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Grievance Settlement Board

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Ontario

GSB#2011-1335
UNION#2011-0999-0033

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Union) **Union**

- and -

The Crown in Right of Ontario
(Ministry of Attorney General) **Employer**

BEFORE	Nimal Dissanayake	**Vice-Chair**
FOR THE UNION	Tim Hannigan Ryder Wright Blair & Holmes, LLP Barristers and Solicitors	
FOR THE EMPLOYER	Omar Shahab Ministry of Government Services Labour Practice Group Counsel	
HEARING	February 21, 2013.	

Decision

[1] The Board is seized with a number of individual grievances and a policy grievance which were consolidated on agreement. The focus of this decision, however, is only on the policy grievance, GSB file number 2011-1335. This policy grievance dated June 29, 2011 states, "The employer is in violation of article 1 of the OPS collective agreement and any other articles and legislation by not applying the terms of the collective agreement to court reporters who prepare and certify transcripts". Remedies sought include a cease and desist order and an order that the employer apply the terms and conditions of the collective agreement. The employer objects to the union's request for those orders.

[2] The issue of whether or not the work of production of transcripts performed by Court Reporters is covered by the collective agreement has a history of litigation before this Board. That history was reviewed in my decision in this matter dated February 1, 2013 and need not be repeated here. It suffices to record that as a result of the previous Board decisions, the following facts are not in dispute considering the agreement by the employer that nothing has changed in the manner the work of producing transcripts is carried out, and that the "Status quo continues":

- The work in question continues to be bargaining unit work.
- The collective agreement continues to apply to that work.
- When court reporters perform that work they do so as employees, and not as independent contractors.
- Finally, by not applying the collective agreement to employees performing that work, and continuing to treat them as independent contractors, the employer continues to be in contravention of the collective agreement. As employer counsel put it, "liability is not in issue". The only dispute is about the remedy that would flow as a result of the contravention.

[3] The Board's ruling that the work in question was bargaining unit work was first made in its July 2006 decision in Re Hunt. In a later decision dated December 4, 2009, at para. 22, the Board made clear what its July 2006 decision means, as follows:

> What this means – as requested in the policy grievance – is that the preparation and certification of transcripts is work of the bargaining unit, specifically the Court Reporters, to which the collective agreement applies. It also means that OPSEU is the exclusive representative of the Court Reporters for that work. The decision had implications retrospectively – the Court Reporters and the Union were entitled to all the benefits of the collective agreement. It also had prospective implications – the Employer could not refuse to recognize OPSEU as the exclusive representative nor could it treat the Court Reporters as falling out side of the collective agreement in regard to transcription work. The decision was based on the evidence and facts established at the hearing.

[4] The employer has made it known to the union as well as the Board that its intention is to exercise its management rights to contract out the work of producing transcripts. It takes the position that when this is done, the collective agreement would no longer apply to that work. The evidence is that notwithstanding the Board's finding that under the status quo (which continues to date) the work is bargaining unit work to which the collective agreement applies, the employer has explicitly stated that it has no intention of applying the collective agreement to that work in the interim period leading up to the implementation of its planned contract out. Thus, in response to a demand dated October 31, 2012 by union counsel that the employer apply the collective agreement in compliance with the Board's decision, on November 12 employer counsel wrote:

> The Employer will not be immediately applying the Collective Agreement to the production of transcripts. Vice-Chair Abramsky's September 17, 2012 decision does not require the employer take this step.
>
> The Employer will object to the Union seeking an order from Vice-Chair Abramsky requiring the Employer to immediately apply the Collective Agreement to transcript production. The Employer takes the position that Vice-Chair Abramsky is without jurisdiction to issue such an order. Furthermore, Vice-Chair Abramsky previously rejected the Union's request for an order of this nature, so the issue has already been decided. The Employer reserves the right to raise additional objections in the event that the Union actually seeks an order in this regard.

[5] The employer's position in essence is that while the union may pursue redress for any losses that may result from its continuing failure to apply the collective agreement, it would be inappropriate for the Board to order it to apply the collective agreement. Counsel submitted that the employer does not intend to continue to be in contravention of

the collective agreement indefinitely. It intends to end the violation and to be in compliance. He submitted that compliance can be achieved in different ways. It is the employer's right to determine how to come into compliance. It has decided to achieve compliance by properly contracting out the work in question which would take the work in question outside the bargaining unit. It was submitted that it was inappropriate for the Board to direct the employer on "how to comply with the collective agreement".

[6] In support of its position that the orders requested by the union ought not be issued, the employer put forward four distinct arguments. The first was to the effect that orders of the same nature were made before Vice-Chair Abramsky in Re Hunt, and were denied by her in the decision dated December 4, 2009. Therefore, the doctrines of res judicata and issue estoppel prevent the union from relitigation the same issue. A number of authorities on the application of those doctrines were relied on.

[7] The employer's second position was also based on res judicata and issue estoppel. It was argued that even if I conclude that the same issue was not litigated in Re Hunt, the union could and should have sought the orders it seeks now, before Vice-Chair Abramsky. Having decided not to include these orders in its remedial request in Re Hunt, the union cannot in hindsight decide to seek additional remedies through the instant grievance. A number of authorities were presented as supporting the proposition that a union is obliged to put is full and best case before an arbitrator, and that a case cannot be litigated in piecemeal fashion.

[8] The third position advanced by the employer was described as a jurisdictional objection to the orders requested. Counsel reminded that the employer has made it known that in the exercise of its management rights it has decided to contract out the work in question, so that the work would no longer be in the bargaining unit, and would be performed by true independent contractors. It was submitted that if the Board orders that the collective agreement be applied to the collective agreement in the face of this decision made by the employer, that would be an unauthorized incursion by the Board into the employer's exclusive management rights.

