

IN THE MATTER OF AN ARBITRATION

BETWEEN:

Participating Hospitals,

Employers,

- and -

Ontario Public Service Employees Union,

Union

BEFORE: Michael Bendel, Chair
Douglas K. Gray, Employer Nominee
J. Cameron Nelson, Union Nominee

Decided without a hearing.

SECOND SUPPLEMENTARY ARBITRAL AWARD

This board issued an award on August 29, 2003. On September 25, 2003, we issued a supplementary award dealing with four items on which the parties had sought clarification.

On November 10, 2003, the union referred to us a further implementation issue on which it had a disagreement with the employer. The issue was the Board's award on the question of Layoff and Recall (Article 11.03 and 11.04), on which we had written the following in our award of August 29:

LAYOFF AND RECALL (ARTICLE 11.03 and 11.04)

The agreement shall be amended by adding the following:

An employee who has the right to displace another employee shall have the right to the same training period as would typically be accorded to a new employee. Such training period may commence prior to the anticipated layoff.

It appears from the parties' submissions that they have a fundamental disagreement about the meaning of this part of our award. For the union, an employee who is subject to lay-off would be entitled to displace another employee, other things being equal, if he or she were able to perform the duties of the position either immediately or after a training period of the type and duration typically given to a new employee. For the employer, on the other hand, the award does not affect the right to displace at all, but merely grants the right to a training period to employees who have qualified to displace another employee.

II.

Before addressing the question of which of these interpretations was intended by the board, we have to consider our jurisdiction to resolve this issue.

In our original award, we said nothing about the retention of jurisdiction. However, section 9 (2) of the Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H. 14, as amended, states that a "board of arbitration shall remain seized of and may deal with all matters in dispute between the parties until a collective agreement is in effect between the parties". In our supplementary award in September 2003, we stated that we would "remain seized with respect to any other implementation issues that arise".

When the union referred the present disagreement to us on November 10, it asked us to "provide the parties with direction and clarification as to its intent in awarding the language".

In its November 13 reply to the union's letter of November 10, the employer stated the following:

While it would be within the Hospitals' rights to argue that the matter has been dealt with in the Board's award, and that the Board is *functus officio*, we wish to allow the majority to address this issue in order to allow reasoned argument to prevail.

We interpret this statement by the employer as meaning that, however this disagreement is properly characterized, and whether or not resolving it would have been within our jurisdiction by virtue of section 9 (2) of the Act or by virtue of the jurisdiction retained in our first supplementary award, the employer

consents to the board providing the parties with binding direction and clarification as to the meaning of the language in question.

III

We have reviewed the union's brief submitted at our original hearing on the subject of layoff and recall.

The union's main concern was to improve the chances of employees subject to layoff to bump into other positions. It proposed, in the first place, that the collective agreement be amended to allow such employees to displace any employee in his or her classification who had less seniority, rather than simply the employee in the classification who had the least seniority. Next, it proposed that such employees be allowed to bump any employee in the bargaining unit, regardless of discipline or department. Finally, it proposed the addition of a clause having to do with training, which would read as follows:

An employee who has the right to displace another employee shall have the right to the same training period as would be accorded a new employee. Such training period may commence prior to the anticipated layoff.

In explaining the rationale for this last proposal, the union stated in its brief that, in large hospitals, Medical Laboratory Technologists ("MLT's"), although having all received the same academic training, invariably work in only one of the five recognized specialty areas, i.e. Blood Bank, Chemistry, Microbiology, Histology and Haematology. If they work in the "Core Lab", they generally rotate between three of the specialties. The union explained that it wanted any MLT who was subject to layoff to be able to

bump into any other MLT position, even though he or she might need a modest amount of training in a particular specialty. The union pointed out that, under the old collective agreement, an employee could only bump if he or she "can perform the duties...without training other than orientation". It drew our attention to two recent arbitral awards where MLT's in this scenario had been denied the right to bump since the arbitrators held that they required some training and not simply orientation before they could perform the duties of the positions in question. The union observed that it made no sense for a hospital to lay off such an employee without offering him or her the same training period that a newly hired employee would be accorded. It stated that an MLT could be functional in a new discipline within a very short period. It was advantageous to the employer, according to the union, to retain the services of the MLT who was subject to layoff, even though some training were needed, rather than bring in a new employee who had no knowledge of the hospital's systems or personnel.

The board accepted the union's proposal on training, subject to one minor drafting change. It gave no explanation for its decision on this point.

