

CAAT (A)
98C533-535
L. 420

IN THE MATTER OF AN ARBITRATION

BETWEEN:

LOYALIST COLLEGE OF APPLIED ARTS AND TECHNOLOGY

The College

- and -

**ONTARIO PUBLIC SERVICE EMPLOYEES UNION,
LOCAL 420**

The Union

AND IN THE MATTER of grievances by Brian Grimley alleging improper layoff and a failure to reassign.

Board of Arbitration:

I.G. Thorne, Arbitrator
Richard O'Connor, Employer Nominee
Ed Seymour, Union Nominee

Appearances for the College:

D.K. Gray, Counsel
D. Butler, V.-P., Human Resources

Appearances for the Union:

Andrew Lewis, Counsel
Cecelia Reilly, Chief Steward
Brian Grimley, Grievor

A hearing in this matter took place on April 12th, 1999, at Belleville, Ontario.

PRELIMINARY AWARD

The grievor was notified on July 23rd, 1998, of his layoff from his position as a full-time professor at the College. He filed three grievances following this decision. Two of the grievances alleged an improper layoff and each, by way of remedy, sought reassignment to positions then occupied by other full-time members of the bargaining unit; two individuals were named in each case. The third grievance asserted that the College had failed to reassign the grievor into positions which should have been created through combining non-full-time work; that grievance sought a reassignment of a full-time load from sessional, part-time and/or partial load positions then held by four named individuals (but not limited to them). The grievances thus named eight individuals whom the grievor claimed entitlement to displace in one way or another.

The grievances proceeded through the grievance procedure but were not resolved. It is common ground that the College's decision at Step 2 of the grievance procedure was received by the grievor on Friday, October 16th, 1998.

At the commencement of the hearing the College raised two preliminary objections: that the Union's referral of the grievances to arbitration was untimely in that notice in writing had not been given to the College within the fifteen-day period specified in Step 2 under Article 32.03;

and that the referral to arbitration did not comply with Article 27.08(B) which in the College's view limited the grievor to specifying two full-time positions (or possibly more if partial load positions were involved) into which the grievor might bump.

The parties called evidence about the circumstances surrounding the sending of the Union's referral to arbitration.

The offices of the President of the College and of the Human Resources Department are both located in the main building of the College, the Kente Building. The office of the Chief Steward, Cecelia Reilly, is in the same building one floor below the administration offices. The Union office, in which the referral to arbitration was prepared, is also in the building but quite some distance from the administration offices. Obviously in some circumstances it will be easy to deliver important documents within the building by hand. On other occasions the internal mail system will seem more convenient.

The College's internal mail system is operated by a private contractor. Although the contractor which provides the service and the clerk who does the work had been in place for less than a month at the time of the referral to arbitration, it appears that the system for delivering mail had been in place for quite some time before that. There is a mailroom in the Kente Building in

which mail can be left for internal delivery by the mail clerk. Those leaving mail can either place it on the counter or put it in one of the slots kept for each member of the faculty in the mailroom. In either case the clerk gathers up the mail twice a day and delivers it throughout the building, initially between 9:00 a.m. and 10:00 a.m., and then between 2:00 p.m. and 3:00 p.m.. Mail which arrives in the mailroom too late for one delivery goes out with the next. On all the evidence the mail delivery system is a routine operation and a dependable one.

Ms. Reilly prepared a letter referring Mr. Grimley's grievances to arbitration on October 30th, 1998; the date was generated by her computer when she prepared the letter. The letter noted that the written response from Step 2 had been received by Mr. Grimley on October 16th, 1998. Ms. Reilly's best recollection was that she had sent the letter, which was addressed to the President of the College, in the internal office mail that Friday afternoon. She did so by taking it to the mailroom as was her usual practice. She assumed that mail sent through the system would reach its destination in a reasonable length of time. She was aware that the deadline in this case was coming up, she stated, and that in fact she used the mail to be expedient. The letter reached the Human Resources Department at 2:55 p.m. on Monday, November 2nd. Luisa Bowry, the executive secretary to the Vice-President for Human Resources, made a point of recording the time she received the letter and also noted on it that this was 17 days after the grievor had received the written response from Step 2. It was her evidence that she checked with the office of

the President (to whom the letter had been addressed) and was informed that that office had received the letter in that afternoon's mail. Indeed it is our understanding from Ms. Bowry's evidence that separate copies of the letter were received by her and by the President's office.

