

95A536 LANGLEY VS NIAGARA
IN THE MATTER OF AN ARBITRATION

BETWEEN

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(hereinafter referred to as "the Union")

- and -

NIAGARA COLLEGE
(hereinafter referred to as "the Employer")

GRIEVANCE OF BEVERLY LANGLEY

BEFORE: M.G. Mitchnick - Chairman
 P. Munt-Madill - Union Nominee
 R. Hubert - Employer Nominee

FOR THE UNION:
A. Ryder

R. Murdock
B. Langley
C. McKay
R. Martin

FOR THE EMPLOYER:

C.G. Riggs
J.F. Garner
D. Cunningham
G. Voicic

Hearing held in St. Catharines on October 24, 1995

A W A R D

This is an individual grievance brought by Beverly Langley, grieving the failure of the College to credit as a "teaching contact" hour on her Standard Workload Form the assignment to "proctor", or invigilate, at the writing of exams. The grievance provides:

The College is in violation of the Collective Agreement by refusing to give proper credit for an assigned contact with student(s). This action/inaction violates Article 6 and/or Article 11. The College's refusal to redress this violation is shown by memoranda of Feb. 6 and Feb. 13, 1995.

That the College credit me with contact hour(s) for the assigned work. That the College provide a written statement that proctoring is teaching contact. and That the College provide additional vacation credit to me at a rate of one day of extra vacation for each day of proctoring which has been assigned.

"Beverly Langley".

The jurisdiction of this board to entertain the grievance is challenged by the College. As can be seen, the grievance is concerned with the interpretation of Article 11, and specifically, as noted by the Union at the hearing, of Article 11.01. The grievance is brought under the general arbitration provisions of the collective agreement which, in Article 32, provide:

Complaints

32.02 It is the mutual desire of the parties that complaints of employees be adjusted as quickly as possible and it is understood that if an employee has a complaint, the employee shall discuss it with the employee's immediate supervisor within 20 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employee in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the employee and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the employee.

Grievances

32.03 Failing settlement of a complaint, it shall be taken up as a grievance (if it falls within the definition under 32.12 C) in the following manner and sequence provided it is presented within seven days of the immediate supervisor's reply to the complaint. It is the intention of the parties that reasons supporting the grievance and for its referral to a succeeding Step be set out in the grievance and on the document referring it to the next Step. Similarly, the College's written decisions at each step shall contain reasons supporting the decision.

Step One

An employee shall present a signed grievance in writing to the employee's immediate supervisor setting forth the nature of the grievance, the surrounding circumstances and the remedy sought. The immediate supervisor shall arrange a meeting within seven days of the receipt of the grievance at which the employee, a Union Steward designated by the Union Local, if the Union local so requests, the Dean of the Division and the immediate supervisor and Dean will give the grievor and the Union Steward their decision in writing within seven days following the meeting. If the grievor is not satisfied with the decision of the immediate supervisor and Dean, the grievor shall present the grievance in writing at Step Two within 15 days of the day the grievor received such decision.

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.

32.04 A Any matter so referred to arbitration, including any question as to whether a matter is arbitrable, shall be heard by a Board of three arbitrators composed of an arbitrator appointed by each of the College and the Union and a third arbitrator who shall be Chair ...

Group Grievance

32.09 In the event that more than one employee is directly affected by one specific incident and such employees would be entitled to grieve, a group grievance shall be presented in writing by the Union signed by such employees to the Director of Personnel or as designated by the College within 20 days following the occurrence or origination of the circumstances giving rise to the grievance commencing at Step One of Article 32, Grievance Procedure. Two grievors of the group shall be entitled to be present at meetings in Step One of Two unless otherwise mutually agreed.

Union Grievance

32.10 The Union or Union Local shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees.

Such grievance shall be submitted in writing by the Union Grievance Officer at Head Office or a Union Local President to the Director of Personnel or as designated by the College, within 20 days following the expiration of the 20 days from the occurrence or origination of the circumstances giving rise to the grievance commencing at Step One of the Grievance procedure.

College Grievance

32.11 The College shall have the right to file a grievance with respect to the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall be presented in writing signed by the College President or the President's nominee, to the Union at the College concerned with a copy to the Union Grievance Officer within 20 days following the occurrence or origination of the circumstances giving rise to the grievance, commencing at Step 2. Failing settlement at a meeting held within 20 days of the presentation of the grievance, the Union shall give the College its written reply to the grievance in 15 days following the meeting.

