

NUTLEY VS ST. LAWRENCE
93A318
IN THE MATTER OF AN ARBITRATION

BETWEEN

ST. LAWRENCE COLLEGE
(hereinafter referred to as "the College")

- and -

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

Grievance of R. Nutley

BEFORE:	M.G. Mitchnick H.J. Cook T. Kearney	Chairman Nominee for the College Nominee for the Union
FOR THE COLLEGE:	S.C. Raymond L.J. Sawyer C. Bleakney	Counsel V.P. Human Resources Human Resources Assistant
FOR THE UNION	G. Leeb M.A. White R. Nutley	Counsel Chief Steward Local 417 Grievor

Hearing held in Kingston on October 19th, 1993.

A W A R D

This matter involves the current employment status of Mr. Roy Nutley, and in particular whether Mr. Nutley must be found, under Appendix VIII of the collective agreement, to have completed the first year of his "probationary period" with the College. Appendix VIII provides:

APPENDIX VIII SEASONAL EMPLOYEES

1 A sessional employee is defined as a full-time employee appointed on a sessional basis for up to 12 full months of continuous or non-continuous accumulated employment in a 24 calendar month period. Such sessional employee may be released upon two weeks' written notice and shall resign by giving two weeks written notice.

2 In determining the employment and calendar periods under Appendix VIII, 1, only the period after January 1, 1976 shall be considered and no prior employment or calendar period shall be taken into account. Also, an employee's continuous service acquired in accordance with the provisions of the previous Agreement dated September 17, 1975, as at August 31, 1976, for the period back to January 1, 1976, shall count as continuous employment or months of non-continuous accumulated employment for the purpose of such paragraph.

3 If a sessional employee is continued in employment for more than the period set out in Appendix VIII, 1, such an employee shall be considered as having completed the first year of the two year probationary period and thereafter covered by the other provisions of the Agreement. The balance of such an employee's probationary period shall be 12 full months of continuous or non-continuous accumulated employment during the immediate following 24 calendar month period.

4 A person assigned to replace a full-time regular employee for up to 14 working days for unplanned absences in any month shall not have such period(s) considered as sessional employment for the purpose of the computation of the 12 months sessional employment. During such periods such a person shall be paid as if partial-load and within the range of partial-load hourly rates as set out in Article 14.

5 Other matters concerning the use of sessional appointments may be referred to the E.E.R.C. which shall deal with these matters as priority items.

Mr. Nutley teaches primarily the Apprenticeship group, and began doing so under short-term contract, initially for less than 12 hours a week, in April of 1991. In September of 1991, he first went to what the parties regard as "sessional" status, i.e., a total weekly teaching load in excess of 12 hours, and has continued from that point to teach courses in the Program under a

series of short-term contracts executed by the parties. Those contracts vary in their number of weeks, and in their number of hours per week contracted for, and some of them are overlapping. Because of the variations that the parties themselves saw in Mr. Nutley's status from September 1991 on, as between "sessional" versus "partial-load", they each have characterized his relationship on a calendar-month basis, and with respect to the majority of the months so analyzed, the two parties agree. The Union, however, counts all of those months in which they see the grievor, on the basis of both the total and the spread of his hours, as essentially replacing a "full-time" employee, while the College counts only those months in which the grievor's actual "teaching" days totalled 15 or, more in the month. A summary of the grievor's teaching assignments prepared by the College is appended as Schedule I to this award, with an asterisk marking the 6 individual months in dispute, and an addition at the far right of the summary showing the total number of hours taught in the months in dispute. ("Partial-load" hours become "full-time" hours under the collective agreement when they exceed 12 hours per week on a regular basis.) The months in dispute are further broken down by weeks by the Union in their own exhibit, which is appended as Schedule II. Mr. Nutley testified that in addition to the actual "teaching hours" contracted for, he spends an average additional day a week in the usual preparation, marking and student consultation associated with teaching. Part of Mr. Nutley's assignment from the College is to teach a lot of night courses, and the effect of that, for the purposes here, is often to "stack" both day and night courses on the same day, so that both fall on the same calendar day. From the Union's point of view, that is irrelevant; from the College's point of view it becomes critical.

