92B134 HARVEY, STORMS VS LOYALIST COLLEGE OF APPLIED ARTS AND TECHNOLOGY

IN THE MATTER OF AN ARBITRATION

BETWEEN: ONTARIO PUBLIC SERVICE EMPLOYEES UNION (FOR ACADEMIC EMPLOYEES)

(the "Union")

- AND -

LOYALIST COLLEGE OF APPLIED ARTS AND TECHNOLOGY

(the "College")

AND IN THE MATTER OF THE GRIEVANCES OF A. HARVEY AND N. STORMS (OPSEU FILE NOS. 92B134 AND 92B135)

BOARD OF ARBITRATION
Robert D. Howe, Chair
Michael Lyons, Union Nominee
David W. Guptill, College Nominee

APPEARANCES

For the Union
Chris Paliare, Counsel
Gary Fordyce

For the College
Barry Brown, Counsel
Dave Butler
Ken Robb
Wayne Tocheri
Dennis Stapinski
Shirley Kehimkar
John Podmore

Hearings in the above matter were held in Toronto, Ontario on June 2 and 9, and July 5, 1994.

AWARD

As indicated in our earlier award (the "preliminary award") dated January 26, 1994 in this matter, the two grievances which have been referred to this Board of Arbitration (the "Board") for determination in these proceedings allege that the College has incorrectly limited the salary expectancy of the grievors. The relief requested is that the College increase their salary expectancy to Step 16, and advance them to that step retroactive to April 24, 1991.

In the preliminary award, the Board wrote, in part, as follows:

> The parties agree that the Board has been duly constituted, and that it has jurisdiction to hear and determine the grievances. However, they are not in agreement concerning the scope of the evidence to be heard by Board in these proceedings....
>
> The parties' evidentiary dispute centres upon the effect to be given to an (unreported) arbitration award dated April 20, 1993 concerning a grievance filed against Fanshawe College ("Fanshawe") by Gary Fordyce (OPSEU File No. 92A085). On the agreement of the parties, that award (the "Fordyce Award") has been entered as an exhibit (Exhibit #5) in these proceedings, along with the two grievances, the applicable (September 1, 1989 to August 31, 1991) collective agreement, and the "Member's Handbook" and "Reference Manual" of the Joint Education Qualifications Subcommittee ("JEQS").
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> In the Fordyce Award, the majority of an arbitration board chaired by Richard H. McLaren (the "McLaren Board") wrote, in part, as follows in describing the grievance which they were called upon to arbitrate, and the circumstances which gave rise to it:
>
> Mr. Gary Fordyce filed a grievance on December 2, 1991, in which it was alleged that the College had failed to apply a ruling of the [JEQS] to permit him to progress to step 16 on the salary scale. It was alleged that the actions of the College were a breach of the collective agreement, in particular Articles 2, 3, 7 and Appendix 1.
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> The collective agreement in force at the time of the grievance had expired as of August 21, 1991 ... but was extended until its renewal in 1992.... In Appendix 1 of the extended agreement under the heading "Guidelines", in paragraph 4 beginning at page 70, the collective agreement provides:
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> The parties agree to the establishment of a Joint Educational Qualifications Subcommittee to consider and rule on further formal educational qualifications for the purpose of maximum salary level identification under the salary scale. Such Committee shall be composed of three (3) representatives of the Union and the Council of Regents respectively and shall decide the Committee's procedures. Any further qualification must be agreed to by the representatives of both the Council of Regents and the Union and shall be in writing.
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> Pursuant to this provision and its predecessors there has been a JEQS Committee in existence since June of 1975. It was formed "as an off-shoot of the C.A.A.T. Academic Negotiating Teams". The interpretation the JEQS Committee placed upon the provision in the Collective Agreement is found in its manual.... In the closing paragraph of its history at page 3 the Committee provides its interpretation of the Collective Agreement provision under which it has operated over the years. It reads as follows:

> "The JEQS meets on a regular basis to consider individual submissions. Committee decisions are made only at meetings which are attended by a minimum of two representatives of each party. Decisions are made on a consensus basis and are final and binding."

On October 1, 1991, a memo was sent to the Union members of JEQS ... indicating that the next meeting of the Committee would be on November 1, 1991, commencing at 11:00 a.m....