Failing settlement, such grievance may be referred to the Arbitration Board within 20 days of the date the College received the Union's reply.

32.12 C "Grievance" means a complaint in writing arising from the interpretation, application, administration or alleged contravention of this Agreement.

Barring any other provision in the collective agreement, Article 32 obviously is broad enough to encompass any kind of grievance alleging a violation or calling for an interpretation of the parties' collective agreement. However, as the parties in this sector are well aware, a great deal of thought and effort has gone into negotiating, into what is now Article 11, complex and sophisticated rules governing the manner and extent to which the College may assign "workload" to its teachers. And equally, the parties have provided with respect to these workload rules an elaborate system of review and enforcement, specifically responsive to the need for timeliness and familiarity with the issues. Thus:

11.02 B 1 There shall be a College WMG at each College.

11.02 B 2 Each WMG will be composed of eight members, with four to be appointed by the College and four appointed by the Union Local unless the College and the Union Local otherwise agree. The term of office of each member of the WMG shall be two years, commencing on April 1 in each year with four members of the WMG, two College appointees and two Union appointees, retiring on March 31 of each year. A quorum shall be comprised of four, six or eight members with equal representation from the College and Union Local.

Alternative arrangements may be made at the local level upon agreement of the Union Local and the College.

11.02 C 1 The functions of the WMG shall include:

- (i) reviewing workload assignments in general at the College and resolving apparent inequitable assignments;
- (ii) reviewing specific disputes pursuant to 11.02 A 4 and/or 11.02 A 6 (a) and where possible resolving such disputes;
- (iii) making recommendations to the College on the operation of workload assignments at the College;
- (iv) reviewing individual workload assignments where requested by the teacher or the Union Local and, where possible, resolving the disputes;
- (v) making recommendations to the College and Union Local committees appointed under Article 7, Union College Committee, as to amendments or additions to the provisions governing workload assignments at the College for local negotiation in accordance with 11.02 G in order to address particular workload needs at the College.

11.02 C 2 The WMG shall in its consideration have regard to such variables affecting assignments as:

- (i) nature of subjects to be taught;
- (ii) level of teaching and experience of the teacher and availability of technical and other resource assistance;
- (iii) size and amenity of classroom, laboratory or other teaching/learning facility;
- (iv) numbers of students in class;
- (v) instructional modes;
- (vi) availability of time for the teacher's professional development;
- (vii) previously assigned schedules;

- (viii) lead time for preparation of new and/or changed schedules;
- (ix) availability of current curriculum;
- (x) students with special needs;
- (xi) introduction of new technology;
- (xii) the timetabling of workload.

11.02 D 1 The WMG shall meet where feasible within one week of receipt of a workload complaint or at the request of any member of the WMG.

11.02 D 2 The WMG shall have access to all completed SWFs and such other relevant workload data as it requires to review workload complaints at the College.

11.02 D 3 The WMG or any member of it may require the presence of the supervisor and/or the teacher before it to assist it in carrying out its responsibilities.

11.02 D 4 Any decision made by a majority of the WMG with respect to an individual workload assignment shall be in writing and shall be communicated by the College to the teacher, the supervisor, the senior academic officer at the College and the Union Local President as soon as possible after the decision is arrived at.

11.02 D 5 Such decision shall be binding on the College, the Union Local and the teacher involved.

11.02 E 1 If following a review by the WMG of an individual workload assignment which has been forwarded to the WMG, the matter is not resolved, the teacher shall be so advised in writing. The matter may then be referred by the teacher to a WRA ["Workload Resolution Arbitrator"] provided under the agreement. Failing notification by the WMG within three weeks of the referral of the workload assignment to the WMG, the teacher may refer the matter to the WRA.

11.02 E 2 If the teacher does not refer an assignment to the WRA within one week of the receipt by the teacher of notification by the WMG that it has been unable to settle the matter, the matter will be considered to have been settled.

11.02 F 5 A WRA shall determine appropriate procedure. The WRA shall commence proceedings within two weeks of the referral of the matter to the WRA. It is understood that the procedure shall be informal, that the WRA shall discuss the matter with the teacher, the teacher's supervisor, and whomever else the WRA considers appropriate.

11.02 F 6 A WRA shall, following the informal discussions referred to above, issue a written award to the College and the Union Local and to the teacher, resolving the matter. Such award shall be issued by the WRA within ten working days of the informal discussion. The award shall only have application to the teacher affected by the matter and shall have no application beyond the end of a twelve-month period from the date of the beginning of the workload assignment.

