

88A905  
CAAT(A)  
Local 125

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

LAMBTON COLLEGE

(The College)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCE OF W. SAYERS - #88A905

BOARD OF ARBITRATION:

Kenneth P. Swan, Chairman  
René St. Onge, College Nominee  
Joe Herbert, Union Nominee

APPEARANCES:

For the College:

C.C. White, Counsel  
Vincent P. Johnston, Counsel  
Gerry Silver, Director of Personnel  
and Finance  
Ray Rothenbury, Dean, Technology  
and Applied Science

For the Union:

Tim Hadwen, Counsel



## A W A R D

Following a preliminary award in this matter dated October 25, 1989, the hearing was resumed on February 6, 1991. Several days of hearing subsequently followed, after the course of which written submissions were received from counsel.

This arbitration concerns the grievance of Mr. W. Sayers, a Welding Instructor in the Department of Technology at the College, dated February 15, 1988. The grievance related to an allegation that Mr. Sayers, who had been teaching in the Welding Program on a full-time basis and had been a relief teacher in certain other programs, had been improperly laid off.

The grievance presented certain unusual features, including the claim by Mr. Sayers to be able to combine part-time and partial load teaching assignments into a full-time job, thereby displacing the employees filling those assignments, and in the process avoiding his own lay-off. The legal issues which this presented were discussed in some length in the preliminary award, and need not be repeated here.

We shall, however, set out the relevant provisions of the collective agreement for ease of reference:

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

position concerned are relatively equal, seniority shall apply consistent with the following:

- (a) an employee will be reassigned within the College to a vacant full-time position in lieu of being laid off if the employee has the competence, skill, and experience to perform the requirements of a vacant position;
- (b) failing placement under paragraph (a) above, such employee shall be reassigned to displace another full-time employee in the same classification provided that:
  - (i) the displacing employee has the competence, skill and experience to fulfil the requirements of the position relatively equal to the employee being displaced;
  - (ii) the employee being displaced has lesser seniority with the College.
- (c) failing placement under paragraph (b) above, such employee shall be re-assigned to displace a full-time employee in another classification upon acceptance of the identical employment conditions as the classification concerned provided that:
  - (i) the displacing employee has the competence, skill, and experience to fulfil the requirements of the position relatively equal to the employee being displaced;
  - (ii) the employee being displaced has lesser seniority with the College.
- (d) failing placement under paragraph (c) above, such employee shall be re-assigned to displace a partial-load employee (as referred to in Appendix II) or a part-time employee upon acceptance of the identical employment conditions as the partial-load or part-time employee concerned provided that:
  - (i) the displacing employee has the competence, skill, and experience to fulfil the requirements of the position relatively equal to the employees being displaced;
  - (ii) the partial-load or part-time employee being displaced has lesser months of service with the College as determined in both Appendix II and IV than such displacing employee's months

of seniority;

- (e) failing placement under paragraph (d) above, such employee shall be reassigned to displace a sessional employee (who has more than ninety (90) days remaining on the sessional employee's term appointment) for the remainder of such sessional employee's appointment provided that:

the displacing employee has the competence, skill, and experience to fulfil the requirements of the position relatively equal to the employee being displaced. Such a reassigned employee shall be laid off without further notice at the termination of the sessional appointment.

8.08 (a) An employee claiming improper lay-off contrary to the provisions of this Agreement, shall state in the grievance the names of up to four (4) employees (of whom no more than three (3) shall be full-time) whom the employee claims entitlement to displace. The time limit referred to in Section 11.02 for presenting complaints shall apply from the date written notice of lay-off is given to the employee.

(b) If the grievance is processed through Step 2, the written referral to arbitration in section 11.03 shall specify, from the names of such employees originally designated in (a) above, the name of only one full-time employee or two or more partial load or part-time employees (the sum of whose duties will form one full-time position), who shall thereafter be the subject matter of the grievance and arbitration. The grievor shall be entitled to arbitrate the grievance thereafter under only one of sub-paragraphs (a), (b), (c), (d) or (e) of Section 8.05.