> Two of the Union members of the JEQS Committee [Mr. Craig McKay and Mr. Gary Fordyce] were called as witnesses in this proceeding.... The College called Mr. John Podmore as a witness.... Since [July of 1989] he has been a resource person to the Council of Regents representatives on the JEQS Committee. The other witness called on behalf of the College was Mr. Dennis Stapinski.... He became a member of the JEQS Committee in November of 1990, and was one of the three Council of Regents Representatives on the Committee.... Each of these individuals gave testimony as to what transpired in the meeting of November 1, 1991. There is a conflict in that testimony which will have to be resolved by this Board....

The majority award then describes the process by which the following two motions were made and voted on at the November 1, 1991 meeting, with the three Union representatives in attendance voting in favour of the motions and the two Council of Regents' representatives abstaining, in the absence of the third Council of Regents' representative whose travel plans had been delayed by weather conditions:

> That all individuals possessing a B.A. and a B.Ed. should get step 16 (maximum salary progression).
>
> That individuals with the teaching certificate, achieved as a result of 180 hours of study, and therefore comparable to in-service training, have maximum step 16.

The majority award also indicates that a third motion was proposed at the meeting, and that the result of the vote taken in relation to it after the delayed arrival of the College of Regents' third representative was "three for, three against".

In describing the areas in which conflicting testimony was adduced, the majority wrote as follows in the Fordyce Award:

The area of dispute in the evidence centres upon: whether or not the Union Representatives left the hearing room briefly before commencing the Motions; the volume of discussion and general manner in which the Motions were put; and the characterization of the testimony. Union Counsel alleges that the proper characterization of the meeting was that it was one which progressed in a normal fashion. In contrast, Counsel for the College alleges that it was one which progressed in a fashion which permitted the "railroading" of the motions though the Committee, in circumstances where the vote could not be even because of the absence of one Representative from the Council of Regents.

After setting out some of the evidence which was not in dispute and reviewing the witnesses' testimony concerning the disputed areas of the evidence, the majority made the following findings of fact:

> ... The Arbitration Board finds as a fact that there was no caucus by the Union Representatives during the period of the meeting prior to the putting of the motions, but that it occurred following the motions and involving the Management members....

> ... the Board finds as a fact that there was a meeting, it was properly constituted as a quorum within the rules, and the meeting proceeded in a fashion consistent with at least some of the meetings in the past. It was common practise [sic] for motions to be put, which had failed in previous meetings. The Committee has acted within its mandate, and from a factual point of view, the proper characterization of the meeting is that it was one carried out in the usual fashion. It is so found as a fact.

After summarizing the parties' submissions, the majority reached the following conclusions:

> The Board of Arbitration has already found as a fact that the meeting proceeded in a manner which was consistent with prior meetings, and that it is incorrect to characterize what transpired as being a "railroad meeting". The Committee has in the past proceeded on the basis of consensus. The two Council of Regents representatives abstained from voting on the first two motions and then requested a caucus before a vote on the third motion. When one abstains in a voting procedure, one effectively has declared disinterest in the result and indicated that they have no view to express and are therefore willing to go along with whatever view is expressed by the voting process. There was a consensus in that the vote was three to zero. To abstain is to take no position or make no vote. It cannot be counted as a negative vote as is argued on behalf of Counsel for the College. It is an abstention, it means to not use one's vote. It is an accepted declaration of indifference to the outcome of the vote.
>
> Therefore, as a matter of law, this Board of Arbitration ought to conclude that there was a consensus, as the Committee has required in the past, in order for motions to be confirmed. The Board also concluded that the meeting was properly established pursuant to the JEQS Committee's own procedure, in view of its interpretation of the collective agreement. There was a quorum present and it must be concluded, given the findings of law by this Board, that there were two motions approved by the Committee, which must be considered as motions of the JEQS Committee pursuant to Appendix 1, paragraph 4. Therefore, the College is unable to act as it did in denying the grievance of the Grievor....

It is the Union's position that, in view of the findings made in the Fordyce Award, the Board should not entertain any evidence concerning what occurred at the JEQS meeting on November 1, 1991....

