

W.R.A.

Feb 03, 03

IN THE MATTER OF A WORKLOAD ARBITRATION

BETWEEN:

NIAGARA COLLEGE OF APPLIED ARTS AND TECHNOLOGY
(Hereinafter referred to as the "College")

-and-

PROFESSOR BRUCE McNIVEN
(Hereinafter referred to as the "Grievor")

AND IN THE MATTER OF the Grievor's workload complaint that the College violated the collective agreement by not attributing hours on his Fall 2002 SWF for travel between campuses and between assigned classes on the same day.

WORKLOAD RESOLUTION ARBITRATOR: J. David Whitehead

APPEARANCES

For the College: Barry Sharpe, Spokesperson
Neil Chartrand, WMG Member
Doug Rapley, WMG Member
Bill Hutton, WMG Member

For the Union: Sherri Rosen, Spokesperson
Carmel Constantini, WMG Member
Angela Nevin, WMG Member
Bruce McNiven, Grievor

A hearing of this matter was held in Welland, Ontario on January 27, 2003.

AWARD

The issue before me is whether or not the College violated the collective agreement by not attributing hours on the Grievor's Fall 2002 SWF for travel between two campuses in Niagara Falls and Niagara-on-the-Lake, which was required between assigned classes on the same day, two days per week, over the fourteen week term. The Grievor submits that the collective agreement was thereby violated and requests as a

remedy a declaration of violation, an order to revise his SWF, and an order for an overtime payment to compensate him for the travel time. The College submits that the agreement was not violated, requests a declaration that travel time between campuses is not a complementary function for which additional hours are to be attributed on the SWF within the meaning of Article 11, and argues that the grievance should be dismissed.

There is no dispute on the following material facts:

1. On Wednesdays during the Fall term in 2002, the Grievor was assigned two morning classes from 10:30 a.m. to 12:20 p.m. on the Glendale Campus in Niagara-on-the-Lake, and three afternoon classes from 1:30 p.m. to 4:20 p.m. on the Maid of the Mist Campus in Niagara Falls.
2. On Thursdays during the Fall term in 2002, the Grievor was assigned one morning class from 10:30 a.m. to 11:20 a.m. on the Glendale Campus in Niagara-on-the-Lake, and one afternoon class from 2:30 p.m. to 3:20 p.m. on the Maid of the Mist Campus in Niagara Falls.
3. On his timetable for this period, the Grievor was not assigned classes from 12:20 to 1:30 p.m. on Wednesdays, and from 11:20 a.m. to 2:30 p.m. on Thursdays. At some point during these periods between classes, when classes were not scheduled for him, he would be required to travel between campuses.
4. On Mondays, the Grievor was assigned six classes in an uninterrupted block from 10:30 a.m. to 4:20 p.m., and on Fridays, he was assigned two classes in an uninterrupted block from 12:30 p.m. to 2:20 p.m., but travel between campuses was not required on these days. The Grievor had no classes scheduled on Tuesdays during this period.

5. The total weekly hours indicated on the grievor's Fall 2002 SWF were 47.38, including 13 teaching contact hours, 8.3 preparation hours, 19.58 evaluation feedback hours, the minimum 5.0 mandatory hours for complementary functions under Article 11.01 F, and an additional 1.5 complementary hours for meeting time (0.5) and Tour Operations Committee (1.0).
6. There were no hours attributed on the SWF for the required travel between campuses and between assigned classes on Wednesdays and Thursdays.
7. The Grievor's requested remedy was based on one-way inter-campus travel time of 30 minutes per day, and the College did not dispute the Grievor's estimate of 30 minutes for this purpose at the hearing.
8. At all material times, there was no local agreement in place between the parties, an alternative which is provided for in Article 11.01 M and 11.02 G, which covered the matter of attributed hours on a SWF for inter-campus travel between assigned classes on the same day.
9. The College's practice is, and has been, to try to avoid scheduling teachers to teach on more than one campus per day because of the inconvenience and extra time required for travelling between campuses. In the instant case, the College had legitimate business reasons for scheduling the Grievor as it did, and there is no suggestion that the College acted unreasonably or in bad faith by so doing.

