The Union grieves in this matter that, contrary to Article 27.06 of the collective agreement, "the College acted in "Bad Faith" in issuing an improper lay-off notice". The grievance is dated April 5, 1994. The matter was referred to arbitration by the Union by letter that reads;

The President
George Brown College (A)
P.O. Box 1015, Station B
Toronto, Ontario
M5T 2T9

Dear Sir/Madam:

**Re: GRIEVANCE(S) OF De Simone, Giovanna LOCAL 0556
Article 27.06;
GRIEVANCE(S) DATED 04/05/1994**

This is to advise that your reply to the captioned grievance(s) is not satisfactory. We are, therefore, referring the matter to a Board of Arbitration.

By copy of this letter, we are bringing this matter to the attention of Human Resources Secretariat Ontario Council of Regents so that the selection of a Chairman and a date for a hearing may be arranged. If further information is required, please contact myself, in the Grievance Department.

Yours truly,

"George Richards"
Grievance Officer

I was notified by memorandum from the Council of Regents dated November 30, 1994, that, by mutual agreement of the parties, I had been scheduled to hear this matter. A hearing was convened on February 16, 1995 at which time the College raised for the first time a preliminary objection to the jurisdiction of the Board. In summary, the College argued that the requirement under Article 27.08 to "state in the grievance the positions ... claimed," and to then designate two of these positions in the referral to arbitration had not been complied with and, therefore, we are without jurisdiction. The Union replied that it had been caught by surprise and an adjournment was granted.

Article 27.08 of the collective agreement reads as follows:

Lay-Off Grievances

27.08 A An employee claiming improper lay-off, contrary to the provisions of this Agreement, shall state in the grievance the positions occupied by full-time and non-full-time employees whom the employee claim.; entitlement to displace. The time limit referred to in 32.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

27.08 B If the grievance is processed through Step 2, the written referral to arbitration in 32.03 shall specify, from the positions originally designated in 27.08. A two full-time positions, or positions occupied by two or more partial-load or part-time employees (the sum of whose duties will form one full-time

position), who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the grievance thereafter under only one of (i), (ii), (iii), (iv), (v), (vi), (vii), or (viii) of 27.06.

When the hearing reconvened on October 30, 1995 the Union called Mr. T. Tomassi, the steward responsible for the processing of the instant grievance. It was agreed between the parties at the commencement of his evidence that the grievance challenges the College's decision making and, by implication, the steps that followed. It is Mr. Tomassi's evidence that at steps 1 and 2 of the grievance procedure the Union argued that "the work was there being done by someone junior" and that Messrs. Young and Halton were identified as junior employees who had not been laid off who were performing the work in question. Mr. Tomassi was asked if the College objected to the processing of the grievance on the basis that it now does and replied that he had no recollection of any such objection. He also disputed that there had been any objection prior to the referral to arbitration. He acknowledged in cross examination that the grievance does not refer to any specific position and that the referral to arbitration does not identify two positions. He maintained throughout cross examination that two junior employees were identified at both the step one and step two meetings.

The College's written response to the step one grievance meeting, dated April 29, 1994, makes no reference to any individual positions having been identified. However, the union responded by Memorandum dated May 5, 1994, as follows;

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 556
344 DUPONT STREET, SUITE # 101, ToRONTO, ONTARIO**

M E M O R A N D U M

TO: Jack McGee, Dean, School of Science & Technology, G.B.C.

FROM: Tom Tomassi, Chief Steward, Local 556, O.P.S.E.U.

DATE: May 5th, 1994

**RE: RESPONSE TO STEP 1 GRIEVANCE G. DESIMONE -
ARTICLE 27.06**

During our presentation, we maintained all along that Mr. DeSimone should have been reassigned to work that is presently and will be in the future, taught in the Tool & Dye Program. It is our understanding that Machine Shop is part of the curriculum for common first year students in the Tool & Dye Program and that this work is currently being taught by someone whom is junior to Mr. DeSimone on the seniority list. Having made a presentation on this basis, I find it peculiar that your response does not even address the reason as to why the College is not willing to look at this type of reassignment for Mr. DeSimone.