Counsel for the College submitted that the interpretation placed on the collective agreement by the majority in the Fordyce Award was wrong, in that it overlooked or gave no effect to the final sentence in the above-quoted paragraph 4 of the Guidelines contained in Appendix 1 of the collective agreement, which sentence reads:

> ... Any further qualification must be agreed to by the representatives of both the Council of Regents and the Union and shall be in writing.

Mr. Brown further advised the Board that the College intends to adduce in these proceedings not only some or all of the evidence which was presented in the Fordyce case, but also additional evidence which was not introduced in those proceedings. Although he acknowledged that the McLaren Award was properly received into evidence by this Board, it was his contention that the weight, if any, to be given to that award would be a matter for

determination by the Board at the end of these proceedings, after the Board had heard all of the evidence adduced by the Union and the College....

Having duly considered the parties' submissions ... and all of the material filed with the Board, we have concluded that the position advanced by Mr. Leeb on behalf of the Union should not be sustained, for the following reasons. Although the legislation under which the collective agreement was negotiated provides for centralized collective bargaining (in which the Council is statutorily authorized to bargain for all of the colleges), neither the Act nor the collective agreement provide for centralized arbitration under which an arbitration award issued in respect of a grievance against one college is binding upon all of the other colleges....

... In the absence of a collective agreement (or statutory) provision creating centralized arbitration under which all of the colleges would be bound by an award against any one of them, we are not persuaded that it would be appropriate for us at this stage of the proceedings to accept as conclusive the factual and legal findings made in the Fordyce Award, thereby relieving the Union of any obligation to adduce further evidence concerning what occurred at the November 1, 1991 JEQS meeting, and depriving the College of the opportunity of doing so. Although section 46(3), which gives the Board the same powers as a board of arbitration under section 28(1) of the Act, provides the Board (through section 28(1)(c)) with a broad discretion regarding the acceptance and exclusion of evidence, we are not persuaded that it would be appropriate in the circumstances of this case to exercise that discretion in the manner advocated by the Union (assuming, without deciding, that the discretion conferred by that provision is sufficiently expansive to permit us to do so).

We respectfully agree with the reasoning contained in the awards to which we were referred by the Union, under which contemporary boards of arbitration generally adopt a posture of deference and restraint in the face of decisions of other boards previously seised of the same issue(s) between the same parties, in the interests of avoiding inconsistent results and abuses of the arbitration process such as those involved in unwarranted case splitting. It is possible that a similar approach may also be ultimately found to be warranted in proceedings involving a college (such as Loyalist College), where an earlier arbitration award has construed a provision under their common collective agreement in the context of a grievance against another college (such as Fanshawe College). However, in the circumstances of this case, we agree with counsel for the College that this is a matter which should be left for determination at a later stage in these proceedings, after the Board has heard all of the relevant and admissible evidence which the Union and the College choose to adduce, and after the Board has had the benefit of full argument regarding the factual and legal issues involved.

For the foregoing reasons, the Union's request that the Board decline to entertain any additional evidence concerning what-occurred at the JEQS meeting on November 1, 1991 is hereby denied. At the continuation of hearing, the Board will proceed to hear further evidence (and argument) concerning the merits of the grievances.

The hearing of this matter continued on June 2, June 9, and July 5, 1994. During the course of those three days the Board heard testimony from six witnesses. The Union's witnesses were Craig McKay and Gary Fordyce who, as noted above, were also the two Union representatives on the JEQS called by the Union to testify in the Fordyce arbitration case. (Although Aarne Hannikainen, the third Union representative on the JEQS, was in attendance during part of the hearing of the instant case, he was not called as a witness.) In addition to Dennis Stapinki and John Podmore (the two aforementioned witnesses called by Fanshawe in the Fordyce case), the College called Ken Robb and Shirley Kahimkar to testify before the Board in these proceedings. Mr. Robb was the other Council

of Regents representative on the JEQS who was ln attendance during the relevant part of its November 1, 1991 meeting. Ms. Kahimkar worked for the Council of Regents in the Fall of 1991. Although her principal function involved participation in the scheduling of grievances, she also served as secretary to the JEQS (also referred to in this award as the "Subcommittee" for ease of exposition). In that capacity she attended most the JEQS meetings between 1982 and 1992, including the one held on November 1, 1991. Her primary responsibility in that regard was taking minutes of the Subcommittees' meetings. She also wrote letters in respect of matters which came before the JEQS, and occasionally did some research for the Subcommittee.

