

IN THE MATTER OF AN ARBITRATION

98C240

CAAT (A)

L556

BETWEEN:

GEORGE BROWN COLLEGE OF APPLIED  
ARTS AND TECHNOLOGY

The Employer

-and-

ONTARIO PUBLIC SERVICE EMPLOYEES UNION,  
LOCAL 556

The Union

AND IN THE MATTER of the grievance of Diane Wardrope.

Board of Arbitration.

I.G. Thome, Chairman

David Guphill, Employer Nominee

Michael Lyons, Union Nominee

Appearances for the Employer:

Ann E. Burke, Counsel

Anne MacKenzie-Rivers, Chair, Community Health Programs & Interdisciplinary Studies

Zaki Ullah, Consultant, **Labour** Relations, Academic Human Resources

Appearances for the Union.

Andrew Lewis, Counsel

Diane Wardrope, Grievor

A hearing in **this** matter took place on November **25th**, 1998, at Toronto, Ontario.

PRELIMINARY AWARD

The grievor is a professor in the Faculty of Interdisciplinary Studies at George Brown College. She has grieved that the College has made an improper response to a workload arbitration award made by Arbitrator Howard Snow on December **21st**, 1997. The College has raised the preliminary objection that this board lacks jurisdiction to consider the grievance, essentially on the basis that the resolution of disputes over workload is reserved to the workload resolution process established under the collective agreement.

An appreciation of the parties' submissions requires some description of the provisions of the collective agreement regarding workload. Article 11 sets out in considerable detail the level and type of workload which may be assigned and attributed by the College to a teacher. A supervisor's establishment of a teacher's workload is embodied in a document known as a Standard Workload Form ("**SWF**"). Article 11 includes provisions enabling a teacher to refer disputed matters of workload assignment to the Workload Monitoring Group ("WMG") and ultimately to a Workload Resolution Arbitrator ("**WRA**"). The composition of the WMG, which has representation **from** the College and the Union local, is spelled out in Article 11. The article also **specifies** the way in which **WRAs** are to be jointly selected by the College President and the Union Local President, and directs that proceedings before the WRA are to be prompt and

informal and will result in a binding award. The portions of Article 11 which are at the heart of the parties' submissions with respect to our jurisdiction are the following:

**11.02A 1 (a)** Prior to the establishment of a total workload for any teacher the supervisor shall discuss the proposed workload with the teacher and complete the SWF, attached as Appendix 1, to be provided by the College. The supervisor shall give a **copy** to the teacher not later than six weeks prior to the beginning of the period covered by the timetable excluding holidays and vacations. It is recognized that if the SWF is subsequently revised by the College, it will not be done without prior consultation with the teacher.

11.02 A 1 **(b)** The College may, where a change **in** circumstances requires it, amend **assignments** provided to a teacher after the original assignment, subject to the teacher's right to refer any matter to the College Workload Monitoring Group **(WMG)** referred to in 11.02 B 1 and if necessary, the Workload Resolution Arbitrator **(WRA)** referred to in 11.02 E 1 and appointed under 11.02 F 1.

11.02 A 6 (a) In the event of any difference arising **from** the interpretation, application, administration or alleged contravention of 11.01 or 11.02, a teacher shall discuss such difference as a complaint with the teacher's immediate supervisor.

The discussion shall **take** place within 14 days after the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the teacher in order to give the immediate supervisor an opportunity of adjusting the complaint. The discussion shall be between the teacher and the immediate supervisor unless mutually agreed to have other persons in attendance. The immediate supervisor's response to the complaint shall be given within seven days after discussion with the teacher.

Failing settlement of such a complaint, a teacher may refer the complaint, in writing, to the WMG within seven days of receipt of the immediate supervisor's reply. The complaint shall then follow the procedures outlined in 11.02 B through 11.02 F.

11.02 A 6 **(b)** Grievances arising with respect to Article 11, Workload, other than 11.01 and 11.02 shall be handled in accordance with the grievance procedure set out in Article 32, Grievance Procedure.

