

96F846  
Local 110  
CAAT (A)

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:**

FANSHAWE COLLEGE  
("The College")

**AND:**

ONTARIO PUBLIC EMPLOYEES UNION  
("The Union")

**IN THE MATTER OF GRIEVANCE:**

LESLIE DOBOS - OPSEU # 96F846

**BOARD OF ARBITRATION:**

- Kevin M. Burkett - Chairperson
- John McManus - Union Nominee
- Ron Hubert - Employer Nominee

**APPEARING FOR THE COLLEGE:**

- Robert Atkinson - Counsel
- Gail Rozell - Manager, Human Resources

**APPEARING FOR THE UNION:**

- David Wright - Counsel
- Paddy Musson - President, OPSEU Local 110
- Gary Fordyce - Chief Steward
- Leslie Dobos - Grievor

Hearings in this matter were held in LONDON, Ontario on February 21, April 4, October 31 and November 18, 1997

## A W A R D

We have before us the grievance Mr. Leslie Dobos, a professor at Fanshawe College, whose seniority dates from March 2, 1988, challenging his layoff as having been in breach of article 27.06 of the collective agreement. In accord with article 27.08 of the collective agreement, Mr. Dobos identified the positions occupied by Ms. Linda Froese, who has a seniority date of April 1, 1988, and Ms. Ruth Johnson, who has a seniority date of December 11, 1988, as those he seeks. There is no dispute with respect to my authority to hear and determine this matter.

The relevant provisions of the Collective Agreement read as follows:

**27.06** When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntarily full-time employees who have completed the probationary period to another position from that previously held as a result of such layoff or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected.

Where an employee has the competence, skill and experience to fulfil the requirements of the full-time position concerned, seniority shall apply consistent with the following:

- (i) An employee will be reassigned within the College to a vacant full-time position in lieu of being laid off if the employee has the competence, skill and experience to perform the requirements of a vacant position.
- (ii) Failing placement under 27.06(i), such employee shall be reassigned to displace another full-time employee in the same classification provided that:
  - (a) the displacing employee has the competence, skill and experience to fulfil the requirements of the position concerned;
  - (b) the employee being displaced has lesser seniority with the College.

**27.08 A** An employee claiming improper layoff, 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 32.02 for presenting complaints shall apply from the date written notice of layoff 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 27.08A, 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.

There is no dispute between the parties that they are under a sufficient ability clause whereby the senior employee seeking to displace a junior incumbent is not measured against the incumbent but rather against the position. If the senior employee about to be laid off can establish that he has the "competence, skill and experience to fulfil the requirements of the position," he/she is entitled to displace the junior incumbent.

There is an issue between the parties as to what constitutes "the full-time position" in respect of which the "competence, skill and experience" of the grievor is to be measured. The Union takes the position that the position is the bundle of courses taught by the incumbent at the time that the grievor was laid off to the street. The College, on the other hand, argues that in the case of Ms. Froese, who occupies an ongoing position, the position encompasses the core pattern of assignments over some representative period. The College asks us not to take a "snapshot" of one term as suggested by the Union.

In the case of Ms. Johnson, who occupies a newly-created position, we are asked not to focus just on the assignments given to Ms. Johnson in the fall and winter of 1996/97, but rather, to take into account the assignments that the College contemplates for the position over time. This, it is argued, would entail all of the courses that have been taught by Ms. Johnson up to the present.

This issue has been the subject of considerable prior adjudication, the preponderance of which establishes that in this work environment, under this collective agreement, where an employee subject to layoff is seeking to displace a junior employee, the position encompasses those courses assigned to the junior employee at the time the senior employee would have been laid off. Arbitrator Howard Brown analyzed the language at issue in *re: Niagara College and OPSEU Martin, 88C730 (October 21, 1989)*. In that case the employer did not argue the "core pattern" approach based on courses taught by the incumbent over a representative period, but rather argued that the grievor had to establish the ability to teach the courses required of the incumbent for both

the fall and winter term that coincided with the grievor's layoff; that is for the fall academic year. The Union, on the other hand, argued that the grievor need only demonstrate an ability in respect to the fall courses. Arbitrator Brown concluded that on the language, it was ability at the time based on the courses assigned to the junior incumbent at the time. He reasoned as follows:

The question then is what meaning is to be given to "position" for the purposes of the application of Article 8.05(b). As the time for determination of the grievor's skill is as of the date of lay-off, it is the position held by the employee who the grievor seeks to displace which is at issue. His position at that time is made up of a number of courses of teaching for which he is responsible and for which he has been assigned by the College as indicated in the SWF's. Courses of instruction which he may be subsequently required to teach are not then part of the position, although it is expected that as a full time Teaching Master, he will be required to teach for the full academic year. Nonetheless, his position for the purposes of the lay-off provisions is, we find, that which covers his teaching assignments as of the date of lay-off (emphasis added).