11.02 F 7 On request of either or both parties within five working days of such award, the WRA shall provide a brief explanation of the reasons for the decision.

11.02 F 8 The award of the WRA shall be final and binding on the parties and the teacher, and shall have the same force and effect as a Board of Arbitration under Article 32, Grievance Procedure.

11.02 F 9 Having regard to the procedures set out herein for the resolution of disputes arising under 11.01 and 11.02, no decision of the WMG or award of the WRA is subject to grievance or any other proceedings. And preceding all of that in the Article, and most important for our purposes:

11.02 A 6 (a) In the event of any difference arising from the interpretation, application, administration or alleged contravention of 11.01 or 11.02, a teacher shall discuss such difference as a complaint with the teacher's immediate supervisor.

The discussion shall take place within 14 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the teacher in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the teacher and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the teacher.

Failing settlement of such a complaint, a teacher may refer the complaint, in writing, to the WMG within seven days of receipt of the immediate supervisor's reply. The complaint shall then follow the procedures outlined in 11.02 B through 11.02 F.

11.02 A 6 (b) Grievances arising with respect to Article 11, Workload **other than 11.01 and 11.02** shall be handled in accordance with the grievance procedure set out in Article 32, Grievance Procedure.

[Emphasis added]

Mr. Ryder makes a number of arguments in support of a right in any Teacher to take any dispute concerning the "workload" rules of Article 11.01 before an Article 32 tripartite board, should she or he choose. The primary point made is that the *Colleges Collective Bargaining Act*, like the *Labour Relations Act*, demands that every collective agreement contain a provision for "final and binding" arbitration of its disputes as follows:

46.-(1) Every agreement shall provide for the final and binding settlement by arbitration of all differences between an employer and the employee organization arising from the interpretation, application, administration or alleged contravention as to whether a matter is arbitrable.

(2) Unless an agreement otherwise provides for the final and binding settlement of all differences between an employer and the employee organization arising from the interpretation, application, administration or alleged contravention of the agreement, the agreement is deemed to include a provision to the following effect:

Where a difference arises between an employer and the employee organization relating to the interpretation, application or administration of this agreement, or where an allegation is made that this agreement has been contravened, including any question as to whether the matter is arbitrable, either the employer or the employee organization may, after exhausting any grievance procedure established by this agreement, notify the other in writing of its desire to submit the difference or allegation to arbitration and the notice shall contain the name of its appointee to an arbitration board. The recipient of the notice shall within five days inform the other either that it accepts the other's appointee as a single arbitrator or inform the other of the name of its appointee to the arbitration board. Where two appointees are so selected they shall, within five days of the appointment of the second of them, appoint a third person who shall be the chair. If the recipient of the notice fails to appoint an arbitrator or if the two appointees fail to agree upon a chair within the time limited, the appointment shall be made by the Commission upon the request of either the employer or the employee organization. The single arbitrator or the arbitration board, as the case may be, shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the employer and the employee organization and upon any employee affected by it. The decision of a majority is the decision of the arbitration board, but, if there is no majority, the decision of the chair governs. The arbitrator or arbitration board, as the case may be, shall not by his, her or its decision add to, delete from, modify or otherwise amend the provisions of this agreement.

Article 11.02 F 8, above, Mr. Ryder notes, appears to promise that. However, he continues that apparent mechanism for final and binding arbitration is then diluted in 11.02 F 6, once again as follows:

11.02 F 6 A WRA shall, following the informal discussions referred to above, issue a written award to the College and the Union Local and to the teacher, resolving the matter. Such award shall be issued by the WRA within ten working days of the informal discussion. The award shall only have application to the teacher affected by the matter and shall have no application beyond the end of a twelve-month period from the date of the beginning of the workload assignment.

What that means, according to Mr. Ryder, is that the decision of the Workload Resolution Arbitrator ("WRA") does not deal with the matter in dispute "finally", but only temporarily. And thus here, for example, without concession by the College the issue of proper crediting for any "proctoring" assignments will have to be referred back to arbitration annually. Having the College force that to happen will only perplex and frustrate the teachers, and create a situation of extremely unhealthy labour relations. While the normal workload-resolution process may work well for the bulk of complaints, where the dispute is in fact time-limited by the SWF and its application, there are other issues, Mr. Ryder submits, where finality is more important than expedition. And in the face of the statute, such avenue must be available, whenever the individual teacher concerned seeks it. See Keeling and A.G. Ontario (1980), 30 O.R. (2d) 662 (Div. Ct.).