Thus, the Board had the benefit of receiving testimony not only from the four witnesses who testified in the Fordyce case, but also from two additional witnesses who were not called to testify in those proceedings. In addition to that oral evidence, the Board has before it twelve exhibits which were entered during the course of the proceedings. In making the findings and reaching the conclusions set forth is this award, we have duly considered all of that oral and documentary evidence, the submissions of counsel, and the usual factors germane to assessing evidentiary credibility and reliability, including the firmness and clarity of the witnesses' respective memories, their ability to resist the influence of self-interest when giving their version of events, the internal and external consistency of their evidence, and their demeanour while testifying. We have also assessed what is most probable in the circumstances of the case, and considered-the inferences which may reasonably be drawn from the totality of the evidence.

As in the Fordyce proceedings, there is a conflict in the evidence regarding whether or not the Union representatives on the JEQS left the meeting room for a brief caucus before the above-quoted motions were made on the morning of November 1, 1991. Although the two Union witnesses firmly denied it, the four College witnesses all testified that this did in fact occur. We find it to be unnecessary to resolve that evidentiary conflict in the circumstances of this case as we are satisfied that nothing turns on it. Regardless of whether the motions were preceded by a Union caucus, it is apparent from the totality of the evidence that Craig McKay, the Union Co-chair of the JEQS, was attempting to take advantage of the delayed arrival of Wayne Tocheri, the Council of Regents' Co-chair and third representative on the JEQS. Although he knew that Mr. Tocheri's weather delayed flight had arrived in Toronto and that Mr. Tocheri was on his way to the meeting and expected to arrive within the hour, Mr. McKay chose to terminate the cases and materials categorization which the persons in attendance at the meeting had been engaged in while awaiting Mr. Tocheri's arrival, and to abruptly make and proceed with the aforementioned motions in a loud and aggressive manner. This unexpected course of events caught Messrs. Robb and Stapinski off guard. By the time they had the presence of mind to call for a caucus after realizing that neither Mr. Podmore's noting that he was not a member of the JEQS but only an advisor, nor their nonparticipation in the process, was-going to dissuade Mr. MacKay and the other two Union representatives from proceeding with motions on what had been highly contentious matters within the Subcommittee for a number of years, the above-quoted motions had already been made, seconded, and voted upon by the Union representatives on the Subcommittee.

Although the making of motions and the formal recording of votes had occurred at the request of Mr. Tocheri at the previous meeting of the JEQS (which was held on April 24, 1990), that was not the manner in which the Subcommittee had generally proceeded. With the exception of the April 24, 1990 meeting, all of the previous JEQS meetings had proceeded on the basis of an informal discussion of cases or issues, with decisions being made on the basis of consensus, without formal votes being taken. When it was not possible to achieve consensus, the case or issue would generally be deferred pending further research, such as obtaining an evaluation of a foreign degree by the University of Toronto's Comparative Education Service. The evidence indicates that this process worked quite well for a number of years. However, by November 1, 1991 the Subcommittee had built up a substantial backlog of undecided cases because it was meeting very infrequently and when

it did meet discussion tended to bog down over issues such as those covered by the above-quoted motions, which the Union representatives wished to have resolved before dealing with individual cases, but which the Council of Regents representatives were firmly of the view should be dealt with at the bargaining table rather than by the JEQS.

As noted above, the relevant portion of the Collective Agreement provides as follows:

> The parties agree to the establishment of a Join Educational Qualifications Subcommittee to consider and rule on further formal educational qualifications for the purpose of maximum salary level identification under the salary scale. Such Committee shall be composed of three (3) representatives of the Union and the Council of Regents respectively and shall decide the Committee's procedures. Any further qualification must be agreed to by the representatives of both the Council of Regents and the Union and shall be in writing.

The issues which the Board is called upon to determine in this case are whether the two aforementioned motions are "further qualification[s] ... agreed to by the representatives of both the Council of Regents and the Union", and whether they are "in writing", as required by that provision.