11.02 F 5 A WRA shall determine appropriate procedure. The WRA shall commence proceedings within two weeks of the referral of the matter to the WRA. It is understood that the procedure shall be informal, that the **WRA** shall discuss the matter with the teacher, the teacher's supervisor, and whomever else the WRA considers appropriate.

11.02 F 6 A WRA shall, following the informal discussions referred to above, issue a written award to the College and the Union Local and to the teacher, resolving the

matter. Such award shall be issued by the WRA within ten working days of the informal discussion. The 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**.

11.02 F 8 The award of the WRA 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.

11.02 F 9 Having regard to the procedures set out herein for the resolution of disputes arising under 11 .01 and 11.02, no decision of the WMG or award of the WRA is subject to grievance or any other proceeding.

The parties also canvassed the relationship of the foregoing provisions to the grievance and arbitration provisions found in Article 32 of the collective agreement, including especially the **following**:

32.04 C The finding of the majority of the arbitrators as to the facts and as to the interpretation, application, administration or alleged contravention of the provisions of this Agreement shall be **final** and binding upon all parties concerned, including the employee(s) and the College.

32.04 D The arbitration board shall not be authorized to alter, **modify** or amend any part of the terms of this Agreement nor to make any decision inconsistent therewith, nor to deal with any matter that is not a proper matter for grievance under this Agreement.

Reference was also made to Article 6.02, in which the College agrees to exercise the management functions described in Article 6.01 " . . . in a **manner** consistent with the provisions of **this Agreement.**"

This dispute concerns Ms. Wardrop's workload assignment for the term beginning in January 1998. Her proposed workload was the subject of an **SWF** completed on December **3rd**,

1997. Ms. **Wardrope** objected to aspects of the proposed workload and pursued her complaint through to arbitration before a workload resolution arbitrator in accordance with Article 11. Arbitrator Snow issued his written award on December **21st**, 1997. For the purposes of this preliminary award it is not necessary to go into the details of the dispute and its resolution, beyond quoting the arbitrator's summary of the relief awarded and his retention of jurisdiction (p 12):

**In summary**, I have directed that the errors noted earlier be corrected, that the hours assigned to Ms. Wardrope's complementary functions be revised to reflect 1.00 hour for Promotional Meetings, and that the assignment to teach the second section of the anatomy course (**ANAT 1011 Section 2B0**) be removed from Ms. **Wardrope's SWF**.

**Finally**, I remain seized to deal with any problems which may arise in the implementation of this award.

The matter might have ended there, but on March **18th**, 1998, the **grievor's** supervisor prepared a new **SWF**. The **SWF** was accompanied by a memo in the following terms:

This memo confirms the rationale for issuing a revised SWF (**#4**) for the balance of the current **SWF** period. As you know, students in your **ANAT 1011** and **ANAT 1039** have asked for additional tutorial time with you.

This revised SWF reflects your revised work assignment based on the new circumstances that have arisen since we signed your current **SWF** (cf. Collective Agreement, Article **11.02 A 1 (b)**).

Note that the revised SWF includes three (3) new tutorial hours. These have been added to your Teaching Contact Hours in order to be consistent with the previously assigned tutorial hour.

Please consult with your students to determine mutually convenient times and locations for these additional hours.

Again without going into detail, it appears that the allocation of tutorial time for Ms. **Wardrope** was one of the issues before Arbitrator Snow, when the parties' positions were somewhat **different** - the Union seeking the allocation of more tutorial time and the College proposing the elimination of the one tutorial hour it had assigned in the SWF then in dispute.

The present grievance was then filed. It alleged a failure to manage in accordance with Article 6.02 and an improper response to the workload arbitration award of December 1997. The remedy sought was exact compliance with that arbitration award, together with compensation. It is obviously common ground between the parties that the grievance invoked the grievance and arbitration procedures of Article 32. The College's response was that a board appointed under Article 32 would not have jurisdiction to hear the matter, a position reflected in the preliminary objection made before us.