It is helpful to review the relevant provisions of the collective agreement here. I note first that the collective agreement workload provisions do not expressly deal with the issue of travel time required between campuses between assigned classes on the same

day. Article 25 specifies rates for kilometrage expenses for “travelling to assigned duties away from the employee’s accustomed work location.” Article 11.01 B 1 mandates a maximum total workload, assigned and attributed, of 44 hours per week for up to either 36 or 38 weeks, depending on program, during weeks when there are scheduled teaching contact hours. Article 11.01 C specifies that “a “teaching contact hour” shall be assigned as a 50 minute block plus a break of up to ten minutes.” Article 11.01 D 2 limits the number of different course preparations to four per week and of different sections to six per week, subject to the terms of Article 11.01 D 3 including subsection (viii) which provides that “... additional time necessary to arrange and prepare for student placement in ... learning situations [that is, courses which “in the objectives describe the students’ application of knowledge in actual work settings”] shall be attributed on an hour for hour basis and recorded on the ... SWF ...” Article 11.02 C 1 provides that “the functions of the WMG shall include: (i) reviewing workload assignments ... and resolving apparent inequitable assignments” Article 11.02 C 2 provides that the WMG shall have regard to such variables affecting assignments as “(xii) the timetabling of workload.” Article 11.01 F provides that “complimentary functions appropriate to the professional role of the teacher may be assigned ... by the College” and such “hours ... shall be attributed on an hour for hour basis.” In addition, this clause provides for a minimum of five such hours per week to be attributed for providing out-of-class student assistance and for normal administrative tasks. Article 11.01 G 2 provides as follows:

Where there are atypical circumstances affecting the workload of a teacher or group of teachers which are not adequately reflected in this Article 11, Workload, additional hours shall be attributed following discussion between each teacher individually and the supervisor, on an hour for hour basis.

Finally, overtime payment calculations for total weekly workload hours in excess of the total weekly workload hours maximum are set out in Article 11.01 J 2, but these provisions will not be repeated here.

Because the parties did not expressly deal with travel time between campuses in the workload provisions, I find that the interpretation and application of the workload provisions of the collective agreement to travel time between campuses for classes on the same day is clearly ambiguous. Certain evidence of past practice was received at the hearing, both as an aid to interpretation and as relevant to deciding an issue of estoppel to be dealt with later in this award. In the alternative that I was wrong about the language being patently ambiguous, this evidence was also admitted to disclose any latent ambiguity therein.

There is no dispute on the following facts regarding past practice. Prior to Winter 1993, the College attributed hours on SWFs for required travel time between campuses between assigned classes on the same day. From Winter 1993 to the time of the instant grievance and to the date of this hearing, the College has had a consistent practice of not attributing hours on SWFs for time for required travel between campuses between assigned classes on the same day. At all material times, there has been no change in the language of the relevant provisions of the collective agreement. At all material times, the College has had a practice of attributing hours on SWFs for travel time for assigned "Pracs" and off-campus course work assignments. In this regard, the College has interpreted the provisions of Article 11.01 D 3 (viii), namely, "additional time necessary to arrange and prepare for student placement" in courses with "objectives" describing

“application of knowledge in actual work settings,” as being consistent with the attribution of hours for such travel time.

Decision

As noted above and for the reasons set out there, I have found that the relevant language of the agreement is ambiguous regarding the attribution of hours on a SWF for time required for travel between campuses and between classes on the same day. The issue of travel time required for Pracs and for related off-campus work assignments is not the issue before me; however, on the evidence before me, the past practice of the parties indicates a long-standing, consistent practice since at least the Winter of 1993, which was known by the Union, or which ought reasonably to have been known by the Union, and which is consistent with the College’s interpretation of Article 11.01 D 3 (viii) that travel time for Pracs and related assigned off-campus work duties is to be attributed on a SWF. On the issues before me, the evidence of past practice indicates both that (1) before the Winter of 1993, travel time for inter-campus travel between assigned classes was consistently attributed on a SWF, and (2) after the Winter of 1993, travel time for inter-campus travel between assigned classes was consistently not attributed on a SWF. This past practice since the Winter of 1993 on the issues before me may be relevant concerning any estoppel and I will return to this matter below, if necessary.

The evidence of the past practice before winter 1993 is consistent with, and unambiguously based on, only one interpretation of the language, namely, that travel time between campuses and between classes on the same day is attributed on a SWF. However, the evidence of past practice after Winter 1993 is consistent with, and

unambiguously based on, only the opposite interpretation of the language, namely, that such travel time is not attributed on a SWF. I find that this evidence of past practice, taken as a whole, is not uniform and is not unambiguously based on only one interpretation of the relevant language, and, therefore, that it is not of assistance as an aid in interpreting the relevant language of the agreement. In fact, given the clear change in past practice in the Winter of 1993, this past practice, taken as a whole, discloses or confirms the ambiguity.

I turn now to a close reading of the relevant provisions in the context of the collective agreement as a whole in order to interpret the provisions and then to apply them to the facts in the case before me. The agreement as a whole is a master agreement covering many different colleges and union locals in many different locations in Ontario, and, in particular, colleges with many different campus configurations including number of campuses, distance between campuses, time required to travel between campuses, and extent to which teachers are assigned to teach classes on different campuses on the same day. The evidence before me is that the campus configuration at this college has also changed significantly over time from many campuses (up to 17 at one time in the past), to three campuses now, and, when the relocation of the programs at the Maid of the Mist Campus in Niagara has been completed, to two campuses.

