

93FF721 OPSEU VS SHERIDAN

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SHERIDAN COLLEGE

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

STAFFING GRIEVANCE

BOARD OF ARBITRATION:

JANE H. DEVLIN  
ANDREW SHIELDS  
NOMINEE  
JON MCMANUS

CHAIRMAN  
COLLEGE

UNION NOMINEE

D.K.GRAY, FOR THE COLLEGE

IAN ROLAND, FOR THE UNION

OPSEU FILE NO.: 93F721  
HEARING DATE: April 29, 1994

The grievance in this case involves a claim that the College has improperly utilized sessional appointments to fill regular full-time positions in the School of Business at the Brampton campus. By way of relief, the Union requests that fulltime faculty be hired to fill the positions in question.

The relevant provision of the collective agreement is Article 2.03, the material portions of which are as follows:

2.03 A The College will give preference to the designation of full-time positions as regular continuing teaching positions rather than sessional teaching positions including, in particular, positions arising as a result of new post-secondary programs subject to such operational requirements as the quality of the programs, enrolment patterns and expectations, attainment of program objectives, the need for special qualifications and the market acceptability of the programs to employers, students and the community. The College will not abuse sessional appointments by failing to fill ongoing positions as soon as possible subject to such operational requirements as the quality of programs, attainment of program objectives, the need for special qualifications, and enrolment patterns and expectations.

2.03 C If the College continues a full-time position beyond one full academic year of staffing the position with sessional appointments, the College shall designate the position as a regular full-time bargaining unit position and shall fill the position with a member of the bargaining unit as soon as a person capable of performing the work is available for hiring on this basis.

At the outset of the hearing, Mr. Gray, on behalf of the College, moved to set aside or, alternatively, to limit the scope of a subpoena duces tecum issued at the request of the Union. The parties agreed that it would be appropriate for the Board to deal with this motion prior to proceeding with the hearing on the merits.

The documents listed on the subpoena are as follows:

1. Faculty of Business and Commerce - Davis Campus "Faculty Loading" documents prepared for each of semesters 1, 2 and 3 for years 1991/92, 1992/93 and 1993/94 for all courses. Enclosed as document "1" is an example for "Office Administration" dated November 22, 1993.
2. Faculty of Business and Commerce - Part-time/Partial Load/Sessional Faculty for each semester showing parttime and sessional faculty, hours taught, hourly rate, total, and weeks - for each of semesters 1, 2 and 3 for years 1991/92, 1992/93, 1993/94. Enclosed as document "2" is an example for the first semester 1993/94.
3. A document titled "PART-TIME FACULTY - Business, Brampton", dated "1993 05 06", showing the history of teaching of "PART-TIME FACULTY " in the Business/Business and Commerce Faculty at Brampton/Davis Campus. Enclosed

as document "3" is the first page of this document. We require similar documents prepared from 1991/92, 1992/93 and 1993/94.

4. Documents titled "Faculty of Business - Brampton" or "Faculty of Business and Commerce, Brampton", "Non Full-Time Faculty", for each of semesters 1, 2 and 3 for the academic years 1988/89 to 1993/94, inclusive. Enclosed as documents "4" are an example for "AY 88/89" and an example for "AY 92/93 3RD Trimester".
5. Documents titled "Faculty of Business & Commerce TCH" for each of semesters 1, 2 and 3 for 1991/92, 1992/93 and 1993/94, showing subject areas and hours taught by full-time, sessional and part-time faculty at the Davis Campus. Enclosed as document "5" is an example for Semester 2 (Jan/94).
6. Documents titled "Faculty of Business TCH - Sessional and Part-Time TCH" showing the "Instructor", "TCH Both Campuses", "Davis" Campus - TCH and Subject Area. Enclosed as document "6" is an example page for "Semester 2 (Jan/94)".
7. Memos to and from Human Resources and the Faculty of Business showing those faculty "eligible for further sessional appointments" in the Faculty of Business, Brampton per semester for 1991/92, 1992/93 and 1993/94, or similar documents. Enclosed as document "7" is an example of such a memorandum.
8. Documents titled "Faculty of Business and Commerce Non Full-Time Faculty Sessional Teaching" dated February 10, 1994, showing where faculty members taught on a sessional basis from 1992 to 1994, by semester.