In the foregoing circumstances, counsel for the College argued, this board had no jurisdiction to deal with the dispute as it was one which fell under Article 11 and particularly Articles 11.02 A 6 **(b)**, 11.02 F 8 and 11.02 F 9. So far as our jurisdiction was concerned, counsel noted the stipulation in Article 32.04 D that we may not make any decision inconsistent with the terms of the collective agreement. She indicated that there was a dispute about the facts which led up to the grievance and argued that the dispute was not one **which** could be determined

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by this board. In the College's view there were two alternative bases on which this dispute could be seen to be a matter reserved to the dispute resolution provisions of Article 11. One possibility was that the grievance concerned the implementation of the Snow award. The College's **view** was that the dispute which has now arisen has nothing to do with the Snow award or its implementation - but that if it does then the matter is clearly one of **which** the arbitrator remains seized.

The other alternative, and the one which counsel maintained was the appropriate one, was that the present dispute was a new one which had arisen after the **grievor's** SWF had been revised by the College - something it had the right to do in certain circumstances under Article 11.02 A 1 (a). In this respect the College understood the Union to **assert** that the effect of Article 11.02 F 6 was that once the award of a **WRA** had been issued, a teacher's assignment could not be changed for the balance of the academic year. Counsel for the College argued that that could not have been the intended effect of Article 11.02 F 6 and that Article 11.02 A 1 (a) recognized the College's right to revise an SWF.

In the course of these submissions counsel referred us to Re **Niagara College** and Ontario **Public Service Employees Union** (unreported, November 29, 1995, Mitchnick) in which a board appointed under the general arbitration provisions of Article 32 found that it was without

jurisdiction to consider an individual grievance about a workload issue. In concluding that the dispute was one which the parties had reserved to determination under the procedures in Article 11, the board relied on a series of cases (pps 12 - 16) in which similar conclusions had been reached, and also considered the effect of the decision in Re Fanshawe College of Applied Arts and Technology and Ontario Public Service Employees Union (unreported, **March 29th, 1989**, Burkett), following review of that award by the Divisional Court and the Court of Appeal, on which we **will** touch later.

Counsel **also** referred us to Re Conestoga College and Ontario Public Service Employees Union (unreported, July **23rd**, 1993, Mitchnick), Re Ontario Council of Regents for Colleges of Applied Arts and Technology in the form of George Brown College and Ontario Public Service Employees Union (unreported, February **7th**, 1995, McLaren) and Re Algonquin College and Ontario Public Service Employees Union Local 415 (unreported, February **25th**, 1994, O'Neil).

In counsel's submission, the effect of Articles 11.02 A 6 **(b)** and 11.02 F 8 and F 9 was that an issue of the present type must be heard by a Workload Resolution Arbitrator under Article 11.

Counsel for the Union acknowledged that disputed workload issues must be dealt with by

a Workload Resolution Arbitrator. However, in the Union's submission, this was a matter of the College having **refused** to apply a Workload Resolution Arbitrator's award and in fact purporting to amend it. The question now was one of interpretation which was a matter within the jurisdiction of a board appointed under the general arbitration provisions in Article 32. This was the sort of question which a Workload Resolution Arbitrator was not empowered to resolve effectively, since such an arbitrator's award was expressly to have application only to the teacher affected by the matter and not to have application beyond the end of a twelve-month period.

In the Union's view the present grievance was neither a new issue which could be raised and resolved under Article 11, nor a matter of which Arbitrator Snow had remained seized. Arbitrator Snow had made an award which had been implemented - but it had then been changed by the College. This was something which, **in** counsel's submission, the College could not do, and only the jurisdiction of a board appointed under Article 32 was sufficiently broad to consider and determine the matter.

From the Union's point of view the proper interpretation of Article 11.02 F 8 (providing that the award of a **WRA** was **final** and binding), read in the light of Article 11.02 F 6, was that the award must have binding effect for the time specified in the latter article. In the present case that time period would be the four months of the **January** to April term. **During** that period the

award could not be changed. Any other interpretation would mean that the College could repeatedly revise a teacher's SWF, rendering the "final and binding" nature of the award meaningless. Counsel argued that it could not have been the intention of the parties that the College might repeatedly revise an SWF, thereby requiring the teacher involved to take the matter back to a Workload Resolution Arbitrator to request the resolution of precisely the same issue. He argued that it was the present board, appointed under Article 32, that had the jurisdiction necessary to resolve the interpretation of this contract language which was (in the words of Step Two of the grievance procedure under Article 32.03) a ". . . **difference** arising **from** the interpretation, application, administration or alleged contravention . . ." of the collective agreement.

