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CAAT(A)

Local 653

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NORTHERN COLLEGE OF APPLIED ARTS AND TECHNOLOGY

(The College)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF C. DePENCIER AND THE UNION

BOARD OF ARBITRATION: HOWARD D. BROWN, CHAIRMAN
J. McMANUS, UNION NOMINEE
DAVID CAMELETTI, COLLEGE NOMINEE

APPEARANCES FOR THE COLLEGE: ANNE BURKE, COUNSEL

APPEARANCES FOR THE UNION: NELSON ROLAND, COUNSEL

HEARINGS IN THIS MATTER HAD BEEN HELD ON SEPTEMBER 2ND AT TIMMINS AND NOVEMBER 11TH, 1993 AT TORONTO.

INTERIM AWARD

A grievance was lodged by the grievor in a letter to Mr. Hemingway, Dean of the Mining & Instrumentation Department at the College on October 29th, 1991, claiming that the College:

"Has abrogated my rights under Article 8.04g by withholding notice of Lay off until October 29, 1991 thereby cancelling my right to a meeting with a College representative within three (3) calendar days as per the Collective Agreement.

The remedy requested is that the Lay off notice be rescinded."

A notice of Lay off dated October 21st, 1991 was issued by the College to the grievor. The Union filed a grievance dated October 30th, claiming that the College failed to follow the intent of Article 8.04. By letter, dated November 4th, the grievor complained that,

"my rights were violated under Art. 8.00 with regard to improper lay off."

By letter, dated November November 4th, Mr. Hemingway advised the grievor that the lay off notice would be rescinded but the date of termination after the ninety day notice period would be changed to February 1st, 1992. The College responded to the Union's grievance that it was not in violation of Article 8.04. On November 16th, the Union requested a meeting at Step 2 of the collective agreement with regard to its grievance.

On November 25th, 1991 the grievor sent the following letter:

P.O. Box 247,
Haileybury, Ont.,
POJ LKO

S+11

Nov. 25, 1991

Dean D. Hemingway,
Mining & Instrumentation,
Northern College of A. A. & T.
Haileybury, Ont.

Dear Sir,

Step 1 Grievance

The College has breached the Collective Agreement by failing to meet to adjust my complaint of Nov. 3, 1991 regarding Art. 8.00 and I am therefore forced to proceed to Step 1 of the Grievance Procedure.

I believe that I have been improperly laid off contrary to the provisions of the Collective Agreement and I claim entitlement to displace the following:

1. R. Oblin, currently on temporary assignment in Business but normally assigned OBS teaching work.
2. M. Deveault, sessional, currently teaching OBS 25 hours.
3. Since preference is to be given to full-time over partial-load, part-time and sessional, (art 8.04) and since the College in previous lay-offs had agreed to combine aspects of part-time, sessional work to arrive at a full time load, I believe I am entitled to displace any such person in order to arrive at a teaching assignment. These would include all employees of the college hired to do teaching and/or related activity who are included in the 8.15b list referred to in the Collective Agreement and who do contracted work for the college, specifically but not exclusively.

I also grieve that the teaching positions in India, presently contracted out to D. Hosking and E. McVeigh, are within the boundaries of the Collective Agreement and must be included as candidates for displacement. N.B. Federal Court of Canada ruling PSAC vs Regina, Nov. 1990.

The remedy sought is that my lay-off be rescinded and that I be allowed to exercise my displacement rights under the Collective Agreement.

I request that the Step 1 meeting be held in Haileybury and that Brother A. Hannikainen attend as my counsellor.

Yours very truly,


Charles dePencier

cc A. Hannikainen, V.P. Opseu local 653
R. Mason, Pres. OPSEU local 653

By letter, dated December 6th, 1991, the grievor sent the following letter to the President:

P.O. Box 247,
Haileybury, Ont.
POJ 1K0

December 6, 1991

Mr. R. Gervais, President
Northern College of A. A. & T.
P.O. Box 2002,
South Porcupine, Ont.
PON 1H0

Dear Sir,

Grievance Step 2, Art. 8.00

The College has violated my rights under the Collective Agreement by not replying to my Grievance Step 1 of November 25, 1991. I am therefore obliged to tender my grievance at the Step 2 level.