Arbitrator Brown had been referred to the award of arbitrator Carter in *re: St. Clair College and OPSEU dated May 15, 1989*; an award released after the completion of the hearing in the *Niagara College* case. Arbitrator Carter had been asked to define the term "position" as it appears in the present article 27.06; a clause that at that time had recently been negotiated into the collective agreement. Arbitrator Carter found as follows:

Both parties agree that article 8.05 no longer contemplates a competition between employees, but differ as to how this new language is to be applied. As we read this language it expresses an intention that the competence, skill, and experience of the displacing employee be measured against the benchmark of the content of the position being claimed. The problem, however, is to define the content of that position in an objective manner so

as to maintain in the lay off situation a balance between respect for seniority and recognition that an employer is not required to re-organize its work assignments to accommodate the particular qualifications of a more senior employee. In situations where job content is not well defined, as in this case, this task can pose considerable difficulties.

In the board's view, what one must do in this kind of case is to determine the core pattern of duties and responsibilities performed by an incumbent teacher during the course of her employment. It is this core pattern of duties that forms the content of the position against which the competence, skill, and experience of a displacing employee must be measured. If it can be established that a displacing employee is capable of performing the core pattern of duties and responsibilities being performed by an incumbent with less seniority, then under the terms of article 8.05 the incumbent would be displaced.

In the subsequent award between the same parties dated October 12, 1989, dealing with the merits of a specific complaint under the relevant language arbitrator Carter refined his definition of the term "position", as it appears in the clause. He rejected the notion of considering future assignments. He stated:

What pattern emerges from these course assignments? In identifying this pattern, the more appropriate approach, in our view, is to confine our consideration to those courses that had been assigned to the incumbent prior to the lay-off of the grievor. It is at the point of lay-off that the collective agreement requires the employer to put its mind to whether a displacing employee has the competence, skill, and experience to fulfil the requirements of the position. At this time, absent any precise job description, past assignments are the only concrete evidence of the responsibilities that define the position. While the College may have contemplated other assignments in the future, such future intentions are hardly an objective measure of what constitutes the position. Rather, what must be looked to is the past pattern of assignments in order to establish an objective benchmark against which to measure the grievor's qualifications.

Arbitrator Brown in his *Niagara College Award (supra)*, which was released shortly after the second Carter award, further limited the concept of core duties

articulated by arbitrator Carter in his first St. Clair College Award (*supra*) when he concluded that "the 'position' at that time (the time of layoff) is that which the incumbent fills with his responsibilities for teaching assignments at that time. Arbitrator Brown interpreted the first Carter award as follows:

The Carter award did not define the position in terms of future teaching assignments which would not be set by the College at that time for the entire academic year. If that was to be the criteria, it would be possible to defeat the seniority rights of the laid-off employee by structuring future courses in a manner which would effectively prevent that employee from exercising the displacement rights under Article 8.05(b). As this clause has been changed by the parties from a relative equality competition clause contained in past Collective Agreements, to a sufficient ability requirement by which the laid-off employee must meet the conditions set out in the Article, in order to give effect to the seniority factor. The application of seniority is of significant importance to employees who are subject to layoffs and which must be given effect under the terms of the agreement. We conclude that this Article requires the grievor to have the requisite competence, skill and experience to fill the position as at the time of lay-off. The "position" at that time is that which the incumbent fills with his responsibilities for teaching assignments at that time (emphasis added).

Having reviewed the first Carter award, arbitrator Brown found that the grievor had the obligation to establish that he could fulfil the position occupied by the junior incumbent as of the date of layoff.

It is to be observed that in the *Niagara College* (*supra*) case decided by arbitrator Brown the employer's position was that the grievor had to show that as of the date of layoff he had the ability to teach the courses required of the junior incumbent in both the fall and winter term. The employer at that time did not take the position that courses taught in the past by the incumbent together with courses that might be taught in the

future constituted the position in respect of which the grievor must establish his/her ability. Arbitrator Brown rejected the argument that both the fall and winter term must be taken into account, but rather, accepted that only the courses taught in the fall term, as the courses taught at the time of the layoff, had to be taken into account.