Apart from the requirements of statute, Mr. Ryder relies as well on the wording of Article 11 itself, as an indication that resort to the workload-resolution machinery was not intended to be exclusive. Article 11.02 A 6 (a) again, for example states:

11.02 A 6 (a) In the event of any difference arising from the interpretation, application, administration or alleged contravention of 11.01 or 11.02, a teacher shall discuss such difference as a complaint with the teacher's immediate supervisor.

The discussion shall take place within 14 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the teacher in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the teacher and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the teacher.

Failing settlement of such a complaint, a teacher may refer the complaint, in writing, to the WMG within seven days of receipt of the immediate supervisor's reply. The complaint shall then follow the procedures outlined in 11.02 B through 11.02 F.

The third paragraph of that section says "may"; it does not, in other words, stipulate that the workload resolution process is the only place the teacher can go if dissatisfied. That article, Mr. Ryder submits, in fact stands in contrast to 11.02 A 6 (b), which stipulates that grievances "shall" be pursued under Article 32 - unless dealing with Articles 11.01 or 11.02. But even though the section makes that exception from the otherwise mandatory referral to Article 32, the language does not "complete the circle": i.e., it does not go on to say that Article 11.01 and 11.02, in turn, must go the Article 11 route. Mr. Ryder adds that this non-exclusive reading of Article 11.02 A 6 (b) is supported by the absence in Article 32 of anything to qualify or prohibit the access to arbitration apparently provided under that Article. All of this, Mr. Ryder states further, is consistent with the unrestricted access to general arbitration that existed prior to 1985, when the whole workload review article went into the collective agreement for the first time. See Confederation College, an unreported decision of Mr. Burkett dated June 18, 1984. And finally, Mr. Ryder notes that the grievance alleges a violation of Article 6.02 of the collective agreement as well.

There has in fact been a good deal of comment on this issue in the case law. In Cambrian College, a decision issued October 28, 1988, Mr. Teplitsky wrote, at page 3:

The grievance alleges a breach of Article [11.01]. It is clear from this provision and others in the Collective Agreement that the Union has no right to bring this matter before us. Indeed, the teacher could not have. His only remedy was through the Workload Monitoring Group and the Workload Resolution Arbitrator.

It might be noted that Mr. Ryder's argument based on the "final and binding" arbitration provision required by statute was made by the Union in that case as well. At page 5 Mr. Teplitsky commented on that as follows:

Mr. Hines did not respond to this latter submission asserting that he was not prepared to do so. What is relevant is that even if it were correct (it may be, I express no final opinion), it would not assist the Union in this case. It is not a violation of the statutory policy set forth in Section 46 for the parties to confine to a teacher the right to grieve or to channel such grievance through a Workload Resolution Arbitrator.

In Loyalist College, decision of Ms. Devlin dated May 7, 1991, the issue was primarily whether the requirement to attend curriculum review meetings was a matter of "workload" covered by [Article 11.01] of the collective agreement. In the final paragraph the board concluded:

In the Board's view, curriculum review is a matter of workload within Article 4.01 of the Agreement.

And the board then added:

Accordingly, any dispute in this regard must be dealt with by a Workload Resolution Arbitrator and is beyond the jurisdiction of this Board.

Conestoga College, a decision of this chair dated July 23rd, 1993, is also of interest, in terms of the general perception of Article 11.02 A 6 (b), the key section to the present issue in dispute. The collective agreement incorporates by reference in then-Article 29 the provisions of the *Occupational Health and Safety Act*, and the Conestoga award in its opening page sets out the following background to the dispute there:

Mr. Small has filed two grievances which are before the board. The first reads:

STATEMENT OF GRIEVANCE

I grieve that contrary to Article 7, 29 and any other Article of the Collective Agreement that may apply, the College has failed to conform to the provisions of the Ontario Occupational Health and Safety Act by not providing time to act on the required committees.

SETTLEMENT DESIRED

All time spent on OHS Joint Union Management Committees be reflected on my workload assignments, i.e. SWF as provided for in Article 4.

The Union has filed a similar grievance in its own name. The second grievance of Mr. Small reads:

STATEMENT OF GRIEVANCE

I grieve that contrary to Articles 4, 7 and any other related Article of the Collective Agreement that may apply, the College has failed to include time on my SWF for the required time as a member of the legislated committees required by the Province under the Occupational Health and Safety Act.