I believe that I have been improperly laid off contrary to the provisions of the Collective Agreement and I claim entitlement to displace the following:

- 1) R. Oblin, currently on temporary assignment in Business normally assigned OBS teaching work.
- 2) M. Deveault, sessional, currently assigned OBS 25 hrs.

Since preference is to be given to full-time over partial-load, part-time and sessional, (art. 8.04) and since the College in previous lay-offs had agreed to combine aspects of part-time, sessional work to arrive at a full-time load, I believe I am entitled to displace any such person in order to arrive at a teaching assignment. These would include all employees of the College employed to do teaching and/or related activity who are included in the 8.15b list referred to in the Collective Agreement and who do contracted work for the College, specifically but not exclusively.

I also grieve that teaching positions in India, presently contracted out to D. Hosking and E. McVeigh, are within the boundaries of the Collective Agreement and must be included as candidates for replacement. Refer to: Federal Court of Canada ruling, PSAC vs Federal Government of Canada, November, 1990.

The remedy sought is that my lay-off be rescinded and that I be allowed to exercise my displacement rights under the Collective Agreement.

I request that the Step 2 meeting be held in Haileybury, within the time limits as specified in the Collective Agreement, and that Brother A. Hannikainen be in attendance as my counsellor.

Yours very truly,

Charles dePencier

c.c. R. Mason, Pres. local 653, OPSEU
A. Hannikainen, VP. local 653, OPSEU

S+12

*copy to: PM MacLean
1991-12-09
kj*

RECEIVED NORTHERN COLLEGE
HUMAN RESOURCES OFFICE

DEC 09 1991

FILE _____

Received N/C
DEC - 9 1991
Human Res.

By notice, dated December 10th, 1991 the Union gave its notice of referral to arbitration of its grievance. The response of the College to the grievor on December 17th was:

Sx14



DOSSIER / FILE: HS91-010
Personal/dePencier, C.

1991 12 17

Professor C. dePencier
379 Probyn Street
P. O. Box 247
Halleybury, Ontario
POJ 1K0

Dear Professor dePencier:

Re: Step II Grievance meeting concerning article 8 at Halleybury
School of Mines site on 1991 12 13

The College will change your lay-off date to 1992 02 01 to coincide with the "Response to your Step I Grievance" as signed by Mr. Hemingway on 1991 11 04.

The College does not agree that you have the competence, skill, and experience to displace Mr. R. Oblin and Mr. M. Deveault, nor does it recognize that there are positions included in the 8.15(b) list that you have the competence, skill and experience to displace.

Yours grievance is therefore denied.

Yours truly,

PMM/gh

Peter MacLean
Executive Director of
Human Resources
(President's Designee)

c.c. A. Hannikainen, Union Stewart
Halleybury School of Mines
site
R. Gervais, President, Northern
College

Subsequently the following letter was sent by the grievor to the President.

FILE MAY 2 1992
S 115
HS

Received NIC
JAN 08 1992
Human Res.

P.O. Box 247
Haileybury, Ont.
POJ 1K0

January 7, 1992

Mr. R. Gervais, President
Northern College of A.A. & T.,
P.O. Box 2002,
South Porcupine, Ont.
PON 1H0

NORTHERN COLLEGE
OFFICE
JAN 08 1992

FILE _____

copy to P.M. MacLean
1992-01-09
f

Dear Sir:

Request for Arbitration

I request that my Step 2 Grievance regarding Article 8, be sent for arbitration. Your denial of my Step 2 Grievance (1991-12-17) does not refer to all aspects of my grievance, specifically, D. Hosking, and E. McVeigh presently teaching Diamond Drilling in India and the ruling of the Supreme Court (PSAC vs Federal Government).