It is true that we also talked about Mr. DeSimone working in Tool & Dye Making, however, it was made clear that would be an alternative to him being reassigned to the Machine Shop portion of the Tool and Dye Program.

I would appreciate receiving an answer as to why Mr. DeSimone has not been assigned to the Machine Shop portion of the Common First Year Tool & Dye Program.

The College's written response to the second step grievance meeting dated May 24, 1994, states in part, that, "... Management did acknowledge that there were teachers with less seniority who are teaching machine shop courses,

as part of other programs, but stated that they are also teaching other courses that require specialized knowledge." The Union, by Memorandum dated May 25, 1994, responded as follows:

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION, LOCAL 556
344 DUPONT STREET, SUITE #101, TORONTO, ONTARIO**

M E M O R A N D U M

TO: Sally Layton, Vice-President, Human Resources

FROM: Tom Tomassi, Chief Steward, Local 556, O.P.S.E.U.

DATE: May 25th, 1994

RE: MR DESIMONE'S GRIEVANCE - ARTICLE 27.06

So that there is no misunderstanding with respect to our position, on this matter, I would like to state the following:

- We believe that Mr. DeSimone is to be reassigned, as there is approximately thirty hours of Machine Shop work that Mr. DeSimone can be assigned to.
- We do not believe that reassigning this work would be more costly for the College and furthermore, the College has not presented any evidence that it will be.
- It appears to us that the College is trying to protect one faculty member at the expense of another, who happens to have more seniority and this is contrary to Article 27.06 of the Collective Agreement.

The College did not call as a witness anyone who was present at the first or second step grievance meetings.

The College submits that because the grievance claims a violation of Article 27.06, Articles 27.08 A and B apply. It is further submitted that because neither the grievance nor the referral to arbitration identify any positions as being challenged we are without jurisdiction. The College maintains that the requirement to identify these positions is both mandatory and substantive (as distinct from procedural), because it goes to the rights, of incumbents. We are referred to the following awards in support of the proposition that a party's failure to comply with a mandatory and substantive requirement to the processing of a grievance robs a board of arbitration of its jurisdiction to hear the grievance.

Re St. Lawrence College and OPSEU (Brown grievance) September 11, 1986 (Unreported) (Shime).

Re Conestoga College and OPSEU (Rennie grievance) October 21, 1985 (Unreported) (H.D. Brown)

Re Sudbury General Hospital and CUPE Local 1023 (Martel grievance) March 31, 1987 (Unreported) (Boscariol)

Re Ontario Educational Communications Authority and NABET Local 72, (1976) 11 LAC (2d) 258 (Brent)

The Union's failure to identify the subsection of Article 27.06 under which the grievance is to be processed is characterized by the College as a similar omission that also robs the Board of its jurisdiction.

The Union maintains that it does not have to identify any positions until after its allegation of bad faith is decided. The Union argues that, in any event, the positions in issue were identified during the grievance meetings so that there has been essential compliance. Finally, it is submitted that because "fresh steps" were taken after individual positions were identified in the grievance meetings it must be found that the College has waived any objection that it otherwise might have had to the manner in which this grievance has been framed. In support of this position the Union submits that the requirements of Articles 27.08 A & B are procedural so that any defect can be waived. If there is any doubt as to whether or not positions were identified we are asked to review the written record of steps one and two of the grievance procedure. If there is any concern with the rights of third parties we are reminded that notice can be given prior to reconvening on the merits. It is submitted that the awards relied upon by the College do not stand for the proposition advanced by the College.

The College reiterates in reply that there cannot be a waiver of any substantive provision. Reference is made to *re Palmer, Collective Agreement Arbitration in Canada* (2nd) at 205. Alternatively, the College argues that there could not have been a waiver here because there was no fresh step subsequent to the referral to arbitration, in that the composition of the Board is done without the involvement of the parties. It is argued that there was no opportunity to object prior to the commencement of the hearing. The College argues that even if Article 27.08 is found to be procedural the mere fact that Mr. Tomassi identified specific employees (which the College disputes) does not establish that the College waived its right to reply upon Articles 27.08 A and B. The College asks how Mr. Tomassi can be so sure that he identified specific positions or employees when there is no mention of either in any of the correspondence. The College asks us to find that the requirements of Articles 27.08 A & B are substantive and, therefore, cannot be waived or, alternatively, if not substantive, the requirements were not waived.