SETTLEMENT DESIRED

That the time spent on these committees be:

1. Recognized on an hour for hour basis under the complementary hours on my current SWF.
2. Recognized on a hour for hour basis under complementary hours on future SWF's when I act as a member of these legislated committees.

Article 7 is now Article 6, the "Management Rights" clause, which concludes in Article 6.2 with the words:

6.02 The Colleges agree that these functions will be exercised in a manner consistent with the provisions of this Agreement.

And Article 4 is the "Workload" article, now Article 11. The Union concedes that, in light of the special procedure set out in the collective agreement, it cannot ask this board for a remedy under Article 11, and withdraws that portion of the complaint from the board. The Union submits that the board does have the jurisdiction and the duty, under Article 24.02 A however, to decide whether the College has properly "paid" Mr. Small for his health and safety responsibilities under the Act, and seeks from the board (particularly in light of the Workload-Arbitration

decision that will be referred to) a declaration that the College has to credit and compensate employees for time spent doing such health and safety duties. The Union notes further that it does not ask the board to direct the employer as to how that is to be carried out, although it acknowledges that the sought-for declaration by the board may affect the way the College applies Article 11 in the future, as well as future rulings by a Workload Arbitrator. The Union adds that the board is not being asked to apply the provision of Article 11 to the particular facts at hand, although it does have to have an understanding of how Article 11 is structured in order to understand the Union's argument as to why Mr. Small has not been "paid" for these hours in this case. The only point that needs to be established here, the Union emphasizes, is that this time put in by Mr. Small has to be given credit for and compensated by the College, but that it still remains up to the College whether to accomplish that through "SWF" credits under Article 11, or by some other means such as straight "overtime".

The matter had in fact been before a WRA, but he had declined to deal with the *Occupational Health and Safety Act* issue, as the award quotes from the WRA's decision, at page 10:

In the Regulations of the Ontario Occupational Health and Safety Act provision is made, for members of safety committees, to be given time from work to participate. Provision is also made for payment for time in preparation for meetings. The application to teachers in the Colleges of Applied Arts and Technology is not clear. In some respects teachers are full-time employees and in other respects they work under a contract. The resolution of this issue is not appropriate to Workload Arbitrators. It is a matter for collectively bargaining [sic] or some judicial process. The denial in this arbitration may facilitate appropriate action for resolution.

The tripartite board then went on to deal with the matter of the intersection between the obligations of the parties under the *Ontario Health and Safety Act* and Article 11 of their collective agreement, and at page 14 concluded the decision as follows:

... as a matter of interpreting Article 24.02 A [formerly Article 29] of the collective agreement, it is the finding of the board that the College to this point has not properly reflected the time spent by Mr. Small in connection with attending the meetings of the joint health and safety committee, and that it must now do so. If that is going to be done as a matter of SWF'ing, we agree that that is a matter for Article 11, and that any dispute over the actual adjustment is a matter for the procedure provided under that Article, including the reference back to a Workload Resolution Arbitrator if necessary ...

The board will remain seized of this matter in the event the College chooses to deal with it other than through SWF'ing, and the parties are not ad idem with respect to the result.

That brings us to the Fanshawe College case, a decision of Kevin Burkett dated March 29, 1989. The difference in that case from the others previously cited was, *inter alia*, that it involved a Union grievance over the College's practice of assigning teaching contact hours in blocks of less than 50 minutes, in apparent violation of now Article 11.01 C ("Each teaching contact hour shall be assigned as a 50 minute block plus a break of up to ten minutes"). Article 11.10 [now 32.10] of the Arbitration provision of the collective agreement provided, once again:

32.10 The Union or Union Local shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees.

Such grievance shall be submitted in writing by the Union Grievance Officer at Head Office or a Union Local President to the Director of Personnel or as designated by the College, within 20 days following the expiration of the 20 days from the occurrence or origination of the circumstances giving rise to the grievance commencing at Step One of the Grievance procedure.