Regarding my lack of experience, skill and competence, there are precedents within the College whereby Professors and Management have been assigned positions without the so-called SKILL, EXPERIENCE and COMPETENCE required for their assignments.

I request that the Arbitration be heard in Haileybury and that I be notified in advance of the proposed dates.

Yours very truly,

Charles dePencier

c.c. Mr. R. Mason, Pres. Local 653, OPSEU
Mr. A. Hannikainen, V.P. Local 653, OPSEU

By letter, dated January 20th, 1992, Mr. Park, Co-Ordinator of Grievances for the Union, advised the College that its reply to the Depencier grievance was not satisfactory and was referring the matter to a Board of Arbitration with notice to the Ministry of Colleges and Universities.

It is the Union's position that both grievances are properly referred to this Board for its determination. Pursuant to Article 8.08(b) the grievor claims two full-time positions of McVey and Oblin. The India project on which Mr. McVey's work at the time was completed on July 31st, 1992. Mr. Oblin had been seconded at the time of the grievance to another position on a temporary basis but had held a full-time position and the grievor seeks to bump into the position which he regularly held in Ontario Basic Skills.

Article 8.08 of the collective agreement is as follows:

8.08 (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 claims entitlement to displace. The time limit referred to in Article 11.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

(b) If the grievance is processed through Step 2, the written referral to arbitration in Article 11.03 shall specify, from the positions originally designated in (a) above, 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 sub-paragraphs (a), (b), (c), (d), (e), (f),(g) or (h) of Article 8.05.

The position of the College is that the grievance was not properly referred to arbitration under Article 8.08(b) and is not arbitrable. Following initial submissions on this issue, the propriety and extent of a subpoena to Mr. MacLean, Director of Human Resources for the College by the Union and the extra-territorial jurisdiction of the Board, we directed complete oral submissions by counsel in Toronto which were completed on November 11th. Following those submissions, the Board has met in executive session to give consideration to the issues raised with regard to its jurisdiction in this matter and the preparation of this award concerning those issues to which the award is limited.

It is the submission for the College that the grievance here dealt with is that dated November 25, 1991 which is a claim of improper layoff. The claim against M. Deveault was abandoned but when laid off the grievor must claim a position at the time of his layoff and claiming a job of what Mr. Oblin may have been doing prior to that time has not met the terms of the collective agreement. Thus the College does not have notice of the positions which the grievor claims and he failed to be specific as required under Article 8.08. With regard to the third paragraph of the grievance where the grievor claims teaching positions in India of Hoskin & McVeigh as full-time employees of the College cannot be maintained as their work is outside of Canada.

It was submitted that the Step 2 grievance was submitted on December 6th with the same allegations at Step 1 to which the College responded on December 17th. The grievor sent a letter to the President on January 7th, 1992 which was received on January 8th by the College requesting him to refer it to arbitration and takes issue with the College's response as to the above persons but there was no attempt in its submission to narrow the target and no one was given notice of these proceedings. It is the College submission that this letter does not qualify under Article 11.03 which is:

11.03 Grievances

Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under Article 11.12 (c)) in the following manner and sequence provided it is presented within seven (7) days of the immediate Supervisor's reply to the complaint. It is the intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College written decisions at each step shall contain reasons supporting the decision.

The letter of Mr. Park referring the matter to arbitration on January 20th, 1992 was not received by the College but sent to the Staff Relation Section of the College Affairs Branch. It was submitted that there was not a proper referral to arbitration and the referral as such, is beyond the time provided in the agreement of fifteen days after the Step 2 response. The grievor can only displace someone who was doing the work claimed at the time of the grievance and there is no valid target set out in the grievance claimed by the grievor to displace. On that basis in the College submission the grievance should be dismissed.