There was some evidence that members of faculty and staff may on occasion work on weekends and that in some circumstances it might be possible to deliver a letter to one of the administration offices during a weekend. However that did not happen on this occasion and on the evidence it seems most probable that the letter was taken to the mailroom on the Friday afternoon after the last delivery of the day.

On November 2nd, the same afternoon that the referral to arbitration was received, the Vice-President of Staff and Student Services wrote to Ms. Reilly taking the position that the grievance was out of time and also that Article 27.08 B had not been complied with.

* * *

Counsel for the college submitted that the referral to arbitration was defective in two respects. First, it did not meet the requirements of Article 27.08 of the collective agreement. Counsel proposed that the agreement set up a process for dealing with the placement of faculty

members affected by a layoff. Under Article 27.05 a joint union/management committee (the CESC) would meet to discuss planned staff reductions and to formulate recommendations. If the College then decided to proceed with a layoff, it could do so on not less than ninety calendar days' notice to the employees being laid off and must then follow the placement and displacement provisions of Article 27.06. A laid-off employee seeking to challenge the actions of the College could do so in a grievance under Article 27.08 A in which he must state the positions occupied by other employees whom he claimed entitlement to displace. In the College's view there was no limit to the number of names and positions a grievor could mention in his grievance. When it came to a referral to arbitration under Article 27.08 B, however, it was the College's position that the article specifically restricted the number of positions a grievor could mention to two (or more if partial load or part-time employees were affected). Thus the grievor had to make an election after Step 2 when a grievance was referred to arbitration. In this case there were three documents in which the grievor set out the positions he claimed to be entitled to hold, but in substance there was one grievance arising out of one layoff, in counsel's submission. To permit the grievor, by filing three grievances, to name more than the two positions in total permitted under Article 27.08 B would be to allow an end run around the provisions of the agreement.

In support of these submissions, counsel referred to a number of awards dealing with the adequacy of referrals to arbitration under Article 27.08 B, including Re Canadore College and

Ontario Public Service Employees Union (unreported, December 12th, 1996, MacDowell); Re Humber College and Ontario Public Service Employees Union (unreported, May 21st, 1997, Shime); Re Fanshawe College and Ontario Public Service Employees Union (unreported, August 12th, 1997, Simmons); and Seneca College of Applied Arts and Technology and Ontario Public Service Employees Union (unreported, February 6th, 1998, H.D. Brown). Counsel also referred us to three cases which he suggested dealt with attempts to defeat contractual provisions by technical means: Re Canadian National Railway Co. and Canadian Telecommunications Union Division No. 43 of the United Telegraph Workers et al. (1975), 10 O.R.(2d) 389; Re Council of Printing Industries of Canada and Toronto Printing Pressmen & Assistants' Union No. 10 et al. (1983), 149 D.L.R. (3d) 53; and Gardner v. Coutts & Co. [1967] 3 All E.R. 1064. Only a waiver by the College could relieve the Union from the necessity of complying with the express requirement of the collective agreement, and in this case the College had put the Union on notice immediately upon receiving the referral to arbitration.

So far as the timeliness of the referral to arbitration was concerned, counsel argued that notice of the referral must be "given" to the other party and that putting the document in the mail system was not sufficient to accomplish that. The agreement specified a fifteen-day time limit, defined a "day" as a calendar day and made only one exception to the calculation of time limits by excluding the period from Christmas Day to New Year's Day inclusive. In his submission there