The majority decision noted by way of background to the Union grievance:

2. By way of general background it is to be noted that in 1987 the union processed an individual complaint under article 4.02 alleging a breach of article 4.01(3) by reason of scheduling teaching contact hours in less than 50 minute blocks. An award was handed down by Workload Arbitrator (WRA) Foster, appointed pursuant to article 4.02(5)(a) of the collective agreement. The award of Arbitrator Foster, dated November 27, 1987, upheld the union complaint. The arbitrator found that under article 4.01(3) the teaching contact hours "should have been rounded off one way or the other". Following release of that award the union sought to have its finding given general application. The college, in refusing, relied on article 4.02(6)(f) that provides in part that "the award shall only have application to the teacher affected by the matter and shall have no application beyond the end of a twelve month period from the date of the beginning of the workload assignment". The college continued to take the position that it was free to assign less than 50 minute blocks of contact time to other teachers. It is agreed between the parties that the union attempted to solicit grievances from individual teachers but was unsuccessful. The union responded by filing the instant policy grievance under article 11.10.

The College argued that, as a "Workload" grievance, the matter could, according to now Article 11.02, and in particular what is now 11.02 A 6 (b), only proceed before a WRA. The Union responded as follows:

5. The union argues that the procedure set out in article 4.02 is designed to deal with individual teacher complaints as distinct from questions of general interpretation. The union submits that there is nothing in article 4.02 that takes away the union's right under article 11.10 to grieve in respect of the "interpretation, application, administration or alleged contravention of the agreement". Confederation College and OPSEU, June 18, 1984, unreported (Burkett) is cited in support of this proposition. The union asks us to find that the prerequisites to the filing of a policy grievance have been satisfied in that it has attempted to have individual employees grieve and that the grievance alleges the application of an unreasonable standard (teaching contact hours of less than 50 minute blocks) that is patently a violation of the collective agreement and that adversely affects the rights of employees in the bargaining unit. The union points out that if its position is not sustained the union is left without a means of challenging the college's decision to assign teaching contact hours in less than 50 minute blocks so long as individual employees choose not to grieve. The union asks us to find that in the absence of express language providing for this result we cannot infer that it was intended.

The ruling of the majority was as follows:

"The issue is whether the union can bring a policy grievance under article 11.10 alleging a violation of article 4.01(3) with respect to the assignment of teaching contact blocks of less than 50 minutes. Because of the unique configuration of facts in this matter we do not have to decide if the union can proceed by means of a policy grievance of the college. In this case there are three critical facts that shape our consideration. Firstly, there is the prior award under article 4.02 in which it was found that under article 4.01(3) "each contact hour shall be assigned as a 50 minute block plus break". It should be noted at this point that under article 4.02(6)(f) "the award (under article 4.02) shall only have application to the teacher affected by the matter and shall have no application beyond the end of a twelve month period from the date of the beginning of the workload assignment". Secondly, there is the fact of the college's refusal to give the prior award general application. The college continues to take the position that it is free to assign contact hours in less than 50 minute blocks. Thirdly, there is the fact of the union attempting to have individuals grieve the continued assignment of contact hour blocks of less than 50 minutes.

When we consider the position of the college vis-à-vis our lack of jurisdiction to entertain this grievance under article 11.10 in light of these facts we are inescapably drawn to the conclusion that the interpretation of article 4.02 advanced by the college is an anomaly that could never have been intended. Under the college's interpretation the union is without the means to unilaterally initiate a policy grievance challenging a general misapplication of the threshold workload standards stipulated in article 4.01 (i.e. total work load, teaching contact hours, ratio of assigned teaching contact hours, ratio of assigned teaching contact hours to attributed hours for preparation, maximum number of course preparations, etc.). Under the college's interpretation any grievance claiming a breach of these standards must be filed by an individual teacher or group of teachers and the remedy applies only to the grievors and only for twelve months, even though the agreement extends beyond this twelve month period. It would be unusual, to say the least, for the parties, on the one hand, to set out clearly defined threshold standards and, on the other hand, deny the union the means to obtain the consistent application of these standards across the bargaining unit for the duration of the agreement. The college interpretation opens the door to the application of different standards for

different teachers. If there is no means available to the union to enforce the consistent application of these standards the college is free to impose standards different than those set out in the agreement as long as the affected individuals decline to complain under article 4.02. This result is counter intuitive from a labour relations perspective. More importantly, article 4.01(1) stipulates that "each teacher shall have a workload that adheres to the provisions of this article". Article 4.01(1) evidences the intention of the parties that workload standards be applied evenly and consistently across the bargaining unit. It could never have been intended, therefore, that standards different than those provided for in article 4.01 be permitted under any circumstances.