In the alternative, it was argued that pursuant to Articles 8.08 and 11.03 the Union is required to provide particulars of the position claimed as to who performed the work during what period in a named position before the College can be asked to take any other step. The agreement requires specificity with regard to the arbitration of the grievance within the terms of the last sentence of Article 8.08 whereby it can be met only one of those parts of Article 8.05. The claim cannot be ascertained from the grievance because the Union does not identify who the grievor can bump and under what provision in Article 8.05. The Union must take such a position before the latter can proceed to arbitration.

The subpoena submitted by the Union cannot be used as a fishing expedition to establish the claim. The information cannot be obtained until the College knows the scope of the grievance and the case to be met and on that basis the relevance of the documents could be determined. The College objects to the scope of the subpoena and while the Board has the power to compel production of documents it must within the limit of the case. The Union does have SWFS and Mr. Oblin is a full time member of the bargaining unit and could be asked about the information required by the Union. There is no allegation that the grievor should replace Oblin at the time of the grievance but requests information to support the claim that it is the duties which he had performed at some other time and that is not relevant. In its submission the subpoena does not meet the test that the Union had acted diligently to obtain the information to support the claim but apart from that

it is its position that there is nothing which is arbitrable and therefore the subpoena need not be answered.

In the second alternative is that the CCBA while not ultra vires does not have extra-provincial effect whatever therefore was done in India has no bearing on this grievance. The terms of the collective agreement cannot be applied to work performed outside of Ontario; that part of the subpoena which refers to McVeigh and Hosking cannot be relevant and therefore improperly requested by the Union. Reference in the submissions was made to Re Canada Post and C.U.P.W., 24 L.A.C. (3d) 157 (Weatherill); Re Bell Canada and Communication Workers of Canada, 25 L.A.C. (2d) 200 (P.C. Picher); Re Fanshawe College and OPSEU (unreported - Weatherill, June 1987); Re Seneca College and OPSEU (unreported - Kates, May 1985); Re Humber College and OPSEU (H.D. Brown - February 1992); Re St. Lawrence College and OPSEU (Keller - November 1993); Re Easter Bakeries Ltd., 26 D.L.R. (2d) 332; Re Seneca College and OPSEU, (Simmons, May 1991); Re C.U.P.E. v St. Paul University (O.L.R.B., 2185-72-R); Re Southern Ontario Newspaper Guild and MacLeans Magazine (O.L.R.B. - 0205-82-R).

The position of the Union is that the grievor who received notice of layoff has a right to bump into a position not to bump out a named person but to a position which could be vacant or occupied which is what is identified in the grievance, dated November 25th, i.e. a position normally held by Oblin. The Union's position is that the two positions claimed under the narrowing

procedure of 8.08 are those of McVeigh and Oblin. An individual does not need to occupy a position in order it be identified but if it is occupied that person could be bumped. The protection under the agreement could be circumvented by not having a person teaching in the position or having it broken up for temporary reasons and reconstituted at a later time but the Union has a right to prove that there was a position which the grievor could claim. That is related to the subpoena requested by the Union as the information is relative to that position in that the Union has requested SWFS and time tables to prove Oblin's job was fragmented to the others named in the subpoena. The Union should be allowed to demonstrate the existance of a discrete position in which the grievor could have worked at the time.

The information requested by the Union will demonstrate that Oblin was in the position before it was temporarily broken up and the Union can with this information demonstrate that there was such a position. This is not a search to create a case but to prove the case with the requested documents and relies in that respect on the Bell Canada award with reference to Becker Milk award. The subpoena requested gives reasonable particularity of the documents requested of the College and is not an abuse as the names have been provided and the Union has reason to believe that the documents involving those names are relevant and will assist the Union to define the terms of employment. Given the territorial argument as to the India project, the documents are necessary to understand the nature of the work and whether the two employees are

engaged in Ontario but carrying on work outside of the province in which certain elements of the collective agreement could apply.

In its submission the grievor's letter to the President of the College dated January 7th, 1992 is a reference to arbitration and is within the time limits of the agreement. The grievor does have the individual right to send the grievance to arbitration and apart from the highly technical submission of the College in this respect it was submitted that in reality it was a reference to arbitration by the grievor which notice was received by the College in January. Therefore there was no violation to time limits in the agreement and the grievance is arbitrable.