was no significance to the fact that the fifteen days would expire on a Saturday in this case. While no award dealt expressly with the question of the expiry of a time limit on a weekend, counsel argued that the effect of the decisions in the area was consistent and he referred us to Re Fanshawe College and Ontario Public Service Employees Union (unreported, May 25th, 1989, Devlin); Re Seneca College of Applied Arts and Technology and Ontario Public Service Employees Union (unreported, May 3rd, 1991, Simmons); Re Fanshawe College of Applied Arts & Technology and Ontario Public Service Employees Union (unreported, November 26th, 1991, Swan); Re Fanshawe College and Ontario Public Service Employees' Union (unreported, September 4th, 1992, Brent); Re Cambrian College and Ontario Public Service Employees Union (unreported, October 18th, 1994, Swan); Re George Brown College of Applied Arts and Technology and Ontario Public Service Employees Union (unreported, May 14th, 1997, Kruger); Re Cambrian College and Ontario Public Service Employees Union (unreported, October 22nd, 1997, Devlin); Re St. Lawrence College and OPSEU (unreported, March 30th, 1998, Keller); and Re Seneca College and Ontario Public Service Employees' Union (unreported, April 20th, 1998, Brent).

With respect to timeliness, counsel for the Union argued first that the fifteen-day time limit did not expire until after the weekend: he suggested that, when the last day for doing an act falls on a day when it is not possible to act - a dies non in counsel's submission - the time for doing the

act is deferred to the next day on which it can be done. In support of this view he referred us to Re Stelco Inc. Hilton Workers and United Steelworkers of America, Local 1005 (unreported, December 28th, 1988, Jolliffe) and s. 28(h) of the Interpretation Act, as well as to Rule 3.01 of the Rules of Civil Procedure.

Counsel further submitted that the requirement that the referral to arbitration be by notice in writing "given to the other party within 15 days ..." was complied with when the letter in question was delivered to the campus mail. This was delivery to the College, he argued, in that the contractor which handled the mail was an agent for the College. Alternatively, the College had represented that the Union could rely on the campus mail.

Addressing the College's argument that Article 27.08 had not been complied with, counsel for the Union argued first that a strict reading of that article entitled a grievor to name two positions in each of the grievances he had filed. But even if this were not so, he argued, the College had waived its right to object to any deficiency in the referral to arbitration. The grievor had filed three grievances, each naming individuals he sought to displace, and all of the grievances had been processed through the grievance procedure without objection from the College. An objection during that period would have prompted Ms. Reilly to seek advice and possibly to act differently, but the College's silence had led the Union to believe that this way of proceeding was

acceptable and to believe that all three grievances could be the subject of referrals to arbitration.

The Union also suggested an alternative course: this board could direct the Union to narrow the grievances by restricting the number of positions with respect to which it wished to proceed.

Following the hearing the parties provided the board with certain additional authorities having to do with the application of Rule 3.01 of the Rules of Civil Procedure and with the application of the Interpretation Act to various proceedings including labour arbitrations.

* * *

Certain provisions of the collective agreement are particularly relevant to the parties' submissions:

Lay-Off Grievances

27.08A 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 employees claims 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.

27.08B 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.

Article 32
Grievance Procedures

Grievances

32.03 ...

Step Two

The grievor shall present the grievance to the College President.

The College President or the President's designee shall convene a meeting concerning the grievance, at which the grievor shall have an opportunity to be present, within 20 days of the presentation, and shall give the grievor and a Union Steward designated by the Union Local the President's decision in writing within 15 days following the meeting. In addition to the Union Steward, a representative designated by the Union Local shall be present at the meeting if requested by the employee, the Union Local or the College. The College President or the President's designee may have such persons or counsel attend as the College President or the President's designee deems necessary.

In the event that any difference arising from the interpretation, application, administration or alleged contravention of this Agreement has not been satisfactorily settled under the foregoing Grievance Procedure, the matter shall then, by notice in writing given to the other party within 15 days of the date of receipt by the grievor of the decision of the College official at Step Two, be referred to arbitration.

General

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

32.05 D The time limits set out at the Complaint or Grievance Steps including referral to arbitration shall be calculated by excluding the period from Christmas Day to New Year's Day inclusive.

