

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FANSHAWE COLLEGE

(THE COLLEGE)

AND:

ONTARIO PUBLIC SERVICE EMPLOYEES' UNION

(THE UNION)

AND IN THE MATTER OF UNION GRIEVANCES - THOMAS KOVARI

BOARD OF ARBITRATION:

HOWARD D. BROWN, CHAIR
SHERRIL MURRAY, UNION NOMINEE
MICHAEL RIDDELL, COLLEGE NOMINEE

APPEARANCES FOR THE COLLEGE:

R.J. ATKINSON, COUNSEL
DAVID EVANS, MGR. ER
SHEILA WILSON, HR CONSULTANT

APPEARANCES FOR THE UNION:

ELIZABETH NURSE, COUNSEL
GARY FORDYCE, CHIEF STEWARD
TOM GELDARD, VP, L. 110
PADDY MASSON, LU PRES.

A HEARING IN THIS MATTER WAS HELD AT LONDON ON
NOVEMBER 9, 2005.

INTERIM AWARD

Three Union grievances #U99-383; U99-508; U99-565 were referred to the Board for its determination of the issue in each grievance that in the Motive Power Division, the College failed to give preference to full-time over partial load positions with specific reference to the partial load position held by Thomas Kovari. Prior to the scheduled hearing in May 2005 but adjourned, the Union requested production by the College of the time tables for all non-full-time employees in the Motive Power Division for each term from fall 2002 to and including the summer 2005 term and requested a list of the courses including the Course Information Sheets, for all courses in that Division during this time period. The College denied the request for production of this information and in so doing, Counsel wrote in his letter to Ms. Nurse dated May 3:

“Without prejudice to any position which the College may take in this matter, I would also note that since Article 2 does not deal with part-time positions, information regarding part-time positions is irrelevant to this matter...”

The issue of production of documents was raised at this hearing at which the Board was requested by the parties to give an interim ruling on this issue and as well, dealing with the request by the College for particulars of the Union’s grievances. Following the submissions of counsel at the hearing, the Board reserved its decision and did not proceed with the merits of the grievances but agreed to render its decision before proceeding further. The Board has

subsequently met in executive session to consider the submissions and the preparation of its award on this preliminary issue.

The grievances concern the application of Article 2.02 of the collective agreement between the parties which is as follows:

“2.02 The College will give preference to the designation of full-time positions as regular rather than partial-load teaching positions as defined in Article 26, partial-load employees subject to operational requirements as the quality of the programs, attainment of the program objectives, the need for special qualifications and the market acceptability of the programs to employers, students and the community.”

It is the submission of the Union that in order to meet its onus that the College should have created a full-time position, it must show that there is a body of work which would require such a position and requires the information requested concerning work assigned to Sessional Partial-Load and Part-Time employees which information is relevant to obtain a complete picture of the work performed in the Division.

Reference was made to the recent award of a Board chaired by P.C. Picher dated July 29, 2005 which deals with the same issue raised in this matter and submitted that this Board should follow that decision and order the production of documents which the Union requests of the College. In addition, the following awards relating to this issue were filed, Re George Brown College and OPSEU (Shime, December 23, 2002); Re George Brown College and

OPSEU (Devlin, January 16, 2003); Re George Brown College and OPSEU (Knopf, December 17, 2004); Re Algonquin College and OPSEU (Knopf, May 27, 2003); Re St. Lawrence College and OPSEU (Shime, May 18, 2005); Re Fanshawe College and OPSEU (H.D. Brown, August 17, 2004); Re Fanshawe College and OPSEU (H.D. Brown, November 10, 2004).

The submission for the College is that the issue in the grievance concern the allegation of a violation of Article 2 in relation to the Partial Load position held by Mr. Kovari which is alleged should be a full-time position. There is no question of bad faith or erosion of the bargaining unit by the College. Part-time hours and Positions are not regulated by Article 2 and should not be looked at by the Board. It is submitted that the Picher decision in this regard is wrong and should not be followed by the Board, as consideration of the work of part-time employees has no place in an alleged breach of Article 2. Part-time employees are not within the bargaining unit and are not covered by Article 2 which applies only to Partial Load and Sessional employees. Where the parties include Part-Time employees, it is stated as in Article 27.05 dealing with layoffs in which context the College gives consideration to the use of part-time employees but there is no such restriction in Article 2. It is therefore submitted that the Union's request for production of documents for part-time positions is not relevant to these grievances.