Examining the award in Re Niagara College (supra), counsel suggested that the reasoning of the board in that case was unsatisfactory in that it adopted the view of the Divisional Court in Fanshawe with respect to jurisdiction under Article 11, while overlooking the fact that the Court of Appeal had found that the determination of the board of arbitration in Fanshawe was not patently unreasonable and could stand. He suggested that the awards relied on by the College could be distinguished on the basis that they involved grievances of first instance. The situation was **different**, however, when the award of a Workload Resolution Arbitrator had already been obtained and where the College had abrogated it. Indeed the award in Niagara had expressly

recognized the possibility that the procedures of Article 32 might be invoked to deal with repetitive conduct by a college. **Re George Brown** had made it clear that the existence of broader concerns might bring a matter such as this within the jurisdiction of a board under Article 32.

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The case for Article 11 as the source of the exclusive process for **dealing** with **all** aspects of workload grievances is not difficult to appreciate. The parties have set up a distinct arbitration process which is as much a final and **binding** means of resolving that sort of dispute as is the more general arbitration process found in Article 32. Article 11.02 F 8 makes it clear that the award of a WRA is to have the same finality and binding effect as the award of a board of arbitration under the more general process, and Article 11.02 F 9 reinforces the authority of the decision of a WRA in this regard. Read together with those provisions, Article 11.02 A 6 **(b)** seems very clearly to place workload differences **arising** under Article 11.01 and 11.02 within the exclusive jurisdiction of a WRA. Each of the Article 11 process and the Article 32 process provides for a **final** and binding resolution of **differences**, and the impression that the two processes were intended to be mutually exclusive is very strong.

Generally the awards have recognized this, although some have been prepared to consider the possibility that the mechanism of Article 32 may be available when there is a more general

interest at stake which an individual workload **grievance** under Article 11 may not resolve or when the Article 11 process would not produce an effective remedy. The relevant decisions have been examined with care in **Re Niagara College** (supra). We will indicate quite briefly our understanding of the way in which the decisions mentioned to us have helped to shape the **arbitral** approach.

In **Re Fanshawe College** (supra) a Union grievance under what is now Article 32 **claimed** that the College was in breach of what is now Article 11.01 C by assigning partial contact teaching hours. In a policy grievance the Union sought to have the **SWFs** of the affected teachers adjusted and to have compensation awarded. The decision of a WRA had previously **determined** in an individual case under Article 11 that the assignment of a partial contact hour was improper, but the College had allegedly continued to **make** such assignments. The College objected that the grievance could be brought only as a workload grievance. The board found (at p. 11) that "... the interpretation advanced by the College is an **anomaly** that could never have been intended." The parties had established a standard that every teacher should have a workload in accordance with [Article 1 **1**] and the board was prepared to hear a grievance under [Article **32**] so that there might be the means to obtain a consistent application of the standard across the bargaining unit. The Court of Appeal ultimately determined that the board's interpretation was one which the language of the agreement could reasonably bear and the result was that the board's award was

allowed to stand. The effect of the award and the Court's judgment is suggested by Arbitrator **Mitchnick in Re Niagara College** (supra) (at p 23):

... that case must be seen as expanding the potential access to now Article 32 for the "workload" provisions of even Articles 11.01 and 11.02 - i.e., by way of a proper Union grievance.

An example of the circumstances in which it might be open to the Union to grieve a workload issue under Article 32 is also suggested, giving an example that may have a reflection in the present case, at p. 24 **of Niagara**:

And **if**, for example, the employer **were** to persist in repetitive conduct uninformed by prior WRA determinations **against** it, once again as the **Fanshawe College** case ultimately determines, there **is** an avenue **left** open for the Union to take carriage of the matter directly, and obtain an unqualified determination, under now Article 32.10.