Whereas it could be argued that the complaint procedure in article 4.02 is restricted to individual complaints in respect of the subject matters listed in article 4.02(3) we are content to find that article 4.02(f)(ii) does not apply where the college is refusing to apply a threshold standard that has been the subject of a prior award under article 4.02 upholding the interpretation of the standard advanced by the union. In these circumstances the refusal of the college to accept and apply the interpretation of a threshold standard accepted by the work-load arbitrator must be construed as an application of "an unreasonable standard that is patently in violation of this agreement" within the meaning of article 11.10 of the collective agreement. It should not surprise the college that the continued application of a workload standard already found to be in breach of the agreement constitutes a patent violation of the agreement. Where, as in this case, there is a patent violation, where the violation adversely affects the rights of persons in the bargaining unit, as this one does, and where the employee(s) has not grieved as in this case, it must be found that the prerequisites to the filing of a union policy grievance under article 11.10 have been satisfied and that the processing of such a grievance to arbitration, as the only means of ensuring general compliance with article 4.02(1)(f)(ii) of the collective agreement."

The case then proceeded by way of judicial review to the Divisional Court, (1990), 70 D.L.R. (4th) 494. The Court, after finding that the board of arbitration had to be "correct" in defining its own jurisdiction, quashed the award. Noting in particular what was then 4.02(1)(f)(ii):

Grievances arising with respect to Article 4, other than Articles 4.01 and 4.02 shall be handled in accordance with the grievance procedure set out in Article 11.

and 4.02(6)(i):

Having regard to the procedures set out herein for the resolution of disputes arising under 4.01 and 4.02, no decision of the Group or Award of the WRA is subject to grievance or any other proceeding.

the Court commented, at page 498:

In my opinion, the parties to the collective agreement intended that work-load disputes should be dealt with separately from other grievances. It is difficult to imagine what more they could have done to make that clear. The work-load process is designed to provide speedy, informal and individual resolution of disputes in the context of the course under consideration at each institution. A teacher who is not satisfied with a work-load assignment has recourse by way of complaint under art. 4. A teacher cannot grieve a work-load matter under art. 11.

There is no basis in the language of the Agreement that supports the finding that art. 4.02(1)(f)(ii) does not apply where a college is refusing to apply a prior award. On the contrary, art. 4.02(6)(h) provides for the limited application of such an award.

The reference in art. 11.10 to the by-passing of the regular grievance procedure for personal grievances, in my opinion, relates to arts. 11.01 and 11.05 and not to arts. 4.01 and 4.02. The latter-mentioned articles constitute a code for work-load disputes isolated from art. 11. Accordingly, the finding by the board of an "unreasonable standard" whether reviewable or not is of no significance. Also, the unsuccessful attempt to have individuals grieve has nothing to do with the issue.

This was a work-load issue arising under art. 4.01 and the board had no authority to deal with it under art. 11. The board incorrectly interpreted its jurisdiction and the award must be set aside.

The matter, however, did not end there. The decision of the Court came out in Dayco, refining the test for review of board decisions, and the Fanshawe case went on to the Court of Appeal. In brief unreported reasons issued June 8, 1994, per Robins, J.A., the Divisional Court was reversed and the ruling of arbitrator Burkett was reinstated:

In our opinion, the Divisional Court erred in holding that the standard of review to be applied in determining whether the board of arbitration was empowered to consider the grievance in issue was a standard of correctness. The board was constituted under the terms of the collective agreement between the parties and was acting within its "home territory": see Re Dayco (Canada) Ltd. v. CAW Canada (1993) 102 DLR(4th) 609 at 620. The board had jurisdiction to interpret the provisions of the agreement to determine the arbitrability of the issues raised under the agreement. Its decision is protected by the broadly-framed privative clause set out in s.46(1) of the Colleges Collective Bargaining Act. Any judicial review of its decision is confined to the narrow standard of patent unreasonability.

In our review of the award, we are satisfied that it cannot properly be concluded that the decision is patently unreasonable. The board's interpretation of the collective agreement is one which the language of its provisions can reasonably bear. In our opinion, there is no basis for judicial intervention in this case.

What, then, is the state of the law on the question of the exclusivity of Article 11's Workload Resolution procedure? The language of Article 11.02A 6(b) itself, it is true, while stating expressly when Article 32 is to be used, does not go on to expressly state the corollary: that in the case of the stated exceptions, it is the specific procedure provided in Article 11 itself that is intended to be used. Yet on a review of the provisions of Article 11 as a whole, and allowing Article 11.02A 6(b) itself its most natural reading, it is difficult to conclude other than, as the Divisional Court put it in Fanshawe, when faced squarely with what they saw as the issue of "correctness",

"the parties to the collective agreement intended that work-load disputes should be dealt with separately from other grievances. It is difficult to imagine what more they could have done to make that clear".