Letter of Agreement dated April 7, 1986:

Re: Displacement of Partial-Load Employees

This will confirm the advice given in negotiations that it is the Colleges' intention that failing placement of a full-time employee who has completed the probationary period under Paragraph (d) of Section 8.05, the College will give reasonable consideration to the written request of a full-time employee about to be laid off to continue a full-time assignment by displacing two or more partial-load or part-time employees and the employee shall set out:

(a) the names of such partial-load or part-time employees, each of whom, have lesser continuous service with the college.

Upon receipt of such written request, the College will consider the feasibility thereof taking into account such features as:

(b) possible reduction in efficiency, quality of performance or adverse effect upon the program objectives; and

(c) the relative competence, skill, experience and suitability as demonstrate with the College to fulfil the requirements of the positions concerned.

Briefly, we concluded in our preliminary award that the College was obliged, in the circumstances of this case, to give consideration pursuant to the Letter of Agreement to the grievor's claim to be able to combine certain part-time and partial-load assignments being taught by other employees into a full-time assignment for himself. That consideration would have to take into account the factors set out in the Letter of Agreement, and the relative seniority or service of the various persons involved. On that issue, we considered the seniority or service of Mr. Jan Snippe, one of the employees the grievor sought to displace, without coming to a firm conclusion as to Mr. Snippe's precise seniority or service.

The evidence presented to us over the several days of the hearing in this matter is extremely complicated, and to a certain extent there was some shifting of ground beneath the grievor's claim as the evidence came in. For the purposes of disposing of this matter, however, it is sufficient to give a somewhat general description of the evidence, and leave its finer details, which

required graphical display to be understood, to one side. Briefly, the claim ultimately advanced on the grievor's behalf was to continue teaching certain aspects of his own previous teaching load which had not been terminated, as had a substantial amount of his welding teaching. Coupled with this, the grievor claimed certain work being performed by Mr. Snippe, work being performed by Mr. Marsh, and work performed by Mr. Ashmore.

While there are some significant obstacles to combining all of these hours together into a workable teaching load for a single person, the Union was able to respond to many of these obstacles either in evidence or in argument. The Union makes at least a prima facie case that a "plausible" teaching schedule could be constructed, given a certain degree of flexibility on the part of everyone concerned, and certain concessions from other bargaining unit members which, the evidence suggests, they were prepared to make. For the purposes of argument, we will assume that the hours claimed could be combined into a workable teaching schedule, and we will also assume that the number of hours per week, on average over a teaching year, would be sufficient to meet the definition of a full-time position in the collective agreement.

Central to constructing this schedule, however, is the claim to the teaching being done by Mr. Jan Snippe. That claim includes a block of teaching in the Industrial Maintenance Mechanic program of four hours per week for 40 weeks, without which the Union's proposed teaching schedule, already only marginally full-time in total hours, simply fails to meet the definition of a full-

time position. We therefore propose to turn first to that block of time, and to assess the grievor's claim against the competing claim of Mr. Snippe, and the provisions of the collective agreement.

Clause 8.05 sets out a series of what might be called "bumping" opportunities for full-time teachers who are subject to lay-off. At each stage, the competitive test between the employee claiming to displace another employee of lesser service or seniority is that the displacing employee have "the competence, skill and experience to fulfil the requirements of the position relatively equal to the employees being displaced". Under the Letter of Agreement, the test is somewhat differently expressed.

First, the competition aspect of the "reasonable consideration" which the College must make to a request to combine partial-load or part-time assignments is expressed as "the relative competence, skill, experience and suitability. . . to fulfil the requirements of the positions". While it is not perfectly clear whether what is intended by this is the same as the "relatively equal" concept set out in clause 8.05, (and there may be scope for argument as to whether the parties intended that the margin of appreciation inherent in a relatively equal test is not there in a "relative" test) the important factor is that "suitability" has been added to the list of considerations on which the displacing employee must compete with the employee to be displaced.