In Article 11.01 C, the parties provided for ten minutes per teaching contract "hour" by scheduling and timetabling classes in blocks of only 50 minutes, starting on the half hour, for the clear purpose of establishing a timetabling system which provided the required travelling time from class to class by students and teachers in all cases where such travel is required. On average, such a block of 10 minutes per teaching contract

hour for the purpose of “travel time,” where required, is no doubt reasonable and sufficient between classes scheduled in a block on the same campus. However, for the purpose of travelling between classes scheduled on the same day but on different campuses thirty minutes apart, such a ten minute block would clearly be inadequate, and the parties could not, therefore, have intended the ten minute block in each scheduled teaching contact hour to cover travel time between separate campuses. In fact, having regard to the Grievor’s timetable, on days when the grievor was scheduled to teach classes on two campuses, his block of assigned teaching duties on one campus was separated from his block of assigned teaching duties on the other campus by a block of time free from scheduled teaching contract hours of either one teaching contract hour (a block of 70 minutes on Wednesdays between the end of teaching one class and start of teaching the next class), or three teaching contract hours (3 hours and 10 minutes on Thursdays free of teaching), for the clear purpose, among other purposes, of providing the grievor with sufficient time to travel between campuses between the timetabled blocks of classes on each campus.

The purpose of the detailed workload provisions of the agreement, including the maximum total of 44 weekly hours assigned and attributed over teaching periods set out in Article 11.01 B 1, is clearly to provide equity in the assignment of total workloads in the bargaining unit up to an established maximum, and, in this regard, the parties specified in Article 11.02 C 1 that the functions of the WMG shall include “resolving apparent inequitable assignments” (emphasis added). “Total workload” includes both “assigned and attributed” hours. “Assigned” hours include “teaching contact hours,” and “attributed” hours include hours for preparation, evaluation and feedback, and

complementary functions (Article 11.01 B 1). The parties also included language on “complementary functions appropriate to the professional role of the teacher” in Article 11.01 F, and, in Article 11.01 G 2, language on “atypical circumstances affecting the workload of a teacher or group of teachers which are not adequately reflected in this Article 11, Workload” They also provided in Article 11.01 G 2 that “additional hours shall be attributed ... on an hour for hour basis” for such atypical circumstances. In summary, although the parties have specified a workload model that does not include regular specified hours of work such as from 8:00 a.m. to 5:00 p.m., five days per week, they have specified a model with a maximum total number of hours per week.

I will provide two hypothetical examples to clarify the purpose of the parties in agreeing on this language regarding total workload hours and equitable assignments, and as an aid thereby in interpreting and applying these provisions to the facts in the instant case. If travel time were not attributed in situations like the instant case in a multi-campus system, the following is an example of the inequity in total workload which could result. In the first hypothetical example, two professors teach only on one campus and each has a workload assignment totalling the maximum of 44 hours per week without any inequity between the two professors resulting. In a second hypothetical example, I assume that there is no change in these workload assignments except that the teaching assignments on each of three days for only one of these professors were scheduled on two different campuses rather than on one campus, and required travel time of thirty minutes between campuses between classes on each of these three days for a total extra time required of 90 minutes per week or 21 hours over a 14 week period. This additional required travel time for only one of these professors would approach a half a week in

total accumulated over a 14 week term. This extra travel time would be required by only one of the two professors in order to complete their otherwise equivalent assigned teaching duties. This hypothetical situation would clearly have resulted in inequitable assignments between the two professors, a result the parties clearly would not have intended, and which the parties clearly directed the WMG, as one of its assigned mandatory functions in Article 11.02 C 1, to resolve.

After carefully considering the matter of the interpretation of Article 11.01 G 2, which is set out in full above, within the context of all of the relevant workload provisions of the collective agreement set out above, I find that travel time between campuses and between assigned classes is an atypical circumstance because teachers are typically assigned classes on only one campus per day, and because the timetabling system designed by the parties provides in Article 11.01 C only for ten minutes per teaching contact hour for the purpose of travel between classes. Such inter-campus travel between classes affects the workload of a teacher or group of teachers who has been assigned classes on separate campuses on the same day by increasing the time required to travel between assigned classes beyond the 10 minutes per teaching contact hour provided for in Article 11.01 C. I further find that the requirement for any such travel time is not otherwise adequately reflected in Article 11, Workload. For these reasons, I find that the parties agreed in Article 11 that additional hours should be attributed for such travel time, following discussion between each teacher individually and the supervisor, on an hour for hour basis. I further find that attributing such hours for inter-campus travel between assigned classes on the same day is required to provide equitable assignments within the meaning of Article 11.02 C 1, and is consistent with the

provisions of Article 11.02 C 2 (xii) which expressly recognize that “the timetabling of workload” is one of the “variables affecting assignments.”