It is interesting to note that Arbitrator **Mitchnick** saw the effect of Fanshawe, in extending the jurisdiction of an Article. 32 to some workload matters, as being limited to issues raised in a **So far** as individual workload issues were concerned, the board in **Niagara** was prepared to adopt the reasoning of the Divisional Court in Fanshawe at (1990) 70 D.L.R. (4th) 494 at p 498:

In my opinion, the parties to the collective agreement intended that work-load disputes should be dealt with separately from other grievances. It is difficult to imagine what more they could have done to make that clear. The work-load process is designed to provide speedy, informal and individual resolution of disputes in the context of the course under consideration at each institution.

On our own reading of the provisions of Article 11.02 relating to the jurisdiction of a

**WRA**, we do not think that the fact that the Court of Appeal reversed the Divisional Court decision (when the issue was the applicable standard of review) detracts **from** the force of that opinion, as it was suggested in argument it should.

Re Conestoga College (supra) provides another example of a board of arbitration being prepared to tackle an aspect of a workload issue in order to fashion a resolution. The board was careful, however, to distinguish an issue arising out of Article 11 .01 or 11.02, which would be within the jurisdiction of a **WRA**, and an issue arising more generally under the collective agreement. The case involved an individual grievance that a teacher had not been given recognition for the **time** spent acting on the College's Health and Safety Committee. As a matter of interpretation of the health and safety provisions of the collective agreement, the board found that the College had not properly reflected the **time** spent by the grievor and that it was obliged to do so. The board accepted that the College had more than one possible way of recognizing the time spent by the grievor. Thus, if the College chose to do so by way of the **grievor's** SWF, any dispute would then be a matter for the processes of Article 11. Only if the College should choose to deal with the matter other than through the SWF would the board be prepared to take jurisdiction, and it remained seized of the matter to that extent.

Re George Brown College (supra) is another example of a situation **in** which a board

appointed under Article 32 was prepared to take jurisdiction when a dispute with workload aspects also gave rise to broader issues under other aspects of the collective agreement. The dispute arose out of the requirement under the fail-safe provisions of the Social Contract Act, 1993, that employees should take periods of unpaid leave. The board found that the requirement to take such leaves was not a matter of workload but rather a requirement not to work. The board recognized, however, that the College's requirement that teachers take leave during the non-contact part of the academic year would eventually **affect** the teachers' SWF. Nonetheless the broad issue of the scheduling of time off in certain portions of the teaching year was a matter for arbitration under Article 32. Once that issue was resolved, the board noted, the application of the result to an individual's situation might give rise to a proceeding under Article 11. **Again**, therefore, the board was **careful** to distinguish the aspects of the matter which might be within the jurisdiction of a WRA.

The **final** award in the series mentioned to us is Niagara itself's willingness to consider that broader issues with their origin in a workload problem might be raised before a s. 32 board by way of a Union grievance, the board in that case was not prepared to take jurisdiction over an individual grievance concerning appropriate credit on a SWF.

Does the present **grievance raise** issues **beyond** a "**difference arising from the**

interpretation, application, administration or alleged contravention of 11.01 or 11.02" (Article 11.02 A 6 (a)). The answer may depend on how the situation is characterized. One way of looking at it would be as a matter of implementation, with respect to which Arbitrator Snow expressly remained seized. However neither party considers that that is the nature of the situation; if either suggested that it was, we would think that it would be within the **WRA's** jurisdiction to decide that question. Another way of looking at the situation would be to see it, as the College does, as a fresh matter giving rise to a new referral to the WMG and eventually to a WRA. A third way of visualizing the situation is, as the Union does, as one in which the College has refused to apply the **WRA's** award and has actually purported to change the award. In this way the Union seeks to bring the dispute into the category of matters broader than purely workload issues which the jurisdiction of a WRA is **sufficient** to resolve.