Second, there is a broader consideration of which the College is entitled to take account, namely the "reduction in efficiency, quality of performance or adverse affect on the program

objectives" considerations set out in paragraph (b) of the Letter of Agreement. This permits wider institutional concerns to play a role, quite apart from the competition between the two employees directly affected.

The other element here is the relative claim for continuous service of the grievor and Mr. Snippe. This is a very complex issue, which we attempted to come to grips with in our preliminary award, without ultimate success. By the time of argument in this matter, it appears to have been common ground between the parties that Mr. Snippe was at all material times either a full-time teacher or a partial-load teacher. If he was a full-time teacher, there is no dispute that the grievor has insufficient seniority to displace him. If he was a partial-load teacher, then there is a difficult question of interpretation of Appendix 2, and the computation of Mr. Snippe's continuous service in accordance with the provisions of that Appendix. On one arguable interpretation, Mr. Snippe would still have greater seniority than the grievor; on another, he would appear to have less. We shall return to this issue below.

Ultimately, however, the critical question is the relative qualifications of the two individuals competing for the teaching assignment. That issue is really central to the College's reasons for not assigning the "plausible" teaching load which could be identified to the grievor, and should properly be addressed directly. We therefore turn to the relative qualifications of these two individuals, beginning with Mr. Snippe.

Mr. Snippe is a native of the Netherlands, where he apprenticed as a welder and worked until 1957. He then immigrated to Canada, where he requalified as a welder and worked until 1976 in a number of technical and administrative responsibilities in welding. In addition to working as a welder, Mr. Snippe was a welding inspector and a welding superintendent, responsible to ensure that up to 100 welders working for his employer maintained their welding "tickets", annual licences to perform a particular kind of weld on a pressure vessel, which are awarded after a practical demonstration of an ability to perform that weld to the required specifications.

In 1976, Mr. Snippe was hired at the College, and he worked as a full-time teaching master, essentially teaching welding in a number of different applications, until his retirement in early 1988. Since then, he has continued to teach the contested block of welding courses on a partial-load basis.

In effect, Mr. Snippe designed the welding program for the College. When he was first hired, he revamped the program then in operation, and has revised it over the years as an integral part of the trades training program. In addition, he has taught all of the welding courses offered by the College over the years, including about nine separate courses offered on day release programs to employees of various local industries who are sent to the College to upgrade their welding qualifications, usually on a contract basis with their employers. There are also night courses offered, all of which Mr. Snippe has taught at one time or another.

He has also developed courses to teach the ASME Welding Code, and has taught this theoretical aspect of the program for some ten years.

In order to understand the relative qualifications of Mr. Snippe and Mr. Sayers, it is necessary to digress for a moment on the subject of welding "tickets". A ticket is, in fact, the "Identification of Welder" document required under the Boilers and Pressure Vessels Act, administered by the Ministry of Consumer and Commercial Relations of Ontario. The only meaningful ticket is one issued for an individual welder to perform a particular weld for a particular employer; anytime a welder's employment changes, a new ticket must be taken out for the new employer, involving a performance test of the weld type required, destructive testing of the weld and inspection of the workpiece by a welding inspector from the Ministry.

There is no dispute that it is not necessary to hold a welding ticket to teach welding at the College, but at the same time an ability to get a welding ticket for a particular kind of weld is the most practical test of competence in performing the weld, and thus has a significant degree of relevance to the ability of the holder to teach the performance of that weld. Mr. Snippe, for example, last held valid welding tickets in 1974 when he worked at Dominion Bridge; since that time, in his capacity as welding inspector and welding supervisor first, and subsequently as a College teacher, he has instructed other people on how to do the welds, has done destructive testing in preparation for the

inspection by the government inspector, but has not himself requalified for a welding ticket. In fact, it would appear to be impossible to do so unless he were employed in an industry where the ticket were required. Even the College students who pass the tests for welding tickets during their training receive only tickets marked "seeking employment". Once they have secured employment, they would be required once again to do the performance test, subject to inspection by a welding inspector, in order to hold a valid ticket which would permit them to work as a welder on pressure vessels.