Definitions

32.12 A "Day" means a calendar day.

* * *

There is really no dispute between the parties that the time limits set out in the grievance procedure and for referral to arbitration in this collective agreement are mandatory in nature and that a board of arbitration appointed under the agreement has no jurisdiction to extend them. If a step is not taken within the appropriate time limit a grievance is expressly considered to be abandoned. However the Union has not asked us to extend the time limit in this case but to recognize that the time limit which would otherwise have expired on Saturday, October 31st, actually continued to run until the end of the following Monday. None of the decisions under this collective agreement to which we have been referred has expressly dealt with a situation in which a time limit has expired on a Saturday, Sunday or holiday.

The award relied on by the Union (Re Stelco (supra)) considered a factual situation with some similarity to the present case, in the sense that the period of time allowed for referring a grievance to arbitration had come to an end on a Saturday. The matter involved the timeliness of a referral to statutory expedited arbitration under what was then s. 45 of the Labour Relations Act. Arbitrator Jolliffe observed that the offices of the Ministry of Labour were closed on the Saturday, Sunday and following Monday holiday so that it was not "physically and legally possible" to deliver the Union's request for arbitration until the Tuesday. Noting the Employer's reliance on the requirement of the statute that the request must be made "within 30 calendar

days", Arbitrator Jolliffe continued (at pp. 12-13):

Most --- but not all --- of the reasoning explained above is well-founded, but it contains a flaw which I consider to be fatal. It necessitates reading Article 9.15 as though it said --- in circumstances where the thirtieth day falls on a Saturday, a Sunday or a holiday --- that the referral to arbitration must be made within twenty-nine calendar days of the final Reply. That is not what Article 9.15 says. In permitting referral on the thirtieth day, I do not think it can permit the impossible.

The impossibility of literal compliance with certain time-limits is recognized by law. An interesting example is to be found in paragraph (h) of Section 27 in the Interpretation Act, R.S.O. 1980, Chapter 219. It is consistent with that principle to hold that the time-limit in Article 9.15 does not expire on what lawyers used to call a dies non. The result is both practical and equitable.

It is not entirely clear to us whether the award purported to apply Section 27(h) (now Section 28(h)) of the Interpretation Act in order to interpret s. 45 of the Labour Relations Act, or whether the provision of the Interpretation Act was simply used as an illustration of the application of a general principle. Section 28(h) reads:

(h) where the time limited by an Act for a proceeding or for the doing of anything under its provisions expires or falls upon a holiday, the time so limited extends to and the thing may be done on the day next following that is not a holiday;

Section 28(h) itself can be understood only if account is taken of the definition of "holiday" in Section 29(1): "holiday" includes Sunday ...", and a number of specified holidays, but not Saturday. Section 28(i), which extends a time limit for making certain filings in court offices which expires on "a day that is prescribed as a holiday for that office", would appear on the face of it not to be applicable to filings in Ministry offices. In Young v. City of Mississauga

24 C.P.C.(3d) 202, it was found that the Interpretation Act operated to extend the time for service of notice on a municipality when the time limited in a statute fell on a holiday; in that case the Court based its decision in part on the fact that the Interpretation Act of Ontario defined "holiday" as including a number of stipulated days - and thus that the definition was not finite. Earlier in City of Montreal v. Vaillancourt [1977] 2 S.C.R. 849, the Supreme Court of Canada had determined that the Interpretation Act of Quebec did not have the effect of extending the time for service on a municipality in quite similar circumstances. It may be that the board in Stelco was engaged in the exercise of applying s. 28(h) of the Interpretation Act as would have been appropriate given that the issue before it was whether a referral to arbitration had been made within the time limit specified in a statute. (The fact that the board was obliged to interpret and apply a statute made it appropriate for the arbitrator to determine whether he had the authority to extend the time for making a referral to arbitration under the statute - that being the alternative ground on which Arbitrator Jolliffe found the grievance to be arbitrable.