The Union's argument is essentially two-fold. Appendix VIII is all that applies here to "sessional" employees, and the status of Mr. Nutley is to be gleaned from the terms of the Appendix itself. Paragraph 3 of the Appendix has certain "penalties" designed to avoid "abuse" of this latitude afforded the College to use non-bargaining-unit staff, and the meaning to be attributed to the words of paragraph 1 should reflect the potential "abuse" that is of concern in the Appendix; that is, that a college might attempt to make use of its "sessional" appointment power to avoid the filling of a "full-time" bargaining-unit position. Thus, at least where a sessional is teaching "full-time" hours (13 or more a week) throughout the month, on a relatively even continuum from week-to-week, that ought to count as a "full month" of full-time employment toward the sessional reaching the limit of 12 such months in a 24-month period. Alternatively, if Article 27.02 B (formerly 8.01(b)) is to be treated as applying to sessionals who are outside the agreement, then Article 11.01 K 2 of the collective agreement must equally be treated as applying as well. Article 27.02 B reads:

27.02 B The probationary period shall also consist of 24 full months of non-continuous employment (in periods of at least one full month each) in a 48 calendar month period. For the purposes of 27.02 B, a calendar month in which the employee completes 15 or more days worked shall be considered a "full month".

If an employee completes less than 15 days worked in each of the calendar months at the start and end of the employee's period of employment and such days worked, when added together, exceed 15 days worked, an additional full month shall be considered to be completed.

Article 11.01 K 1 of the collective agreement provides:

11.01 K 1 Contract days (being days in which one or more teaching contact hours are assigned) shall not exceed 180 contact days per academic year for a teacher in post-secondary programs or 190 contract days per academic year for a teacher not in post-secondary programs.

and Article 11.01 K 2 as a result goes on to stipulate:

11.01 K 2 Weekly contact hours assigned to a teacher by the College may be scheduled into fewer than five contact days and such compressed schedule shall be deemed to be five contact days.

The Union reads Article 27.02 B as equating days "worked" to the period under employment contract itself, as, it submits, does Mohawk College, a decision of this same arbitrator issued April 30, 1993, and notes that in any event Mr. Nutley on the evidence should be credited with at least one additional day having been "worked" per week, if one is to take the narrower definition of days "worked". The Union also compares the argument made by the College here (which, if too many of the course hours happen to be scheduled on the same day, produces zero credit) with the forms of credit otherwise accorded the less than full-time categories of part-time and partial-load employees under Appendix IX and Article 26.04 B respectively. The Union submits, finally, that if the purpose of a probationary period is evaluation, it makes no sense to have the matter determined by how the College, as a matter of exercising its own discretion, happened to schedule the sessional's courses, and that the College's approach is tailor-made for abuse, insofar as it potentially would permit the College to maintain a sessional on "full-time" hours indefinitely.

The College's response is essentially that Article 27.02 B does apply, that, as a formula worked out by the parties themselves it must apply, and that in any event the fact that it applies has already been decided for these parties by arbitrator Brent in St. Lawrence College (Arsenault), a unanimous decision issued November 16, 1992. The College further cites that and the Mohawk College decision as authority for the proposition that the 15 days "worked" in Article 27.02 B must be days of actual teaching contact.

As noted in the Mohawk College case, the Arsenault case was distinct from that case (and the present one) in that there was no contract of employment at all in existence for the period under review, and the board had to attempt to reconstruct the nature of the relationship through an analysis of the actual payment hours. Given the irregularity of employment there, the board did so on a month-by-month basis, with the month of April 1979 being a critical area of dispute. The board wrote, commencing at page 7:

There is no definition of a full-time employee in the collective agreement; however, it is reasonable to conclude that a full-time employee is anyone who does not fit the definition of either a part-time or a partial-load employee. Therefore, a full-time employee is someone who does not teach six hours per week or less, and who does not teach over six hours and up to thirteen hours per week on a regular basis. Accordingly,

while we can conclude that, when Article 8.01(a) speaks of the probationary period for full-time employees, it refers to two years of continuous employment as a full-time employee, we must look to the second paragraph of Article 8.01(b) to determine what a month of such employment means. That paragraph says, in part, "a calendar month in which the employee completes fifteen (15) or more days worked shall be considered a 'full month'". Therefore, we would conclude that any month in which the grievor completed fifteen or more days worked as a full-time employee should count as a month of full-time employment for the purpose of her probationary period.