For purposes of comparison, we turn next to the grievor's qualifications. Mr. Sayers' early experience was largely in the area of automotive mechanics. In 1963 he received an "A" Automobile Mechanic's Licence in the Province of Ontario, which he still holds. Following a move to British Columbia, he received the equivalent licence in that Province in 1968. He held various positions in both provinces in the auto mechanics trade and related businesses until 1976, when he was first employed by the College. There is no dispute that the auto mechanics trade includes a certain amount of welding, although not of a highly technical nature.

In 1976 he was hired by the College as the Maintenance Technician in the Fire School. This position was covered by the support staff collective agreement, and included maintenance and repairs on a range of mechanical equipment. In 1978, he transferred to the Multipurpose Shop Department at the main campus, the

trades training area for a number of building trades. There he ran the tool crib, which included not only accounting functions in relation to tools and equipment, but also maintenance.

In 1982, the grievor's job under the support staff collective agreement was phased out, but he was offered work as a relief instructor in training courses offered by the College in appliance servicing, automobile mechanics, and welding. Over the intervening years until 1988, he performed teaching functions in a number of areas, but for our purposes it is sufficient to concentrate on his teaching in the welding area.

The grievor frankly admitted, upon his arrival in the welding program, that he had no high pressure pipe welding qualifications. He was thus encouraged to develop those qualifications and he did so by enhancing his skills in the welding shop, both on the College's time and on his own. It is his evidence, and there is no reason to dispute it, that by the time of his lay-off, he had achieved virtually all of the welding tickets which students in the program would be expected to achieve in the course of the 40 week training. It is clear, however, that these formal qualifications were only achieved after the grievor had received at least verbal, and later written, notice of his impending lay-off. The grievor did these tests to enhance his own employment prospects, and not for any reason related to his teaching skills.

It is clear from reading clause 8.05 and the Letter of Understanding together that the College is entitled, when considering the feasibility of the grievor's request to displace a number

of partial-load and part-time employees, to assess the "relative competence, skill, experience and suitability" of the grievor and each employee to be displaced. In our view, when the grievor and Mr. Snippe are compared, there can be no question that Mr. Snippe's competence, skill and experience in relation to teaching welding is significantly greater than is the grievor's. There can be no question that the language requires a competition between the employees contesting the right to teach in the welding program; not only is the language to that effect, but the amendments to the language in the immediately succeeding collective agreement, which change the inquiry into one of sufficient competence, skill and experience, make it clear that relative qualifications were intended in the collective agreement which applies to the situation before us.

Whether "relative" qualifications means "relatively equal" qualifications as described in clause 8.05 or not, we are of the view that the grievor cannot establish on either basis that he is entitled to displace Mr. Snippe. In coming to this conclusion, we recognize that the qualifications of the competing employees have to be assessed in relation to the job itself, and not against some much higher standard, and we therefore have attempted to limit the credit which we give to Mr. Snippe for his qualifications to those of his qualifications which are directly related to the teaching of welding during the relevant period at the College. Thus, to a certain extent, his vast experience in very sophisticated welding techniques cannot really assist him if that experi-

ence is not necessary for nor relevant to teaching of less sophisticated techniques at the College. Even after such discounting, however, it is our view that Mr. Snippe's competence, skill and experience as a welding teacher in the Industrial Maintenance Mechanic program, which is the precise block of work claimed here, is significantly superior to the grievor's.

In addition to competence, skill and experience in teaching welding itself, Mr. Snippe brings years of experience as a teaching master in the program, compared to the grievor's involvement as an instructor. While no doubt the grievor had some collegial input into the development and enhancement of the welding curriculum, in fact the final responsibility for the curriculum was in Mr. Snippe's hands at all material times, and he thus brings additional competence, skill and experience in the academic administration of the welding program into the competition with the grievor.