Arbitrator Devlin in *re: Niagara College and OPSEU, Mymryk Grievance, November 20, 1989*, came to the same conclusion as arbitrator Brown. In rejecting the idea of considering the courses taught in both the fall and winter terms, she reasoned:

If this Board were now to consider Mr. Scoones' position with reference to his teaching assignments during the winter term of 1989, we would, in effect, be altering the nature of the position considered both by the College in making its layoff decision and by the Grievor at the time of the filing of his grievance. This in our view, could not have been the intention of the parties and, for this reason, we are not prepared to consider the courses taught by Mr. Scoones in the winter term of 1989 as relevant to the position sought by the Grievor.

She interpreted the core function test in the first Carter award in *St. Clair College (supra)* as being subject to the qualification that future teaching not be taken into account; a limitation articulated by arbitrator Carter himself in his second *St. Clair College award (supra)*.

When reference is had to the foregoing jurisprudence under this collective agreement we are driven to the conclusion, for the same reasons articulated by arbitrators Brown and Devlin, that the "position" in respect of which a grievor must establish his/her ability under article 27.06 is the position occupied by the junior incumbent, comprised of the courses being taught during the term that the layoff is to be effective. This is not

a surprising result given the competing interests that are at stake; the preference given to senior employees for continued active employment, on the one hand, and, on the other hand, the College's need to have its course offerings taught by qualified professors. In the face of these competing interests it would make little sense to have the senior employee laid off to the street if he/she is capable of teaching the bundle of courses that the College has assigned to a junior professor at the time of the proposed layoff. Indeed, such a result, while it would not advance the interest of the College in having its course offering taught by qualified individuals, would undermine seniority rights. We reiterate that under this collective agreement, seniority operates to permit the senior employee to displace the junior employee in a layoff situation where the senior employee can establish that he/she has the "competence, skill and experience" to teach the bundle of courses assigned to the junior employee during the term that the layoff is to take effect.

In so far as the College relies on *re: Fanshawe College and OPSEU Zurowski, July 3, 1997 (Simmons)*, this award deals with the time as of which an affected employee must grieve a violation of article 27.06 and whether there is an opportunity for displacement after receipt of notice of layoff under article 27.06(viii)(c). This award does not assist us in defining the term "position" in article 27.06 and, therefore, does not in any way conflict with or detract from our finding in this regard.

This takes us to the grievor's claim to the position occupied by Ms. Johnson; the junior of the two incumbents whose positions have been identified by Mr. Dobos as positions occupied by junior incumbents that he has the "competence, skill and

experience" to fill. The College acted to create a position in the information technology division that was filled by Ms. Johnson commencing in the spring of 1996. It is this position that the grievor seeks. The grievor's layoff to the street was effective from September 1996 and, therefore, the position occupied by Ms. Johnson into which he seeks to be placed is defined by the bundle of courses that the College assigned to Ms. Johnson for the fall term 1996. Ms. Johnson was assigned to teach OFAD100, Language Fundamentals and OFAD125, Information and Document Processing. OFAD100 is described in the course information document as follows:

This one-semester course is offered to all entrants to the Office Administration General Program. Areas of study include: parts of speech, sentence structure, grammar, spelling, word use, punctuation, capitalization, use of numbers, abbreviations, editing and proofreading. Use of a dictionary and the GREGG REFERENCE MANUAL will be emphasized as aids for improving students' research, writing, and editing skills and to promote development of students' abilities to produce professionally written communications.

OFAD125 is described in the course information document as follows:

A review of the complete keyboard using word processing software. Keyboarding technique will be stressed. Topics include: speed and accuracy development, basic word processing features, business correspondence, report formatting, proofreading, and the numeric keypad.

The issue to be decided under article 27.06 is not whether Ms. Johnson is better qualified than the grievor to teach these courses, but rather, whether the grievor has the "competence, skill and experience" to teach these courses.

Article 27.06 does not provide for the retraining of the senior affected employee. Rather, the senior affected employee must establish his/her immediate competence to

teach the necessary courses. This requirement has been aptly and fairly described by arbitrator Swan in *re: Seneca College and OPSEU, Morgulis grievance, August 19, 1994* as follows:

As we read the collective agreement, it requires that the displacing Professor be qualified immediately to perform the requirements of the position, and that individual may not claim, for example, time for retraining or re-qualifying prior to taking up the duties. But the words of the collective agreement must be understood in the context of teaching in a College, where there is normally a summer break to prepare for classes beginning again in September, and where similar breaks occur between terms at other occasions in the year. There is also a provision for preparation time, and the collective agreement must be understood in light of the availability of such preparation periods to allow the Professor to brush up on courses which he or she has not taught for a while.