It was submitted on the cases presented, it is clear that part-time employees do not form part of Article 2 and the Board has no jurisdiction where there is no constraint on the

College, in its use of part-time employees in relation to Article 2. Reference in support of its position is made to the Algonquin College award (supra) where Arbitrator Knopf ruled:

“That the arbitrator only has jurisdiction to look at the number of non-full-time hours being taught by sessional or partial load appointments to see if those assignments have been made in compliance with Article 2”.

The body of work to be dealt with by the Union must come from Sessional or Partial-Load employees and not from Part-Time employee positions which are not regulated by Article 2. Reference in this regard was made also to the decision of the St. Lawrence award (supra).

There is no implied restriction on the College as to its use of part-time employees for the purposes of consideration of the issue in these grievances under Article 2 as it is not required by those terms to be concerned with part-time positions. Therefore, the College objects to the Union's request for production of information concerning part-time positions in this Division.

The College has requested particulars of the Union as to why the position of Mr. Kovari should be full-time. Alternatively, any order of production should be limited to Partial Load or Sessional positions from the time the grievances were filed and not before. To produce three years information as to course studies and time tables is too onerous and indicates an improper intent of the Union to learn if a case can be made out.

The submission for the Union is that Article 2 is clear and unequivocal that the matter of preference to designate full-time positions applies to Partial-Load and Sessional and does not

thereby include the same issue with regard to Part-Time employees. That classification relates to those who teach six hours per week or less and those persons are excluded from the bargaining unit. Nonetheless, the facts are that the College does employ part-time teachers who are assigned teaching of duties performed within their time frame set out above. Whether that denotes a hierarchy of employment classifications, the use of part-time employees is recognized as referred to in Article 27 - Layoff as they perform course teaching assignments within their employment. Although therefore the conditions of Article 2 relating to preference for full-time positions do not cover part-time employees but only partial-load and sessional employees, the instant issue of production of documents to the Union based on the claims in the grievances under Article 2, has relevance not to persons employed as part-time but to the assignment of work in the Division where the grievances arise. The information cannot be for the purpose of establishing any preference for part-time employees as that is not covered under Article 2 but what those employees teach form part of the body of work within the Division which is the information the Union is entitled to obtain in order to consider the factual basis for the grievances as all of the relevant facts are not within its knowledge. It is only after that disclosure by the College that the Union can consider whether it can meet the threshold onus to show a prima facie case. When that decision is made, the Union is in a position and could provide particulars to the College of the basis for the grievances to be dealt with at arbitration.

This issue is not of first instance between these parties as the same matter came up for review and decision by the Picher Board (supra) arising in a dispute between the same parties under the same collective agreement. The same issue is stated at p. 2 of that award:-

“As a preliminary matter, the Union seeks an order for the production of certain documentation in the possession of the College. The Union asserts that these documents are relevant to establishing its alleged breach of Article 2 and maintains that it does not have reasonable access to the material it seeks. For its part, the College has asked for an order excluding consideration of part-time employees in respect of the alleged breach of Article 2 emphasizing its position that Article 2 does not regulate either part-time employees or part-time work.”

In the present matter, the submission of the College is that the Board should determine the scope of these grievances so as to properly deal with the merits at subsequent hearings. The College position is that the direction of the Picher Board that: “The Union has the right to full disclosure of documents relating to part-time positions and/or work” and its order for production to the Union of course outlines and timetables as requested including Part-Time teachers back to 2002 is wrong and should not be followed by this Board.