Since our task is to interpret and apply the provisions of the collective agreement rather than a public statute, it is our understanding that the Union urged us to apply the reasoning in Stelco in the sense that it illustrated the application of a broader principle of the law rather than the precise application of s. 28(h) of the Interpretation Act, and that it put forward Rule 3.01 of the Rules of Civil Procedure on the same basis. The effect of that Rule, and of the definition of a

"holiday" in Rule 1.03, is generally to extend time limits under the Rules of Civil Procedure in Ontario if the limits expire on a Saturday, Sunday or public holiday.

We are not convinced that a general principle of law operates, apart from the provisions of statutes such as the Interpretation Act, in such a way as to extend a time limit which runs out on a day on which it is not possible to do the act in question. Instead, the approach of the courts appears to be that some authority must be found in legislation for the non-expiry of a time limit otherwise clearly expressed. That was the case in City of Montreal v. Vaillancourt (supra) in which it was found that the time for giving notice to a municipality of a claim for damages expired on a Saturday as Saturday was not a "holiday" within the meaning of the Interpretation Act in question, notwithstanding the fact that the municipal offices were not open to receive the notice on a Saturday.

In this case we are obliged to interpret and apply the parties' private collective agreement rather than a public statute. We do not consider that we can give effect to the Union's view of the way in which the time limit in this case should be applied either because the Interpretation Act applies - clearly it does not - or on the basis of a more general principle. It seems to us that the collective agreement makes the parties' intentions quite clear. A referral to arbitration must take place "within fifteen days" of the happening of a certain event. The effect of a failure to act within

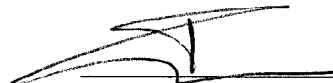
that period of time is well understood in the context of this collective agreement: the time limit is mandatory and strict observance can be insisted on by the other party. The agreement elaborates on what days are to be counted in the fifteen days and Article 32.12 A defines "day" as a calendar day. When one considers the possibilities before those who drafted the agreement of perhaps defining a day as a weekday or as excluding such days as Saturdays, Sundays and holidays, the choice of a "calendar day" can be seen as deliberate. That view is reinforced by a reading of Article 32.05 D which expressly excludes only one period in the year from the calculation of time limits, that being "the period from Christmas Day to New Year's Day inclusive". The parties themselves have determined with reasonable clarity how time limits are to be applied. It may be that this has the effect of shortening in practice some stipulated time limits, just as the interpretation urged on us by the Union would have lengthened them in some circumstances, but it is the parties' collective agreement which produces this result.

We do not agree that delivery of the Union's letter to the campus mail amounted to delivery to the College on the basis that the recipient was an agent of the College for this purpose. The requirement of the collective agreement is that the notice in question be given to "the other party". If reasonable efficacy is to be given to the agreement, this must mean giving the notice to an individual with responsibilities for administering the collective agreement on behalf of the party and, of course, the identity of such individuals is usually well understood as it was in this case.

There is nothing in the agreement or the evidence which would suggest an understanding that the contractor who handled the campus mail was such a person. Likewise there was no evidence which would suggest to us a representation by the College that the Union could rely on the campus mail for that purpose.

It is our conclusion that the referral to arbitration which was given to the College seventeen days after the receipt by the grievor of the decision at Step 2 was out of time and that we do not have jurisdiction to consider the grievance. In these circumstances we do not think it is appropriate for us to comment on the question of compliance with Article 27.08.

Dated at Kingston, Ontario, this ^{14th}~~18th~~ day of ^{June}~~May~~ 1999.



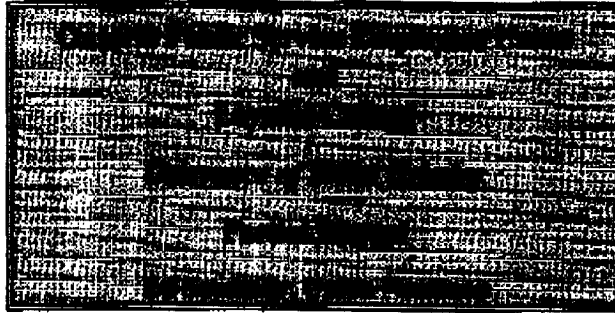
I.G. Thorne, Arbitrator

I concur

"R. O'Connor"
Richard O'Connor, College Nominee

I dissent

"E. Seymour"
Ed Seymour, Union Nominee - Dissent attached



I have read the Majority Award and find that I must dissent in part.