It was further submitted with regard to the extra-territorial argument for the College that McVeigh was engaged by the College in Ontario where his employment relationship originated as a full time employee. The filling of the position took place in Ontario and whoever is in that position falls within the purvue of the collective agreement. In its submission an employee would have to be both engaged and working out of Ontario to exclude the terms of the agreement. The Union can claim what those employees did in Ontario as the employee is a member of the bargaining unit and covered by the terms of the collective agreement. It was submitted that because the College sent some staff to India it does not take the purpose of regulation of employee relationships in this province out of our jurisdiction under the Act.

Having regard to the submissions of the parties the Board finds that the terms of the collective agreement do not preclude this type of grievance submitted by Mr. Depencier and that it was referred by the grievor to arbitration within the time limits of the agreement. The grievor set out his Step 1 grievance by letter, dated November 25th, 1991 in which he claimed entitlement to displace Oblin and Devault and as well grieved "the teaching positions in India presently contracted out to D. Hosking and E. McVeigh". That grievance was processed to Step 2 by letter, dated December 6th with the same particularity and to which the College responded on December 17th. Under Article 11.03 the grievance must be referred to arbitration within fifteen days of the receipt by the grievor of the Step 2 response of the College. We find that the grievor's letter dated January 7th, 1992 addressed to the President of the College headed "request for arbitration" referring to denial of its Step 2 grievance is a reference to arbitration within the meaning of the collective agreement which the individual employee is entitled to present. That was received by the College on January 8th and is we find, a timely notice.

The referral to arbitration does not specify the two positions required by Article 8.08(a) but the grievance indicates two names, Oblin and Devault which the grievor claims to displace and the Union is concentrating on the position held by Oblin. The names of Hosking and McVeigh are set out in both the Step 1 and Step 2 grievances but only two positions from those originally designated can be the subject matter of the grievance. While the

referral to arbitration does not specify the two positions he claims, the grievor has referred in that letter to the Step 2 grievance in which the two positions are set out as well as referring to his claim against Hosking and McVeigh. There can however, under the terms of Article 8.08(b) be only two positions claimed. It is clear to us that the grievor has claimed displacement of Oblin and Devault and those are the two positions in the Step 2 grievance which can be incorporated by reference into the grievor's request for arbitration. With that conclusion whatever the validity of the grievor's claim against those two persons teaching in India, that issue cannot be dealt with under this grievance having regard to the clear and specific requirements of Article 8.08(b). That conclusion is also supported by the Union's focus on the position formerly occupied by Oblin.

Having regard to that finding, the first two paragraphs of Appendix A to the subpoena to Mr. MacLean are not relevant and are hereby struck from the subpoena.

The third paragraph of Appendix A is as follows:

"Any and all SWFS and timetables and course outlines for Roger Oblin, Mr. Deneault, Lucie Beaulac, John Pearce and Lynn Coutts for the period from one year prior to Charles De Pencier's layoff to the present".

The Board has considered the purpose of a subpoena as more particularly set out in the Bell Canada and Becker Milk Company awards. Having regard to those directions we find that the

information requested in the third paragraph of Appendix A of the subpoena does not violate the purposes for which a subpoena should be used. We are satisfied that the Union is not endeavoring to obtain facts on which to establish its case but by this information to obtain the facts on which it intends to support the issues in the grievances. The Union did not know how the College dealt with the Oblin position in fact and is we find, entitled to obtain the relevant documents in that regard. There is reasonable particularity with reference to SWFS and timetables which information is kept by the College and although the Union may have copies of such documents it is entitled to look at the documentation of the College with regard to the position in dispute. There is no doubt on the face of the subpoena what the documents are that the Union requests and which are relevant to the claim of displacement. The grievor made a substantial claim in his grievance and it therefore cannot be concluded that the subpoena requested by the Union is for the purposes of establishing whether any case against the College exists. The Union acted with reasonable diligence in processing its grievance by letter dated December 10th by Mr. Mason to the President which is the referral to arbitration of the October 30th, 1991 grievance.