An arbitration board is not bound in law to apply and apply a decision of a prior arbitration board however, it is generally held that arbitral deference is given to a reasoned decision of a prior arbitration Board where the parties are the same and its decision concerns the same issue arising under the terms of the same collective agreement as that to be dealt with by the subsequent arbitrators. To reject an award requires a conclusion by the subsequent Board that it should not be followed because it is in error and wrongly decided which is the standard of persuasion for a subsequent arbitral consideration of the issue. The Majority of the

Picher Board have in their award issued a detailed and extensive examination of the issue with substantive reasons for that Board's application and interpretation of Article 2 in relation to the production issue. To disregard the Picher award would be contrary to the general arbitral intent to apply consistency in the application of a collective agreement. This Board does not conclude following its complete consideration of the Picher award that it was wrongly decided and having regard to its proximity to the instant case between the same parties, we find that the same result should follow and be applied in these grievances.

In the instant matter, there is no allegation of bad faith by the College nor of an intent in anyway to erode the integrity of the bargaining unit. Here the matter at issue relates to the claim that Mr. Kovari's position should be full time but that claim spawns the same concern for an order of production of documents as dealt with by the Picher Board which also considered and dealt with the same case references provided to this Board. We note the reference in Article 27.12 where the College is required to notify the Union of all personnel hired or terminated in September, January and May including those hired to teach credit courses, which would include part-time employees but without descriptions of their teaching assignments which however in our opinion, are arguably relevant to the matter of preference for Full Time positions set out in Article 2.

The allegation of a violation of Article 2 allows consideration of the total teaching time assigned by the College in the Division where the dispute arose not to concern the employment of part-time persons but in order to determine that the totality of the teaching outside of the full-

time assignments could amount to sufficient teaching hours for which preference should have been given as required by Article 2.

Reference was also made to Article 7.02 (vi) in the George Brown College award in which the Knopf Board “determined that the Union was entitled to the production of course lists, course outlines and time tables for non full-time persons” which we conclude clearly includes part-time teachers.

Reference was made to the St. Lawrence College award and particularly that-

“If the Union is able to demonstrate that by cobbling together either partial load or sessional positions, there are sufficient courses to enable there to be a full-time position, it may do so. That may require an assessment of the total complement including the various courses that are being taught. Once the Union shows there are sufficient courses being taught by partial load and sessional teachers, that would enable a full-time position, the onus then shifts to the College to demonstrate the operational requirements that bring it within the exception of Article 2. While we acknowledge the use of part-time employees, does not constitute a violation of Article 2, it may very well be in the course of considering operational requirements, there may be some incidental evidence to be considered dealing with part-time employees and we do not at this early stage of the proceedings in the absence of specific factual context exclude the possibility of such evidence. The introduction of such evidence must be decided on a case by case basis.”

As to the specific issue of these grievances, set out above, the Union must establish a violation by the College of Article 2 by not giving preference to partial load or sessional teachers which does not relate to the College's employment of part-time persons but it does not exclude information of the course outlines and timetables of all Teachers in the Division which can have relevance to the issue of whether a full-time position existed and should have been given preference. To provide such information to the Union does not negatively impact on the use of part-time employees by the College which in our view is not material to the production issue in these grievances. We note the reference to the consideration of "operational requirements" in the above award which may arise as an issue for this Board but for the purposes of production which is the current issue such information concerning teaching assignments in this Division is not necessarily excluded from a production order.

The Board has the authority to require production of material which it determines is at least arguably relevant to the issue in a grievance and it is to that extent that this Board follows the decision in the Picher award to conclude the direction to the College requested by the Union to produce the course outlines and timetables for all non-regular Full-Time employees retroactive to the year prior to the date of the grievances to consider the facts leading up and after the filing of the grievances and having particular regard to the schedule for Sessional employees.

Following that production of information by the College to the Union, we direct the Union to provide particulars to the College as to the basis for the grievances, all of

which should be completed no later than one month prior to the next scheduled arbitration hearing date.

DATED AT OAKVILLE THIS 31st DAY OF JANUARY, 2006.

HOWARD D. BROWN, ARBITRATOR

SHERRIL MURRAY, UNION NOMINEE

MICHAEL RIDDELL, COLLEGE NOMINEE