The College has interpreted this to mean any month in which the grievor worked at a rate of more than thirteen hours per week for more than fifteen days. We believe that that calculation is more restrictive than what is set out in the collective agreement. It is our view that anyone who teaches more than six hours per week and who also cannot be said to teach between seven and thirteen hours per week "on a regular basis" must be considered to be a full-time teacher. It is the phrase "on a regular basis", which occurs in Article 3.03(b), which must be given meaning. Exhibit 2 shows that during April, 1979, the grievor taught for thirteen hours per week for ten teaching days and for twenty-two hours per week for eleven teaching days. She worked twenty-one days that month. If someone works roughly half the month for thirteen hours per week and the other half for twenty-two hours per week, can it be said that she has worked between six and thirteen hours on a regular basis that month? If her status must be determined for the month of April, then we cannot conclude that the collective agreement could reasonably be interpreted to call her a partial-load employee that month. Therefore, given the definition of part-time, she must be considered to have been a full-time employee during April, 1979. Accordingly, since she was a full-time employee in April and worked more than fifteen days that month, she should have received credit for the month of April, 1979.

For all of the reasons set out above, we conclude that the grievor should have received credit for April, 1979 and that it follows that she was not released during her probationary period.

In Mohawk College, the grievor had been initially employed on a "full-time" sessional contract at 5 days per week, and the board noted that that had never changed, despite some reduction in actual teaching assignments for a limited period towards the beginning, to permit the grievor to spend more time on preparation. The board found the grievor to have completed 12 months in 24 on the face of Appendix VIII itself, but also wrote at page 12 of the award:

We are mindful of the College's argument that Article 8.01(b) [now 27.02 B] does not strictly apply to sessionals, who, so long as they remain so, are not covered by the main body of the collective agreement. However, if one were to ask what "rule of thumb" the parties in dealing with this issue of part-month counting under Appendix III would most likely contemplate as a reasonable method of doing so, it is hard to ignore as a guide what is set out in Article 8.01 of this very collective agreement. Using the 8.01(b) method, the only months that "count" are those with at least 15 days of employment (which we take to be the meaning of days "completed" or "worked", as the logical compromise method of

"rounding" up or down on a typical calendar month of 30 days, bearing in mind also that what is being talked about are points part way in a month where an employment period either commenced or ceased). But at the same time, part months not otherwise counted at the beginning and end of each period of employment are added together to see if combined they equate to the mid- or cut-off point of 15 days that would be the equivalent of at least one month.

Two points should be made about the Mohawk College award. Firstly, as noted, it involved a full-time sessional employee whose employment history very much resembled, in the board's findings, a "regular" full-time employee in the bargaining unit. In that situation the case for adopting Article 8.01(b) as a reasonable "rule of thumb" was much more apparent than in the constantly-fluctuating kind of relationship that the parties agree existed here (and which Ms. Brent, in a similar situation in Arsenault, found had to be characterized piecemeal, on a month-by-month basis). The second point is that the board in Mohawk College, in trying to discern the intent of 8.01(b) on its own, did measure days "worked" as the number of calendar-days in the month over which the contract of employment extended. That was a conclusion that the majority of the board came to in light of the fact that the chosen break-point was 15, which represents the mid-point in a typical calendar month. The board at the same time was cognisant of the fact that the Community Colleges in their own "workload" provisions clearly recognize that there is more "work" to teaching than simply showing up in the classroom. It is not clear that Ms. Brent saw it very differently. As in other cases noted in Mohawk College, the application of Article U.01(b) to sessionals (who are outside the collective agreement) appeared simply to have been assumed in Arsenault by the parties - although by the time of its final submissions, we note that the College suggested that it was being overly generous in having given Ms. Arsenault the benefit of 8.01(b), when she was not actually an employee covered by the collective agreement. And in Mohawk College, as noted above, the employer took the position that, for the same reason, Article 8.01(b) did not apply. In any event, Ms Brent's conclusions, based on the submissions that were made to her, are set out as noted on page 8 of the award. The evidence she had before her in "Exhibit 2" can more clearly be discerned from the written submissions of the Union, which at page 7 note:

In January, 1979, the grievor received one contract for five hours per week of English from January 2 until March 2, eight hours of English from January 9 to April 27 and from March 2 to June 22, five hours per week of another course. These courses produced partial-load hours of less than thirteen hours per week until April.

The grievor received nine more hours of work from the 16th to the 30th of April, putting her over thirteen hours per week for eleven days in April.

Thus it appears that what Ms. Brent in fact was referring to in the passages cited above was the two periods of the month, April 1 to 15, and April 16 to 30, not actual "contact" days, and her 21 "teaching" days were simply the 21 potential "working days" in a month, based solely on the exclusion of week-ends from the calendar. That is an interpretation not that distinct (apart from cutting out week-ends) from that which the majority in Mohawk College took the parties to have had in mind.