The Court of Appeal, in restoring the original award on a "not patently unreasonable" test, it must be borne in mind had before it solely the question of a Union grievance, and whether all the particular attributes of the grievance that Mr. Burkett had before him could not unreasonably be found to bring that matter within the parties' contemplation of what is now Article 32.10. Indeed, as the Dissenting opinion in the Fanshawe award correctly notes, all references to complaints/grievances and carriage of the matter in Articles 11.01 and 11.02 are to the teacher, and it is arguable that it is only such "teacher" grievances that Article 11.02A 6(b) - located there and not in Article 32 - with all its clarity is really speaking to. In any event, on the question that it had before it of a "Union" grievance, the Court of Appeal did reverse. Accordingly, that case must be seen as expanding the potential access to now Article 32 for the "workload" provisions of even Articles 11.01 and 11.02 - i.e., by way of a proper Union grievance. And we believe that that provides an answer to Mr. Ryder's concern that there be, in appropriate cases, scope for a ruling or interpretation of broader application, in the way that only Article 32 provides.

That is not to say that the workload-resolution mechanism provided in Article 11 is not in itself a "final and binding" one. It expressly provides for a binding determination, by a third-party neutral if necessary, of any dispute that a teacher has with his or her workload assignment under Articles 11.01 and 11.02. That determination is "final", in the traditional sense here, of being not subject under the collective agreement to further levels of consideration or review. And it is expressly made enforceable, as a final and binding decision, to the same extent and in the same manner as any other third-party award under the collective agreement. Nor is the pre-1985 history instructive in the matter. The 1985 collective agreement did represent a watershed, addressing probably the most fundamental collective-bargaining concern for the employee-members of this sector - that of workload - in a sophisticated and comprehensive scheme made binding through the collective agreement, and fully enforceable in the same way. The agreed-upon limitation of Article 11 dispositions applying only for that school year, and having no precedential effect beyond the individual teacher bringing the complaint, is a sound, practical trade-off for allowing a process designed to be more expeditious and less formal than the "general" arbitration process. But it also covers the teacher completely. The entire school year is taken care of, and if that or any other problem recurs in the ensuing year, the teacher is protected by the same process again. Keeling does not appear to be a case heavily quoted or extended (logically it would seem to have cast in doubt the ability of parties to negotiate mandatory time limits at all), but in any event was a case where the parties by their collective agreement potentially were barring access to any hearing. For the reasons given above, the ability of the collective-bargaining parties to "customize" a

process in accordance with their specific needs does not appear to us to lie outside the contemplation of the statute, in its requirement for a procedure for "final and binding arbitration" to resolve disputes. And if, for example, the employer were to persist in repetitive conduct uninformed by prior WRA determinations against it, once again as the Fanshawe College case ultimately determines, there is an avenue left open for the Union to take carriage of the matter directly, and obtain an unqualified determination, under now Article 32.10. The agreed-upon limitations in that Article to the use of a "Union grievance" appear to contain two thoughts - it must not include "any matter upon which an employee would be personally entitled to grieve" by way of an individual grievance under Article 32, and "the regular grievance procedure for personal or group grievance shall not be by-passed except ...". While it cannot be said that the exact circumstances existing in the Fanshawe case are necessarily the only ones that would permit such a Union initiative, the *caveat* that should be issued in that regard is that any purported Article 32.10 Union grievance must genuinely meet the test or tests so articulated for such a grievance; and we note in Fanshawe itself the arbitration board's sensitivity to that, in declining at the same time to order an individual remedy. Rather, when dealing with the intersection between Articles 11.01 and 11.02 and the remainder of the collective agreement, we believe that the Union had it right in Conestoga College, *supra*, in not seeking through its Article 32 rights to have a full board of arbitration address the factual components of an individual teacher's SWF or workload, but rather to use such determination for its precedential effect in guiding the College, and any Workload Resolution Arbitrator in a specific teacher's case if necessary.

In the present case, however, that is not the avenue by which the Union proceeded before us to gain its "clarification" of the proctoring issue; rather, what is before us is the specific workload grievance brought by Beverly Langley, and we find that we do not have the jurisdiction to deal with that grievance. The grievance before us is accordingly dismissed.

Dated at Toronto this 29th day of November, 1995

Mort Mitchnick
P. Munt-Madilll
R. Hubert

M.