Although silence can undoubtedly constitute agreement in some contexts, we are satisfied that the silence of Messrs. Stapinski and Robb on the morning of November 1, 1991 when the motions in question were being made, seconded, and voted upon by the three Union representatives on the JEQS did not constitute agreement to those motions. As indicated above, in making those motions on what he and the other Union representatives on the JEQS knew to be highly contentious issues and proceeding with them in a rapid-fire manner in the absence of Mr. Tocheri, Mr. McKay was attempting to take advantage of Mr. Tocheri's delayed arrival. Thus, although he knew that Mr. Tocheri's weather delayed flight had arrived in Toronto and that Mr. Tocheri was on his way to the meeting and expected to arrive within the hour, Mr. McKay chose to terminate the cases and materials categorization which the persons in attendance at the meeting had been engaged in while awaiting Mr. Tocheri's arrival, and to abruptly make and proceed with the aforementioned motions in a loud and aggressive manner. The silence of Messrs. Robb and Stapinski during this unexpected turn of events did not result from their agreement with, or indifference to, those motions, but rather from the fact that they had been caught off guard and were concerned that participating in the process would legitimize it or otherwise prejudice their position. Based on the totality of the evidence, we are also of the view that the Union representatives on the Subcommittee could not reasonably have believed that the silence of Mssrs. Stapinski and Robb constituted agreement on their part to the motions in question. As noted above, the Subcommittee's work had become substantially backlogged because it was meeting very infrequently and when it did meet discussion tended to bog down over issues such as those covered by the above-quoted motions, which the Union representatives wished to have resolved before dealing with individual cases, but which the Council of Regents representatives were firmly of the view should be dealt with at the bargaining table rather than by the JEQS. It is simply not plausible that in those circumstances, the Union representatives could reasonably have believed that Mssrs. Stapinski and Robb had secretly concurred with-the Union's position all along, and that their silence constituted agreement to the motions. Thus, we are satisfied on the totality of the evidence that the two motions were not "further qualification[s] ... agreed to by the representatives of both the Council of Regents and the Union" within the meaning of the pertinent provision of the Collective Agreement.

Having had the benefit of reading the dissent of our colleague Michael Lyons, we find it appropriate to expressly note that in reaching the foregoing conclusion, we have applied an objective test which has led us to conclude that, in the circumstances of this case, the silence of Messrs. Stapinksi and Robb cannot reasonably be construed to constitute agreement to the

motions in question. In order for such further qualifications to be entitled to recognition for the purpose of maximum salary level identification under the salary scale, the Collective Agreement requires not only that they be "agreed to by the representatives of both the Council of Regents and the Union", but also that they "be in writing". That requirement is generally fulfilled by the minutes which are circulated after each JEQS meeting, and approved (with or without modification) at the following meeting. However, although minutes of the November 1, 1991 meeting were prepared by Ms. Kehimkar, they were never approved by the Subcommittee because of the controversy which arose in respect of what had occurred at that meeting prior to Mr. Tocheri's arrival. Moreover, there is nothing else in the evidence adduced before us in these proceedings which fulfils that requirement.

Therefore, in the instant case neither the requirement that the qualifications in question "be agreed to by the representatives of both the Council of Regents and the Union", nor the requirement that they "be in writing", has been satisfied. Accordingly, the College is not required by virtue of the aforementioned two motions to recognize for the purpose of maximum salary level identification under the salary scale the further qualifications referred to in those motions.

We have reached the foregoing conclusions with considerable reluctance, in view of their inconsistency with the Fordyce award and the possible negative impact which such inconsistency may have upon the parties' relationship. As noted in our earlier award in this matter, we respectfully agree with the reasoning contained in the awards to which we were referred by the Union, under which contemporary boards of arbitration generally adopt a posture of deference and restraint in the face of decisions of other boards previously seised of the same issue(s) between the same parties, in the interests of avoiding inconsistent results and abuses of the arbitration process such as those involved in unwarranted case splitting. However, while we would certainly have preferred to advance those important labour relations considerations by issuing an award which reached conclusions similar to those contained in the Fordyce award, we are simply not in a position to do so in good conscience on the basis of the evidence adduced before us in these proceedings, and the able submissions presented by counsel for each of the parties on the basis of that evidence.