It is against this backdrop that we proceed to answer the question that is before us.

Mr. Dobos has a B.A. from the University of Western Ontario, in Film Criticism. This is a course of study taught under the auspices of the English department. He commenced teaching at the College in September 1987 and from that time until the time of his layoff he taught a variety of courses in a variety of programs. He has taught preparatory programs for adult learners, communications levels II, III and IV, English as a second language, job skills and résumé preparation, level II mathematics and WordPerfect 5.1 for DOS, computer application courses for management studies applications, for adult learners, for Ontario Basic Skills program (blueprints), for Employment Skills Enrichment program and for continuing education. The evidence does not disclose any criticism with respect to the ability of Mr. Dobos to grasp the subject matter of his course assignments nor does the evidence disclose any criticism of his delivery of these courses.

Mr. Dobos has developed new programs for students and revised curriculum in respect of English as a second language and communications courses. He has owned and operated a tobacco farm for some 17 years.

Turning to the bundle of course assignments that comprise the position at issue. OFAD100 is an entry level course that includes the following areas of study: parts of speech, sentence structure, grammar, spelling, word use, punctuation, capitalization, use of numbers, abbreviations, editing and proofreading. While Mr. Dobos may not have taught these subject areas at the post-secondary level, he has taught level I to IV communications which encompass spelling, writing, sentence structure, paragraphs, grammar, literature and essays. The fact that he had not previously worked with the Gregg Reference Manual would not, in our view, somehow disqualify him from this position. Having regard to his prior teaching assignments and to his business background, we are satisfied that Mr. Dobos has the "competence, skill and experience" within the meaning of article 27.06 to teach this course.

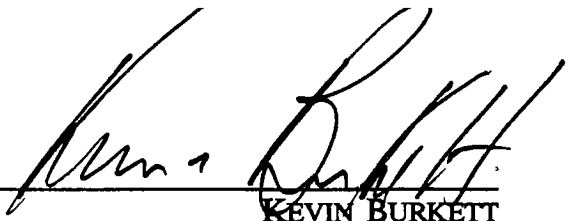
OFAD125, Information and Document Processing I, is also an entry level course, which entails a review of the complete keyboard using word processing software. Topics include speed and accuracy development, basic word processing features, business correspondence, report formatting, proofreading and the numeric keypad. Mr. Dobos has taught a variety of computer software application courses and utilizes a computer in the operation of his business. He had demonstrated his "competence, skill and experience" to teach the word processing software applications described. He has never taught

keyboarding. However, he took a keyboarding course while in high school and has a knowledge of keyboarding acquired in the teaching of various software application courses and in the operation of a computer in his business. This is a mechanical, as distinct from a technical capability, that is somewhat dependent upon the technical understanding that he already possesses. On applying the test articulated by arbitrator Swan in *re: Seneca College (supra)* we are satisfied that Mr. Dobos possesses the required "competence, skill and experience" to teach the keyboarding component of course OFAD125.

Having regard to the foregoing, we are satisfied that Mr. Dobos has the "competence, skill and experience" to teach both of the courses assigned to Ms. Johnson in the fall of 1996. Accordingly, as the senior of the two he was entitled to the position under article 27.06 and, therefore, should not have been laid off. He should have been assigned the position and continued in active employment and we hereby so declare. Mr. Dobos is to be compensated for his losses and treated as if he had worked in the place of Ms. Johnson during the fall term 1996. We are not in a position to determine what his employment status would have been subsequent to the completion of the fall term 1996 and leave it to the parties to address that matter.

We will remain seized in the event of any difficulty with the implementation of our award.

Dated this 4<sup>th</sup> day of ~~March~~ <sup>JUNE</sup> 1998 in the City of Toronto.

  
\_\_\_\_\_  
KEVIN BURKETT

I concur/~~dissent~~ "SIGNED"  
JOHN MCMANUS - UNION NOMINEE

I concur/~~dissent~~ SEE ATTACHED  
RON HUBERT - COLLEGE NOMINEE

**DISSENT**

Having reviewed the award, the evidence, and prior adjudication on the issue of the "position" at the time of lay off, I am not in agreement with the conclusions reached in the Award.