The positions of the parties in this regard have to do with the interplay between Article 11.02 A 1(b) and Article 11.02 F 6. The College observes that the **first** of these two articles contemplates that a change in circumstances may give rise to the amendment of the assignments in a teacher's SWF and that the teacher then has the right to refer any disputed matter to the **WMG** and then on to a WRA. In the College's view an amendment can be made as **readily** to an SWF which has already been the subject of the referral and arbitration process as to an amendment which arises at first instance. The Union considers that, once the content of a teacher's SWF has

been adjudicated and determined by a WRA, the resulting SWF **cannot** be further amended for the balance of the academic year. The Union says that that is the **effect** of the last sentence of Article

**11.02 F 6:**

The 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**.

When we look at Article 11.02 A 1 **(b)** we do not find any limitation on the number of times a change in circumstances may require amending a teacher's assignments. As a practical matter, we would think that changes in circumstances will be infrequent given the limited duration of a term and the need to provide a consistent program to students. However it also seems a matter of common sense that in a rare situation an **SWF** may have to be changed more than once. If the collective agreement said nothing more about the matter, we would have **difficulty** seeing that an SWF which had been before a WRA would be in any different situation: it too could be changed if a change in circumstances required it. When we then look at Article 11.02 F 6 we are not persuaded that the last sentence has the **effect** the Union argues for. Article 11.02 F 6 emphasizes informality and speed and the most obvious purpose of the final sentence is to act as a reassurance that, if the result of the process may lack in thoroughness what it may gain in promptness, it is to be limited in any case only to one person and in the time it is to be applicable. We do not read that provision as **fixing** a teacher's SWF for **the** balance of the academic year and

insulating it from amendment in the event of a change **in** circumstances. Given the nature of an SWF - a document subject to amendment in the event of a change in circumstances - it seems to us that the “final and **binding**” nature of the award of a **WRA** is obviously somewhat qualified: in a given set of circumstances, once the Content of an SWF has been adjudicated by a WRA, the result is indeed **final** and binding until circumstances arise which may justify an amendment; at that point the teacher has the express right under Article 11.02 A 1 **(b)** to refer any concern about the amendment to the **WMG** and to a WRA who ultimately can determine whether the amendment is **justified**.

As we have said, we would **think** that the need to amend an SWF more than once will arise **infrequently**. We would also think that would be particularly the case when it has been examined to the extent involved in the referral process. It may be that repetitive amendments not **justified** by changes in circumstances and made in the face of determinations by **WRAs** could open the way for a policy grievance under Article 32. For example, if a WRA determined that in particular circumstances an SWF must give credit of one hour for a particular task, and if the College then amended the teacher’s SWF to delete that hour without any justification in a change in circumstances, that would be the sort of “repetitive conduct uninformed by prior WRA determinations against it” mentioned by Arbitrator Mitchnik in Niagara College which might be sufficient to found jurisdiction under Article 32.

The memo given to the grievor in conjunction with the new **SWF** prepared on March **18th**, 1998, did assert a change in circumstances as justification: the requests of students for additional tutorial time with the grievor. We understand the position of the Union and the grievor that no change in circumstances can reopen a teacher's SWF for the balance of the academic year, but as we have indicated we respectfully disagree with that position. It is open to the College to amend the **grievor's** SWF on the basis of a change in circumstances and it is open to the grievor to take the matter to the Article 11 resolution process. We would think that it would be well within the jurisdiction of the WMG, and ultimately a WRA, to inquire into the change of circumstances and whether or not it justifies the amendment made by the College. **If there** is more to this matter than meets the eye - **if**, for example, the College's action turns out to be arbitrary and unjustified • we would expect the resolution process to reveal the true nature of the situation. At that point there might be a basis for the assertion of jurisdiction under Article 32, possibly in the manner suggested in **Re Niagara College**.

At this point, however, we consider that the College's amendment of the **grievor's** SWF on March **18th**, 1998, is a matter within the exclusive jurisdiction of a WRA

For the foregoing reasons the grievance must be dismissed.

Dated at Kingston, Ontario, this <sup>12th</sup> ~~17th~~ day of <sup>January</sup> ~~December~~ 199<sup>9</sup>~~8~~.

  
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I.G. Thome, Chairman

I concur/W

"D. GUPTILL"

David Guptill, Employer Nominee

I concur/~~dissent~~

"MICHAEL LYONS"

Michael Lyons, Union Nominee