IV

We acknowledge that the language of the award (like the language of the union's proposal on this subject) could be interpreted in the manner advocated by the employer, i.e. as applying, not to the qualifications to bump, but merely to the training that would be given to an employee who had already qualified to bump. In fact, to give effect to the union's interpretation would require the deletion of certain language in Article 11, which the board did not order. We can therefore fully understand the source of the disagreement.

However, it is obvious from the context (quite apart from the board members' recollections) that the union's proposal was intended to change the circumstances in which an employee can bump, specifically by allowing the bump even though he or she would need some training before being able to perform all the duties of the position. In accepting the union's proposal, the board must be taken to have endorsed the union's intention.

It is regrettable that the award was not clearer on this matter. Undoubtedly, if the parties had dealt with this matter in bargaining, they would have paid more attention to the detailed drafting necessary to give effect to the change agreed to.

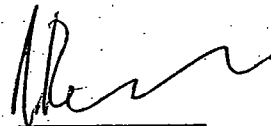
We are satisfied that it is within our jurisdiction to direct the parties to make changes to the language of the collective agreement that are necessary to give effect to our intention.

Our award is therefore as follows:

- (1) We declare that our intention in ordering the amendment of Article 11.03 and 11.04 was to change the circumstances in which an employee can bump, specifically by allowing the bump even though he or she would need some training before being able to perform all the duties of the position;
- (2) We order the parties to make such changes to the language of the collective agreement as are necessary to give effect to our intention; and

- (3) We continue to remain seized with respect to any other implementation issues that arise, including any disagreement about changes to the language of Article 11.03 and 11.04.

DATED at Thornhill, Ontario, this 4th day of December 2003.



Michael Bendel,
Chair

~~I concur~~/I dissent
Dissent attached

"D.K. GRAY" per AB.
Douglas K. Gray,
Employer Nominee

I concur/~~I dissent~~

"J.C. NELSON" per AB.
J. Cameron Nelson,
Union Nominee

DISSENT OF EMPLOYER NOMINEE

I have reviewed the Second Supplementary Award prepared by my colleagues in this matter, and, with regret, I must dissent.

The essence of the current dispute is to resolve what was intended by the Board when it required the addition of some new language dealing with training of employees in bumping situations. In substance, the language ordered by the Board will require that a "displacing" employee be given the same training as might be given by a hospital to a new employee in similar circumstances. The Union contends that the availability of this training must be considered by the hospital in deciding whether a person is entitled to bump. In other words, if the employee would be able to do the job after being given the requisite training, the employee is then to be considered qualified for the job itself. The hospitals, on the other hand, take the position that an employee must be qualified without any training to do the job in order to claim it, and the employee is only to be given training that is typically accorded a new employee once the employee is in the job.

For my part, I disagree with the approach the majority has taken. In my view, the new language now awarded by the majority will cause significant disruption when hospitals try to administer it, and its actual effect will be most uneven as between hospitals, and indeed as among different jobs within the same hospital.

The training that is to be afforded is whatever training may be given to a new employee. In many, if not most, cases that may be no training at all, and will certainly vary from job to job. Even within

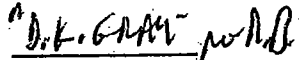
the same job, it is quite likely that different hospitals will provide different levels of training for new employees, and indeed some may provide no training at all.

It is one thing to tolerate different treatment of this sort when what is being ordered is training for a new incumbent once that individual has secured a job. In that respect, the incumbent is in no different position than a new employee off the street, who has secured a job and then is given whatever training may be given by a hospital according to individual circumstances. It is quite another thing, in my view, to require consideration of this sort of training, as inconsistent as it may be, as a factor in whether or not an employee is entitled to secure the job in the first place. The availability of this sort of training will depend on the circumstances in individual hospitals, and will likely be made available on a most uneven basis.

I have little doubt that once the Union discovers, as I predict it will, that the entitlement to claim a job will depend, in some circumstances, on training that may or may not be available and, if it is available, will be made available on a most unpredictable and uneven basis, the Union will be back before the next Interest Arbitration Board arguing that the language must be changed because of its inconsistent application across the spectrum of hospitals.

This difficulty does not arise if, as I contend, the better view of the language is that the availability of training is not a factor in the selection process, but is simply something that is made available to successful employees on the same basis as newly-hired employees. There is nothing inequitable about that, and, in my view, this is what was intended by the original Award.

For these reasons, I would make no change to the original Award, and I would simply direct that the awarded language be added to the various Collective Agreements, as we originally decided.


Douglas K. Gray,
Employer Nominee