As indicated above, in respect of the documents set out in paragraphs I to 7 of the subpoena, the Union enclosed a sample of the type of document to be produced.

Prior to setting out the positions of the parties, it is necessary to note certain facts which were outlined by the College and which were not disputed by the Union. These facts indicate that the documents appended to the subpoena are kept in a private office at the College and that no faculty member or Union representative has authority to search through or take copies of these documents. In these circumstances and in the absence of any explanation from the Union as how it came into possession of the documents, the College asked the Board to infer that the documents were obtained improperly.

It was the submission of Mr. Gray that the Board has a discretion to compel the production of documents pursuant to a subpoena and that it should decline to exercise that discretion where the Union does not come to the proceedings with "clean hands" in that its conduct in obtaining similar documents has been improper. Alternatively, it was contended that the subpoena should be set aside as the Union is not seeking production of documents to support its case but instead is engaged in a "fishing expedition" and attempting to discover whether there is any basis for its case. In the further alternative, Mr. Gray contended that the subpoena is

unduly broad and that any documents produced should be limited to the permissible period for filing a grievance: that is, 40 days prior to June 30, 1993, the date on which the grievance was filed. Moreover, as the Union's claim crystallized on that date, Mr. Gray submitted that there can be no relevance to documents which were prepared subsequently. Finally, in the event that the Board were to direct that any documents be produced pursuant to the subpoena, Mr. Gray requested that production be conditional on the Union providing particulars of its claim.

Dealing firstly with the matter of particulars, Mr. Roland submitted that it is the Union's contention that all positions staffed with sessional appointments in the School of Business at the Brampton campus ought to be designated as regular full-time teaching positions subject to the College demonstrating that the factors set out in Article 2.03A justify a particular position being designated as sessional. Mr. Roland further contended that it is not unusual for confidential documents to come into the hands of one of the parties during a litigious proceeding and that the Union's possession of the sample documents is not a proper basis upon which to set aside the subpoena. Moreover, it was submitted that the Union is not engaged in a "fishing expedition" but is seeking specific documents to support its case and, in this regard, Mr. Roland undertook to tender the documents in evidence. Finally, Mr. Roland contended that given the provisions of Article 2.03 and the Union's claim that ongoing bargaining unit work was subject to sessional appointments, it would be inappropriate to limit the production of documents to a period of 40 days prior to the filing of the grievance. Moreover, it was submitted that documents prepared subsequent to the grievance are relevant to the matter of remedy and, in particular, to the number of sessional positions which ought to be designated as regular fulltime positions.

The general principles applicable to a subpoena duces tecum have been considered in a number of awards and are summarized by Arbitrator Weatherill in Re Canada Post Corp. and Canadian Union of Postal Workers (Best) (1986) 24 L.A.C.(3d) 157 as follows:

That an arbitrator or board of arbitration has authority to issue a subpoena duces tecum is clear from s. 157(b) [rep. & sub. 1972, c.18, s. 1], read together with s. 118(a), (b) and (c) [rep. and sub idem] of the Canada Labour Code. There is not available, in such arbitration proceedings, the process of discovery which is available in civil proceedings in the courts. There is, however, a grievance procedure provided for in the collective agreement. Where that procedure has been effectively utilized, requirements of particularity and disclosure should, in most cases, be met. It remains that a subpoena duces tecum may properly be issued to enable one party to obtain evidence which is relevant to its case, and which is in the possession of the other party.

It may be that in considering the scope of a subpoena, a labour relations board might view it as falling somewhere between the subpoena issued by the courts in civil proceedings, and the discovery process there involved. Such extension, if it is such, of the subpoena power might be justified by the absence of the discovery process in labour relations board proceedings. That would appear to have been the view of the Ontario Labour Relations Board in the Becker Milk case, [1975] Ont. L.R.B.R. 338 (Adams). In arbitration proceedings, of course, there is, as I have noted, a grievance procedure (having some of the effect of discovery proceedings), prior to arbitration.