In coming to this conclusion, however, we do not wish to suggest that the grievor's qualifications are in any way inadequate. He has been a very successful teacher over the years, and has displayed admirable initiative in upgrading his skills even as his lay-off approached. He is a very able teacher who, unfortunately must compete with someone who is better qualified for the available work.

We also had evidence from the College about the impact of the non-personal factors in paragraph (b) of the Letter of Understanding, "possible reduction in efficiency, quality of performance

or adverse effect upon the program objectives", and evidence relating to the additional "suitability" factor in paragraph (c). While this evidence also enhances the College's case, we think it is not really necessary for us to deal with it at any length here.

On the basis of this determination of the relative qualifications of the grievor and Mr. Snippe, we therefore find that the grievor's claim to displace Mr. Snippe cannot succeed. That finding has the effect of knocking the central core out of the Union's argument for constructing a full-time assignment out of various pieces of teaching available at the time of the grievor's lay-off, and as a result the grievance necessarily fails.

Because of the result which flows from our finding on the qualifications issue, it is not necessary to decide the question of the relative seniority of Mr. Snippe and Mr. Sayers. The facts from which this question arise are very complex, and probably unique to the way in which this particular lay-off took place. In the circumstances, we think it better to leave the question unresolved than to further complicate the interpretation of the difficult language involved.

The Union also advanced an alternative argument that the grievor's lay-off should have taken place at the end of the 1987-88 academic year, rather than at the end of the autumn term of that academic year. This argument is based upon an assertion that, by the end of the autumn term, the grievor had already completed sufficient weeks of full-time teaching so that, by augmenting that teaching with available teaching during the spring of 1988, a work

load falling within the definition of a full-time academic year, which is basically 12 hours or more on a regular basis of teaching per week, for a total of 38 weeks.

Without going into the details of this claim, it is sufficient to observe that the Union's case depends upon some nine weeks of teaching during the summer of 1987 being considered as a part of the 1987-88 academic year. The College disputes the grievor's right to claim these weeks toward that academic year, and in our view the College is correct in doing so. All of the evidence, including the grievor's own testimony, indicates that the impending lay-off was known to the grievor and all other members of the Department as early as March 1987. What took place in the summer, therefore, took place in full knowledge that there would be no further teaching available for the grievor as of the end of the autumn term of the 1987-88 academic year.

On that basis, it was agreed that the grievor, instead of taking some nine weeks of vacation to which he was entitled in the months of July and August 1987, would continue teaching on the courses to which he was then assigned until those courses were completed at the end of August. The grievor was thus allowed to postpone his vacation entitlement until December 1987 and January and February 1988.

In effect, this arrangement allowed the grievor to continue his full-time salary for nine weeks longer than would otherwise have been possible. Had he not taught during the summer of 1987, the teaching would have been performed by someone else,

and he would have had no vacation entitlement left when his teaching assignment came to an end in December of that year. This arrangement was clearly made for the grievor's benefit, and it was formalized by a memorandum dated June 26, 1987 from the Chairman of the Division to the grievor, signed and accepted by the latter on July 1.

While this memorandum does not explicitly say how those weeks are to be regarded in relation to various provisions of the collective agreement, the evidence makes it obvious that the intention of the parties was not to create some bootstrap right for the grievor, but rather to permit him the maximum possible extension of his employment status consistent with his teaching obligations coming to an end in December 1987.

In the result, therefore, we reject both the Union's primary claim on the grievor's behalf, as well as its alternative argument. We wish to express our thanks to the parties for their assistance in coming to grips with the unusual technical difficulties of this grievance.

DATED AT TORONTO, this 22nd day of March, 1993.

  
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Kenneth P. Swan, Chairman

I concur

"René St. Onge"  
René St. Onge, College Nominee

I concur

"Joe Herbert"  
Joe Herbert, Union Nominee