Lest it be thought that this award is intended to be critical of the work of the McLaren Board, we would hasten to note that we obviously had the benefit of considerably more evidence than was adduced before that Board, and a more thorough treatment of the salient issues. The hearing which gave rise to the Fordyce award was completed in a single day, and was confined to the testimony of four witnesses. As noted above, three days were devoted to hearing the merits of the instant case, in which the Board heard testimony not only from the four witnesses who testified before the McLaren Board, but also from two additional witnesses (Ms. Kehimkar and Mr. Robb) who were in attendance at the November 1, 1991 JEQS meeting, and who were each in a position to apprise the Board of how that meeting substantially deviated from the manner in which the Subcommittee generally operated. We also had the benefit of thorough cross-examination of each of those six witnesses, and very able argument by counsel for each of the parties. Thus, although we have very carefully considered the Fordyce award and the reasoning which it contains, we have reluctantly concluded that we cannot legitimately reach similar conclusions on the basis of the evidence and argument presented in the instant case.

For the foregoing reasons, we have concluded that the College is not required by the aforementioned two motions to recognize for the purpose of maximum salary level identification under the salary scale the further qualifications referred to in the above-quoted motions.

Accordingly, the grievances are hereby dismissed.

DATED at Toronto, Ontario this 29th day of August, 1994.

Robert D. Howe
Chair

I concur.

"David W. Guptill"
College Nominee

<u>DISSENT OF MICHAEL LYONS, UNION NOMINEE</u>

With respect to my colleagues on the Arbitration board, I must dissent from their opinion in this matter. Specifically, I will deal with two matters.

With regard to the first two motions tabled by Craig McKay at the Nov. 1/91, JEQS meeting, it is agreed that the three Union representatives voted in favour of the motions while the two Council of Regents' (COR) representatives abstained. In their award, the majority looked behind the abstentions of the COR representatives in an attempt to determine their intent. The majority concluded that since the COR representatives had consistently been opposed to similar motions in the past and since they objected to the implementation of the motions following the Nov. 1/91 JEQS meeting, therefore, even though the COR representatives abstained from voting, they were, in fact, opposed to the motions.

I believe this is the wrong way to approach this matter. As Mr. Paliare pointed out in argument, the test of the COR representatives' actions ought to be an objective test. This is the same test which is applied to the interpretation of the terms of a collective agreement; boards of arbitration do not normally try to determine the intent of the negotiators, regardless of any positions the parties may have taken in the past. In this case, we ought to determine what the COR representatives did on Nov. 1/91, not what they intended to do.

If the COR representatives were opposed to the motions, they could have voted 'No'. As well, they could have asked for a caucus (which they subsequently did) or one of them could have left the room to eliminate the quorum. They did none of these. Rather, they chose to abstain. Given what the COR representative chose to do, what conclusion should the Arbitration Board have reached? I believe we ought to have concluded the same thing as the McLaren board:

> "When one abstains in a voting procedure, one effectively has declared disinterest in the result and indicated that they have no view to express and are therefore willing to go along with whatever view is expressed in the voting process. There was a consensus in that the vote was three to zero. To abstain is to take no position or make no vote. It cannot be counted as a negative vote as is argued on behalf of Counsel for the College. It is an abstention, it means to not use one's vote. it is an accepted declaration of indifference to the outcome of the vote. Therefore, as a matter of law, this Board of Arbitration ought to conclude that there was a consensus, as the Committee has required in the past, in order for motions to be confirmed."

With regard to the requirement that agreements reached by the JEQS Committee "shall be in writing", I would again look to standard collective bargaining practices for guidance. When, during collective bargaining, the parties reach an agreement with regard to a specific clause or condition, and then one party unilaterally reneges on that agreement, the appropriate board could issue and order that the original clause or condition be reinstated.

That is the situation we are faced with in this case. The parties reached an agreement at the Nov. 1/91 JEQS meeting. Subsequently, the COR representatives unilaterally concluded that there was no agreement; therefore, the two motions did not have to be implemented. In my opinion, they were wrong. Accordingly, I believe the Arbitration Board ought to have imposed on the parties the terms of the two motions agreed to by the JEQS on Nov. 1/91.

In light of the above, I would have allowed the grievances in this matter.

Dated at Toronto this 29th day of August, 1994. Michael Lyons