This case deals with the creation of a new position in Office and Administrative Studies in the Information and Technology Division of Fanshawe College. The position was designed to deliver a broad range of office administrative courses including business accounting, computer programming, business information systems as well as various general courses applicable to secretarial and administrative duties.

Based on the experience of Mr. Dobos, the grievor, I would agree he could teach the first course assigned in the fall term OFAD100 Language Fundamentals, based on his demonstrated ability in teaching the four levels of Communication courses. On the other hand, I would not agree he has the competence, skill and experience at the time of layoff to teach OFAD125 Information and Document Processing. Having a general knowledge of computer applications does not qualify one to be able to teach Typing, Business Correspondence, Report Formating etc. The evidence of Mr. Dobos was that he took a typing course in high school, perhaps twenty years ago, but has never taught secretarial or legal assistants how to type. He acknowledged he had no experience in respect to

speed and accuracy and if he was to teach this course, he would have to learn keyboarding. This being the case, he does not have the competence, skill and experience required to teach at the time of layoff, a requirement specified by the collective agreement.

At the outset of the Award, considerable reference is made to previous jurisprudence dealing with what constitutes "the full-time position" in which the "competence, skill and experience" of the grievor is to be measured.

With respect, the facts of this case are distinguishable from those referred to, and I do not believe the case analysis has been properly applied to the facts of this decision.

Considerable reliance is given to the decision of Arbitrator Carter, and I wish to review the relevant principals he has enunciated. He states that the language expresses an intention that the competence, skill and experience of the displacing employee be measured against the benchmark of the content of the position being claimed. The problem is to define the content of that position in an objective manner so as to maintain in the lay off situation a balance between respect for seniority and recognition that an employer is not required to re-organize its work assignments to accommodate the particular qualifications of a more senior employee.

He states as reference on page 5 of the Award that in this kind of case, one must “determine the core pattern of duties and responsibilities performed by an incumbent during the course of her employment. It is this core pattern of duties that forms the content of the position against which the competence, skill and experience of a displacing employee must be measured.”

This decision does not meet the above test. This decision does not determine the “core pattern of duties” that will be taught. Instead, the decision takes an extremely narrow view of “position” by referencing those general courses to be taught in the fall term. It is simply by virtue of scheduling that general entry level courses are first offered in the program. Such courses do not reflect a picture of the “core pattern of duties and responsibilities” to be performed, the standard Arbitrator Carter says should be applied.

This decision then refers to a subsequent Carter decision where he refines his definition of the term “position” and suggests Carter rejects the notion of considering future assignments. This explanation does not fit the facts as outlined by Arbitrator Carter. He says, “the more appropriate approach, in our view, is to confine our consideration to those courses that had been assigned to the incumbent prior to the lay off.” He says that past assignments are the only concrete evidence of the responsibilities. He emphasizes that it is “the past pattern of assignments that must be looked at in order to establish an objective benchmark against which to measure the grievor’s qualifications.

It is important to note he still emphasizes the “core pattern” of responsibilities, not the narrow interpretation of relying on the first one of two courses to be taught.

In this case, we cannot apply the Carter test of looking at past assignments because we are dealing with a new position. There is no speculation of what courses are to be taught by the position, they are identified and it is the courses to be taught against which the competence, skill and experience of Mr. Dobos should be considered, if he is to displace Ms. Johnson.

With respect, the Devlin decision of Niagara College referred to is also different from the facts of this case. Her decision specified that the College stick to the facts at hand when they assessed the grievors qualifications and not subsequently rely on courses that had not been identified at the time of lay off. I think it is also important to note that Devlin refers to an unreported Carter decision and quotes the reference “that a ‘position’ consists of the core duties and responsibilities of the incumbent over a representative period of his employment.”

A full time Teaching Master is hired and required to teach for the full academic year. This decision is based only on the two general courses offered in the fall term. It does not apply the jurisprudence that the “position” to be considered at the time of lay off consists of the core duties and responsibilities over a

representative period of employment. In this case, being a new position, the record of past assignments can not be relied upon. It is the description of the new position that has been established that should be relied upon.

For these reasons I cannot concur with the decision of the majority.

A handwritten signature in black ink, appearing to read "R. Hubert". The signature is written in a cursive style with a large initial "R" and a horizontal line extending from the end.

Ronald A. Hubert