Therefore, I find that the three-part test to be applied in each case to determine whether or not additional hours are to be attributed under Article 11.012 G 2 is as follows. (1) Were the circumstances “atypical”? (2) Did the circumstances “affect the workload” of a teacher or group of teachers? (3) Were the circumstances otherwise “not adequately reflected in Article 11, Workload”? The necessary prior condition for attributing such hours is “discussion between each teacher individually and the supervisor.”

Applying these provisions of the collective agreement as interpreted above to the facts in the instant case before me, I find that the Grievor had a right under Article 11.01 G 2 of this agreement to have the hours required to travel between campuses and between assigned classes on two days per week in Fall 2002 attributed on an hour for hour basis on his SWF for the following reasons. Such travel was (1) an “atypical” circumstance, which (2) “affected his workload” and (3) was not otherwise “adequately reflected in Article 11, Workload.” I also find that the attribution of hours for such travel was also required, in the circumstances, in order to provide him with an equitable workload assignment within the meaning of Article 11.02 C 1.

For purposes of the instant case, the College did not dispute the Grievor’s claim that 30 minutes was required to travel between these two campuses. On the evidence before me, the Grievor was entitled under the provisions of Article 11 to have an additional 30 minutes per day for each of two days per week, that is, an additional one hour per week for a 14 week period attributed on his SWF for Fall 2002. Because his

SWF for this period already exceeded the 44 hour per week maximum total workload permitted under the agreement, he was entitled, subject to the proviso set out below, under the provisions of the collective agreement, over the 14 week period to be paid overtime for an additional 14 hours to be calculated according to the overtime payment calculation provisions of Article 11.01 J 2.

However, although I have found the Grievor was entitled under the relevant provisions of the agreement to have this travel time between campuses between classes on the same day attributed on his SWF, and I so declare, I also find on the evidence before me that the Grievor and the Union are estopped from relying on these rights at the instant time and for the duration of the term of this collective agreement for the following reasons. The practice of the College not to attribute hours for this purpose has been consistent since Winter 1993, lasting over the terms of several collective agreements. The Union either knew, or ought reasonably to have known, about this practice over this period. I find on the evidence before me that the Union made a representation to the College by conduct, including silence or acquiescence, that it did not intend to rely on its contractual rights in this matter. I further find that the College was entitled to infer from the acquiescence of the Union that the Union intended that the College rely on this representation. The College clearly relied on this representation to its detriment by forgoing opportunities to negotiate other relevant terms and conditions to be included in the agreement that would be consistent with its current practice. I find that the Union and Grievor are therefore estopped from relying on their collective agreement rights in this matter until the instant collective agreement has been renegotiated and a renewed collective agreement has come into effect. Therefore, I will not make an order in this

award that any overtime payments be made to the Grievor for this matter for the Fall 2002 SWF period.

I note, however, that by bringing this grievance at this time, the Grievor and the Union have put the College on notice that they intend to bring the estoppel to an end, and that it will be brought to an end, with effect from the beginning of the term of a renewed collective agreement.

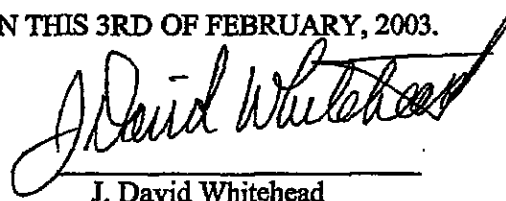
For all the reasons set out above, the workload grievance of Professor McNiven succeeds in part.

I note in conclusion that I have not relied in making this award on any of the following: (1) the George Brown Workload Arbitration (Tucker grievance decided by Arbitrator Kerman dated March 20, 1997) referred by the Union, because the issues and the facts before that arbitrator were different and distinguishable from the issue before me; (2) the Ontario Nurses' Association adjudication (Ontario Labour Relations Board Referee Gail Misra dated February 5, 1998), because the language of that collective agreement must be distinguished from the relevant language in the instant agreement; (3) the Union's submissions regarding insurance coverage for travelling between campuses between assigned classes on the same day and the provisions of certain statutes relevant thereto, because no documentation was provided in support of these submissions.

Finally, I note that, under the provisions of Article 11.02 F 8, this workload arbitration award "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," subject to the provisions of Article 11.02 F 6 that this 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." I further note that the instant workload assignment is that set out on the Grievor's Fall 2002 SWF which began on September 9, 2002. The instant collective agreement was effective from the date of signing on October 24, 2001, and is, pursuant to the terms of Article 36, Duration, in effect until August 31, 2003, subject to any extension of its term.

DATED AT ST. CATHARINES ONTARIO ON THIS 3RD OF FEBRUARY, 2003.

A handwritten signature in black ink, appearing to read "J. David Whitehead", written over a horizontal line. The signature is cursive and somewhat stylized.

J. David Whitehead