Even on a broad view of the scope of a subpoena duces tecum, however, it is clear that it is not to be used to permit a party to go on a "fishing expedition", to endeavour, that is, "not to obtain evidence to support [a] case, but to discover whether [one] has a case at all": see Com'r for Railways v. Small (1938), 38 N. So. Wales 564 at p. 573, cited in the Becker Milk case, supra.

As indicated previously, in this case, the College sought to aside the subpoena based upon the Union's possession of sample documents which the College claimed had been obtained improperly. In support of its position, the College relied on the "clean hands" doctrine, a principle initially applied in courts of equity. The College, however, provided no authorities in which this principle has been applied to set aside a subpoena and, as pointed out by the Union, it is not altogether unusual for confidential documents to come into the possession of one of the parties during a litigious proceeding. In this case, it is not clear precisely how the Union obtained the sample documents but, in our view, its possession of the documents alone is not a sufficient basis to set aside the subpoena.

As to the College's claim that the Union is engaged in a "fishing expedition", the Board notes that the Union is seeking specific documents concerning faculty assignments and, in particular, sessional appointments in the School of Business at the Brampton campus. Given the nature of the Union's claim, we find that the documents are arguably relevant to the matters in dispute. Moreover, as distinct from a number of awards relied upon by the College, this is not a case in which the Union is seeking documents which are not even known to exist, nor is the Union seeking production for the purpose of examining the documents and, only if they prove useful, introducing them into evidence. In this case, Mr. Roland undertook to tender the documents in evidence in support of the Union's case. In the result, the Board is not persuaded that the subpoena can properly be characterized as a "fishing expedition" on the part of the Union. Nevertheless, in the Board's view, it would be appropriate to require the Union to further particularize its claim as requested by the College. Accordingly, the Board directs the Union to advise the College of each of the positions which it claims was improperly staffed with a sessional appointment and which gave rise to the grievance. The Union shall also advise the College of the basis for its claim in each case.

Finally, as to the College's alternate argument concerning the scope of the subpoena, it is necessary to consider Article 2.03 which is the provision of the collective agreement alleged to have been violated. This Article provides that the College will not abuse sessional appointments subject to the criteria set out in subparagraph A. Article 2.03C further provides that if a full-time position is continued beyond one academic year of staffing with sessional appointments, the College will designate the position as a full-time bargaining unit position. Accordingly, it is apparent that in order to determine whether there has been a violation of Article 2.03, it is necessary to examine staffing over a considerable period of time. In these circumstances, we do not find the request for documentation in the period prior to the filing of the grievance to be unreasonable. As to the documentation sought for 1993/94 academic year, in the Board's view, this documentation is arguably relevant to the matter of remedy and, on this basis, is properly produced pursuant to the subpoena.

In the result, the Board directs that the documents listed on the subpoena be produced in accordance with this ruling provided that production shall be conditional upon the provision of particulars as set out above. The Board further directs the parties to confer with respect to concerns expressed by the College relating to the release of information such as employees' hourly rates which we understand is not required by the Union. The Board shall remain seized for purposes of implementation of this interim award and to deal with all other issues arising from the grievance.

DATED AT TORONTO, this 6th day of July, 1994.

Chairman

See Partial Dissent Attached  
College Nominee

"Jon McManus"  
Union Nominee

SHERIDAN COLLEGE  
AND  
ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
STAFFING GRIEVANCE

PARTIAL DISSENT

In my view, this is a case where the Union appears to be engaged in a "fishing expedition". The Union has made an extremely broad allegation and, without any indication as to its basis, now seeks the production of numerous documents to determine whether it can manufacture a case. The Union's undertaking to tender all documents in evidence does nothing to undo this defect.

Nevertheless, I take comfort in the fact the particulars, which the Union has now been directed to provide, will presumably establish the basis for the Union's allegations in this matter and clarify which documents are relevant to which issue. Any residual dispute concerning the relevance of documentation, having regard to the Union's particulars, should presumably be addressed to the Board in writing in advance of the next hearing so as not to prolong this matter.

R.A. Shields