We start with the Union contention that it is entitled to grieve that the lay-off was carried out in bad faith and to have this claim disposed of before having to identify specific positions. Whatever might be said about the extent of the Union's right to challenge the bonafides of management decision making, these parties have circumscribed that right in respect of any decision taken to lay-off. Article 27.08 is very clear in focusing any lay-off grievance and subsequent referral to arbitration on specific positions. These parties have agreed that the test as to whether or not a lay-off decision is in conformity with the collective agreements is whether, under its substantive provisions, a laid off employee can claim a position(s) occupied by another employee. Under Article 27.08 A an employee claiming improper lay-off "... shall state in the grievance the positions occupied by full-time and non-full-time employees whom the employee claims entitlement to displace," and under Article 27.08 B the referral to arbitration "... shall specify from the positions originally designated in 27.08A two full-time positions" There are no other types of lay-off grievances contemplated. Accordingly, we must reject the Union's initial argument. This collective agreement, and more specifically Articles 27.08 A and B, does not permit a grievance to be filed that simply alleges bad faith in the decision making process.

The Union next argues that there has been essential compliance in that Mr. Tomassi advised the College as to the specific positions challenged at the first and second steps of the grievance procedure. Without at this juncture, making a finding as to whether he did or did not advise the College in this regard, we must also reject the Union's second submission. The requirement of both Articles 27.08 A and B is that the identification of the positions that are challenged be in writing. This requirement is for the sound policy reason of avoiding the very type of factual dispute as has arisen in this case. An oral representation does not satisfy either the intent or the purpose of the clause. There was no written advice and, therefore, it must be found that there has not been compliance with Articles 27.08 A or B. We find support for our rejection of the first two positions argued by the Union in *re St. Lawrence College and OPSEU* (supra).

Finally, the Union argues that the College has waived any reliance on Articles 27.08 A or B by failing to object until immediately before the hearing in this matter was convened. The law as it applies to the waiver of a defect in the processing of a grievance is accurately set in *re Palmer, Collective Agreement Arbitration in Canada* (2nd) at pages 205 - 207 as follows;

The term waiver will be used to describe situations where failure to make timely objection to noncompliance with the procedural requirements of the grievance procedure prevents the objection from being raised later.

Conduct which has been held to amount to waiver includes: allowing a grievance to go through the grievance procedure; failure to object at the first opportunity in the grievance procedure; not exercising, at the time the grievance is first presented, an employer option stipulated in the collective agreement to refuse an untimely grievance; a substantial lack of compliance with the grievance procedure by both sides; and an attempt to settle the grievance.

5.75. Certain matters cannot be waived and objections concerning these can be made at any time. Basically, the cases have distinguished between fundamental issues of jurisdiction to which waiver never applies, and formal or procedural irregularities to which the doctrine is applicable.

Failure to comply with mandatory time limits in the collective agreement, filing of a grievance as a policy rather than an individual grievance defects in the form of itself and failure to proceed through all the specified steps of the grievance procedure have been held to be procedural irregularities which can be waived. Failure to object to a damage claim prior to the hearing has also constituted waiver of the right to so object. On the other hand, the filing of the grievance by the union rather than the grievor and the arbitrability of the matter have been considered fundamental issues of jurisdiction.