On the other hand, the anomalies in the approach adopted here by the College, looking solely at "teaching contact" days, are apparent from the specific examples provided by this case in itself. The month of November 1991, for example, "counts" according to the College, even though the month is evenly split between "partial-load" and "full-time" (= "sessional") assignments. But May of 1993 does not, even though the split in weeks is instead 3 to 1 in favour of sessional assignments. And that is all because of the happenstance of the number of days over which the College had spread the grievor's hours or courses in the two instances. Similarly, April 1993, another relatively heavy month overall, fails to qualify, on the College's approach, only because of Good Friday falling on one of the grievor's normal teaching days.

The better view, it seems to us, on facts like the present is to disregard Article 27.02 B entirely, as being both legally inapplicable and of little use as a blueprint, and to attempt to give a reasonable meaning to a "full month" of "full-time employment" in Appendix VIII. In our view, the Union's approach does that, in looking to see whether the contract-employee on the whole demonstrates full-time hours (more than 12 a week) throughout the month, on a relatively consistent basis. That is the Union's claim, and is all in this case that we have to decide. The result, in our view, is a less capricious one than adopting an interpretation that leaves it to the happenstance of how the College chooses to spread a teacher's courses to determine the matter, while at the same time maintaining consistency with the essential purpose of a "probationary period", being to provide the employer an opportunity to assess the adequacy of a teacher through his or her performance on the courses assigned. This approach urged by the Union, we also note, is perhaps an even more generous one for the employer than that adopted in Arsenault, which, given the absence of a definition for "full-time", placed the onus on the employer to demonstrate that the individual was employed instead as a partial-load employee "on a regular basis". Using that test of the Union on the facts here, we find the grievor to have been continued in employment in excess of 12 full months in 24, and the grievor accordingly is to be considered to have completed the first year of his probationary period.

While we normally refrain from doing so, we consider it appropriate here to conclude with some comments in brief arising out of the Dissenting Opinion of board-member Cook. The difference in contractual arrangements between the Mohawk College case and the present matter has already been set out, but the essential point in Mohawk College in any event was that whether one chose in making the count to apply Article 8.01(b) of the collective agreement or not, the employer would lose, unless it could be found to have been unfairly prejudiced by its reliance on the view of the steward. It also is apparent, as the College itself noted throughout the hearing before us, that what the College relied upon in adopting its method of counting in the present case, was its reading of the earlier case between these same parties decided by arbitrator Brent (Mohawk itself did not issue until April 30th, 1993, after the events giving rise to this grievance.) But to avoid confusion, it is perhaps more important to point out that the College in its argument may have misconstrued the conclusion of the board in Mohawk on the issue of "teaching" versus "calendar" days, and that Mohawk adopted an approach under Article 8.01(b) that was essentially contrary to the argument being advanced by the College before us here. With respect to board-member Cook's final point of concern, while the Chair did engage in dialogue with both counsel as their arguments proceeded, and in particular early on raised with the parties the possible intersection of the issues in this case with those in the recently-decided but not reported decision in Mohawk College, to be fair to Union counsel it should be observed

that at the end of the day the Union's grievance has been found to have merit on exactly the grounds set out by the Union in its opening statement, as enunciated at pages 3 to 5 of this award.

The board will remain seized of this matter in the event the parties encounter any difficulties with respect to implementation or the impact of the board's award as it affects Mr. Nutley.

Dated at TORONTO this 7th day of February, 1994

M. G. Mitchnick

I Concur
T. Kearney

I Dissent
H. J. Cook
(see attached)

SCHEDULE I

SUMMARY - ROY NUTLEY WORK SCHEDULE

DECEMBER 1991:

1 week x 20 teaching contact hours (tch)
2 weeks x 10 tch
40 tch

MAY 1992:

1 week x 12 tch
1 week x 16 tch
2 weeks x 18 tch
64 tch

FEBRUARY 1993:

2 weeks x 12 tch
2 weeks x 20 tch
64 tch

APRIL 1993:

1 week x 11 tch
3 weeks x 14 tch
53 tch

MAY 1993:

1 week x 14 tch
1 week x 13 tch
1 week x 12 tch
1 week x 18 tch
57 tch

JUNE 1993:

4 weeks x 15 tch
60 tch

SCHEDULE II
ROY NUTLEY

September 1991	1 week part-time 3 weeks sessional	15 teaching contact days
October 1991	sessional	18
November 1991	2 weeks sessional 2 weeks partial load	17
December 1991	1 week sessional 2 weeks partial load	13
January 1992	sessional	16
February 1992	sessional	16
March 1992	2 weeks partial load 2 weeks sessional	17
April 1992	partial load	15
May 1992	1 week partial load 3 weeks sessional	14
June 1992	partial load	8
July 1992	partial load	2
August 1992	partial load	6
September 1992	partial load	13
October 1992	partial load	13
November 1992	partial load	8
December 1992	partial load	6
January 1993	partial load	11
February 1993	2 weeks partial load 2 weeks sessional	14
March 1993	sessional	17

April 1993	4 weeks sessional 1 week partial load-(good Friday)	13
May 1993	3 weeks sessional 1 week partial load	13
June 1993	sessional	13
July 1993	sessional	8

Dissent

I dissent from the decision of the majority of this Board for three reasons. The first reason relates to the decision of the majority to disregard Article 27.02(B) of the Collective Agreement as a method for interpreting the meaning of "full month" as it is used in Appendix VIII to the Collective Agreement. The major issue in dispute in the hearing was the meaning of a "full month" of "full time employment" as it is used in Appendix VIII. The words "full month" are very clearly defined in Article 27.02(B), but this definition was completely disregarded by the majority. This is of particular concern because the same Chairman in a decision dated April 30, 1993, (Mohawk College), when interpreting the same Collective Agreement indicated that it was appropriate to employ the definition found in what was then Article 8.01(b) [now Article 27.02(B)] of this very Collective Agreement. In the Mohawk case, the College took the position that it was improper for an arbitrator to refer to Article 8.01(b) of the Collective Agreement. Nonetheless, this Chairman did refer to that section. He considered it an appropriate "rule of thumb" to determine the definition of "full month". He allowed the grievance and determined that the College had violated the Collective Agreement.

In the case before us the College took a position, given the view of the Chairman in his previous award, that it was appropriate to look at Article 27.02(B) of the Collective Agreement when attempting to interpret the meaning of "full month". In this case, the Chairman disregarded his earlier decision entirely and stated that it was inappropriate to use Article 27.02(B) as a "rule of thumb" when determining the meaning of "full month". As a result, the Union has another successful grievance. In both cases the College lost at the arbitration hearing. In Mohawk College, the College argued that Article 8.01(b) [now Article 27.02(B)] should not be used as a method for interpretation but this Chairman found that it should so be used. In this case when the College argued that Article 27.02(B) should be used as a guide to interpreting the meaning of "full month", the arbitrator declined to do so. The Colleges are left in a position where it is impossible to have any certainty as to how these provisions will be interpreted.

As a further matter, as I have reviewed Mohawk College in depth, I note that the Union Steward, Mr. Nelson, called by the College in that case, indicated at the top of page 8 that May, 1989, would not count as a "full month" because the grievor would have only 14 teaching days in that month. The Mohawk award indicates on page 4 that the grievor's teaching contract ran until May 26, 1989. If the reasoning of the majority in the case before us had been applied in the

Mohawk case, then the Chairman should have found that he supported the position taken by the College that the grievor must have 15 teaching days. May, 1989 would have counted as a "full month" because there were 20 possible teaching days in that month prior to May 26, 1989. The Board in this case takes the view that 15 days means 15 possible teaching days, not teaching days actually worked. This further demonstrates the inconsistency in the approach of the majority. In my view, the position of the College that only days worked should be considered as days for the calculation of a "full month" is more in keeping with the intent of the parties and I would have so found.

The second reason for my dissent is based upon the decision in St. Lawrence College (Arseneault). On page 7, arbitrator Brent states " Therefore we would conclude that any month in which the grievor completed fifteen or more days worked as a full time employee should count as a month of full time employment for the purpose of her probationary employment." This clearly recognizes that 15 days or more of work is one of the requirements to be counted toward the total number. The decision of the majority in this case appears to contradict the decision in the Arseneault case.

The third basis for dissent relates to the conduct of the Chairman at the hearing. The decision of the majority is not based on arguments that were raised by the employee's counsel, but by the Chairman. These were not the arguments put forth on behalf of the Union and were only raised by Union counsel, if at all, after the Chairman had raised them. I find this particularly troubling. The parties should be left to present their own cases in the manner that they deem appropriate. The Board should listen and judge, not present arguments.

It is for all of the above reasons that I dissent and would have dismissed the grievance .

December 17 1993

H.J. Cook