The grievor has named as we have set out above, with regard to the timeliness issue, two employees of the College. The information requested in the subpoena requested relating to those

two persons are we find, the proper subject of the subpoena. Documents with regard to the other names set out in the third paragraph of Appendix A are not relevant. Therefore the Board amends the subpoena by striking out the first two paragraphs and directing the third paragraph to be amended as follows:

"Any and all SWFS and timetables and course outlines for Roger Oblin, M. Devault, for the period of one year prior to Charles De Pencier's layoff to the date of the grievance."

As the issue has been limited by the Board in this award it is not necessary for it to deal with the second alternate argument of the College with regard to the extra-territorial application of the Depencier grievance which we have found does not involve either Hosking or McVeigh who were involved in the India project. The grievor's claim to those positions are not referred to arbitration and are not properly before this Board pursuant to the terms of Articles 8.08 and 11.03.

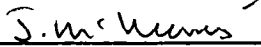
The Board finds that the grievance dated November 25, 1991 is arbitrable and that it has jurisdiction to deal with that claim as set out in this award. The Board finds that it has jurisdiction to deal with the grievance of the Union. The Board will set

further days of hearing to consider the merits of the grievances.


DATED AT OAKVILLE, THIS 30TH DAY OF MARCH, 1994.



HOWARD D. BROWN, CHAIRMAN



J. MCMANUS, UNION NOMINEE



DAVID CAMELETTI, COLLEGE NOMINEE

IN THE MATTER OF AN ARBITRATION

BETWEEN:

**NORTHERN COLLEGE OF APPLIED ARTS AND
TECHNOLOGY**

(The College)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF C. DePENCIER AND THE UNION

DISSENTING OPINION OF COLLEGE NOMINEE

I have read the award of the majority of the Board of Arbitration and, with the greatest of respect, must dissent.

Article 8.08 of the collective agreement sets out a very specific procedure with respect to layoff which must be construed as a specific intention agreed to by the parties to be followed in the event of layoff. This conclusion is underlined by the fact that Article 8.05 occupies more than three full pages of the collective agreement.

Article 8.08(b) specifies that the written referral to arbitration in Article 11.03 is to specify two full-time positions or positions occupied by two or more partial-load or part-time employees.

The parties were careful enough to use the word, "positions" and, in my respectful view, this Board of Arbitration is obligated to assign the plain meaning to the word, "position." In this regard, the second step reply dated December 6, 1991 by the grievor, Mr. dePencier which specifies the names of "R. Oblin" and "M.



Deveault" does not refer specifically to positions but to two individuals. In my respectful view, this does not comply with the requirements of the collective agreement which specify that the positions (which I read to be a reference to the specific classifications into which the grievor wishes to bump) are to be included on the step II reply.

It is significant that the majority finds that the "referral to arbitration does not specify the two positions required by Article 8.08(a) but the grievance indicates two names, Oblin and Deveault, which the grievor claims to displace." In light of this finding, it is my respectful view that the majority opinion was then obligated to find that the referral to arbitration by the grievor did not meet the requirements of Article 8.08(a) and that the grievance could accordingly, not be processed to arbitration.

Having regard to the above, I would have upheld the College's preliminary objection and dismissed the grievance. Since I would have disposed of the grievance, I would also have quashed the subpoena.

I would like to indicate that I do concur with the result by the majority in not permitting the grievor to deal with the claim in the grievance to displace either of the employees, Hosking or McVeigh. My reasoning is on the basis of the argument of the College that the jurisdiction of this Board of Arbitration does not extend to any positions in India into which the grievor sought to bump into..

DATED at the City of Sault Ste. Marie, this 29th of March, 1994.



DAVID CAMELETTI, COLLEGE NOMINEE