The College takes the position that Articles 27.08 A & B are substantive provisions that cannot be waived because they protect the right of third party incumbents. We disagree. To whatever extent a third party incumbent has a right to participate in the processing of a grievance alleging improper lay-off that right exists distinct and apart from Articles 27.08 A & B. Rather, these Articles establish the procedure to be followed in the filing and processing of any grievance claiming improper lay-off. The procedure is one that requires the identification of the specific positions that are challenged. As noted, it is designed to focus the discussion in the grievance meetings and later, to narrow the scope of any arbitration hearing to specific positions. It does not go to the heart of our jurisdiction as would a question as to whether the matter complained about is even spoken to in the collective agreement (See re Ontario Educational Communications Authority and NABET (supra) or whether the matter complained about arose under a predecessor collective agreement (See re Sudbury General Hospital and CUPE, supra). Such irregularities go to the heart of a board of arbitration's jurisdiction and cannot be waived. By comparison a failure to strictly comply with the requirement to name in writing challenged positions in a lay-off grievance is procedural in nature, does not go to the heart of our jurisdiction and, therefore, can be waived. The irregularity is, in our view, analogous to a failure to comply with mandatory time limits which has consistently been found subject to the doctrine of waiver.

The question is, therefore, whether the College waived reliance upon the requirements of Articles 27.08 A & B. In answering this question it is important to remember that Articles 27.08 A & B are interrelated in their operation. All of the challenged positions are to be named under Article 27.08 A and, of these, two are to be identified in the referral to arbitration under Article 27.08 B. Against the backdrop of this interrelationship between the two Articles we make the finding that Mr. Tomassi identified the challenged positions (specifically those occupied by Messrs. Young and Hatter) at steps one and two of the grievance procedure. The correspondence supports Mr. Tomassi in that it makes clear that the Union made a presentation on the basis that "this work is currently being taught by someone whom is junior to Mr. DeSimone on the seniority list" (May 5, 1994 Memo from Union challenging Colleges April 29 minutes of first step meeting) and that "Management did acknowledge that there were teachers with less seniority who are teaching machine shop courses"(Management response so step 2 meeting May 24, 1994) furthermore, notwithstanding Mr. Tomassi's assertion that he identified the two positions and the correspondence that establishes that the focus of the discussion was the continued employment of teachers with less seniority, no one was called by the College to dispute Mr. Tomassi's assertion.

We are satisfied that although the grievance did not identify specific challenged positions these were identified orally at the grievance hearing and the matter was allowed to proceed from step one to step two without objection from the College. Clearly, therefore, the Article 27.08 A requirement was waived by the College and we hereby so find. The matter was then referred to arbitration without specifying in writing the two positions that had been identified orally in the grievance procedure. Having waived the Article 27.08 A requirement and having been advised orally of the positions in issue, the College, if it wished to rely upon the Article 27.08B requirement, should have made a prompt objection upon the referral to arbitration. The referral to arbitration is dated June 15, 1994. The College did not object until February 1995; some eight months later. Whereas the College argues that the first opportunity it had to object was at the time the hearing was reconvened, we disagree. These parties are in an on-going relationship. They deal with each other on a variety of issues on a continuous basis. In this context it cannot be said that the first opportunity to object was at the hearing. An objection could have been made (and in this case should have been made) upon receipt of the referral. Silence implies acceptance especially in circumstances where the Article 27.08 A requirement had already been waived and where the silence extended beyond the time as of which the objection could be made without requiring the granting of an adjournment. Accordingly, in the face of the challenged positions having been identified orally, the College's waiver of the Article 27.08 A requirement and its eight month silence following the referral to arbitration, we are compelled to find that the College also waived its reliance upon the Article 27.08 B requirement. For the purposes of certainty the Union is to advise the College in writing forthwith of two positions that it is claiming.

In so far as the College also relies upon the last sentence of Article 27.08 B under which it is specified that "the grievor shall be entitled to arbitrate the grievance thereafter under only one of (i), (ii), (iii), (iv), (v), (vi), (vii), or (viii), of 27.06," we must also deny its objection. Whereas the grievor is restricted under the sentence to one of the Article 27.06 subsections, there is no requirement to record in writing the subsection that is being relied upon. It follows that a hearing on the merits cannot be defeated by reason that the Article 27.06 subsection that is to be relied upon was not specified in the referral to arbitration.

Having regard to all of the foregoing the College's preliminary objection is denied. This matter is to proceed to a hearing on the merits.

Dated in TORONTO on this 29th day of December, 1995

Kevin M. Burkett

I Dissent - "Fred Cowell"
Fred Cowell

I Concur - "Sherril Murray"
Sherril Murray