While I am in agreement with the Majority insofar as accepting the position that the time limits are mandatory, I am of the view that the situation which arose in this case is "on all fours" with those present in: **Re Stelco Inc., Hilton Works and the United Steelworkers of America, Local 1005** (unreported, December 28, 1988, Jolliffe.)

The language in that Agreement, as well as in the Agreement involved here, is similar in that the time limits are mandatory. Also in both instances, the final day for referring the grievance to arbitration occurred on a Saturday, a day on which the administrative offices were not open for the conducting of business.

In **Re Stelco** (supra), Arbitrator Jolliffe addresses the matter as follows:

That, however, is not the end of the matter. There is a second and crucial issue: whether the 30-day limit had actually expired when a Request was delivered to the Ministry of Labour on Tuesday, October 11.

Assuming — as I have concluded — that time began to run on Thursday, September 8, I find that the first day thereafter expired at the end of Friday, September 9. Similarly, the twenty-ninth day expired at the end of Friday, October 7. Saturday, October 8, was the thirtieth day. Sunday, October 9, was the thirty-first day. Monday, October 10, was the thirty-second day

and also a statutory holiday. It is common knowledge — and cannot be disputed — that the offices of the Ministry of Labour are closed and not open for the purpose of receiving or processing Requests under Section 45 on Saturday, Sunday or a statutory holiday such as Thanksgiving Day. It follows that the first day after the end of the twenty-ninth day when it became physically and legally possible to deliver a Request to the Ministry of Labour was Tuesday, October 11.

The Employer's answer is of course that Article 9.15 requires the Request to be made within thirty calendar days from September 8. On that reckoning, the last day would be Saturday, October 8. It would have been easy to comply with the rule by making the request on any day after September 12 (when the final Reply was received) down to and including Friday, October 7 (the twenty-ninth day) except on intervening Saturdays and Sundays when offices would be closed. This argument depends on a literal interpretation of the term "calendar days".

Most — but not all — of the reasoning explained above is well founded, but it contains a flaw which I consider to be fatal. It necessitates reading Article 9.15 as though it said — in circumstances where the thirtieth day falls on a Saturday, a Sunday or a holiday — that the referral to arbitration must be made within twenty-nine calendar days of the final Reply. That is not what Article 9.15 says. In permitting referral on the thirtieth day, I do not think it can permit the impossible. (UNDERLINING THESE TWO SENTENCES IS MY EMPHASIS. ES)

The impossibility of literal compliance with certain time limits is recognized by the law. An interesting example is to be found in paragraph (h) of Section 27 in the Interpretation Act, R.S.O. 1980, chapter 219. It is consistent with that principle to hold that the time limit in Article 9.15 does not expire on what lawyers used to call a dies non. The result is both practical and equitable.

Of course it would have been prudent to make the request on the twenty-ninth day or earlier, but strictly speaking the Union had until the thirtieth day to comply. On that day and the two following days, Sunday and Monday — beyond the control the parties — it was impossible to deliver the Request to the Ministry of Labour. The first day after the twenty-ninth on which it became possible to do so was Tuesday, October 11.

It is my view that Arbitrator Jolliffe is addressing the terms of the Collective Agreement and not the Labour Relations Act in the above reference. It is the Collective Agreement which stipulated the Union had 30 days in which to file the matter to Arbitration.

In this case before the Panel, the Union had 15 days in which to file the matter to Arbitration and, as expressed in the Majority decision, the fifteenth day fell on a Saturday, a non-business day on which, as previously stated, the College's administrative office was closed.

In the circumstances, therefore, I would have granted the Union the full 15 days to which it was entitled, especially since Ms. Reilly placed the letter in the College mail system on the Friday afternoon, (the fourteenth day,) and I would have so ruled.

With respect to Article 27.08, I am in complete agreement with the Majority that there is no need to make a ruling on this issue since the timeliness issue was dismissed.



Ed Seymour, Union Nominee