[9] The employer's final argument is to the effect that based on the agreed facts and the Board decisions in Re Hunt, the union has not demonstrated a prima facie case for any remedy. It was submitted that the remuneration court reporters received, and continue to receive, for performing the work of producing transcripts as independent contractors leaves them "financially better off" than under the collective agreement.

[10] Employer counsel submitted that if the Board rejects all of the foregoing arguments and determines that it has the jurisdiction to make the orders sought by the union, it should nevertheless hear evidence from the employer about the impact such orders would have on the work place and the harm they would cause to the employer, before deciding whether to exercise that jurisdiction.

[11] The union submitted that the union's first two arguments should be rejected outright because the doctrines of res judicata or issue estoppel simply have no application in the present case. Counsel argued that in Re Hunt the parties litigated the issues of whether the work was bargaining unit work, whether the collective agreement applied to that work, and whether court reporters performing that work were employees or independent contractors. The Board ruled in favour of the union on all those issues. Therefore, there is no attempt to relitigate those issues in this grievance. Such relitigation is in fact unnecessary since the employer has conceded on all three issues, and agreed that it continues to be in violation by not applying the collective agreement to court reporters performing work of producing transcripts.

[12] Union counsel submitted that apart from that, the instant policy grievance is about the employer's conduct, i.e. its ongoing refusal to apply the collective agreement, following the issuance of the 2009 Re Hunt declarations. Those declarations related to violations that occurred from 2002. The instant grievance covers a different period than that litigated in Re Hunt. In the circumstances, there is no relitigation as would attract the doctrines of res judicata and issue estoppel.

[13] Responding to the employer's argument that the union could and should have sought these orders in the Re Hunt proceeding, counsel argued that it would be unreasonable to expect the union to seek compliance orders in anticipation that the employer may refuse to comply with Board decisions. He submitted that the union was entitled, when it filed the Re Hunt grievances, to expect that if the Board finds the work to be bargaining unit work to which the collective agreement applies, the employer would end the violation by applying the collective agreement. When it became clear, despite repeated requests by the union, that the employer had no intention of doing so, the union had no option but to seek orders that would compel compliance.

[14] With regard to the employer's assertion of exclusive management rights to determine on how to have the work of producing transcripts performed, counsel argued that the orders it seeks do not in any way restrict the employer's management rights. The union was not seeking orders that would require the work in question be retained in the bargaining unit in the future. Nor is it requesting for any order that would prohibit the employer from contracting out that work in the future. The union simply wants to ensure that the collective agreement is complied with as long as the status quo continues, and the work in question remains within the bargaining unit. If and when a contract out is implemented, the union would have to assess the situation, and file a separate grievance if it is of the view that the contract out is not in compliance with the collective agreement.

[15] Union counsel cited s. 48(7)(3) of the Crown Employees Collective Bargaining Act, which provides:

> Every collective agreement relating to Crown employees shall be deemed to provide for the final and binding settlement by arbitration by the Grievance Settlement Board, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

[16] Relying on authorities on the scope of an arbitrator's remedial jurisdiction where the mandate is to make a "final and binding settlement", counsel argued that in the present case where the employer continues to refuse to apply the collective agreement while

conceding that such refusal results in a continuing violation of the collective agreement, the only way the violation could be brought to an end is through a direct Board order to cease and desist the violation and to comply with the collective agreement. Counsel argued that such orders come well within the Board's jurisdiction to provide a final and binding settlement under s. 48(7)(3).

[17] Counsel argued that, contrary to the employer's position, the union has established more than a prima facie case that the employer continues to be in violation by failing to apply the collective agreement to the work in question. The employer has explicitly conceded that. It was argued that where there is a violation, there has to be a remedy. The remedy has to be one that provides finality and puts an end to the violation. Counsel pointed out that a collective agreement is not only about money. It provides employees with numerous non-monetary rights such as the right to be represented by the union, the right to grieve, job security, and seniority rights. The sole purpose of the orders sought by the union is to ensure that court reporters have access to all of the rights and protections under the collective agreement, which the Board has held apply to them.

[18] Union counsel submitted that if the Board concludes that it has the jurisdiction to make the orders requested, given the agreement that the employer continues to be in violation, evidence on the impact of the orders on the employer would be irrelevant. All of the material facts are agreed to and any further delay in providing a final and binding decision would be extremely prejudicial to the union.

[19] In reply, employer counsel agreed that whether res judicata and issue estoppel apply would depend on whether the Board in Re Hunt, in its December 4, 2009 decision, considered and rejected a request by the union for orders of the same nature as sought here. Counsel relied on para. 18 of that decision as indicating that the union made the same request there. That reads;

> In argument, counsel for the union reiterated that the GSB has the remedial authority to direct the Employer that transcript work is work of the bargaining unit, to be performed by bargaining unit employees, with full application of the collective agreement. It asserts that the Board may direct the Employer as to how it must comply with the collective

> agreement. Otherwise, it suggests, that the Employer's proposal will mean that the parties will be back to litigating the "same issue", making the "same arguments", leading to frustration, expense and significant labour relations mischief as the parties would be back before the Board, time and time again.

[20] Counsel submitted that the Board in that decision rejected the union's request for an order directing the employer must comply with the collective agreement. That is the same order the union is attempting to obtain here. He submitted that in Re Hunt, Vice-Chair Abramsky decided the liability as well as the remedy. The union is not now entitled to seek remedies it failed to obtain before her.

[21] After careful review of the decision, I conclude that the Board in Re Hunt did not consider, let alone deny, the orders sought here. In its decision dated December 4, 2009, the Board's discussion about its authority to provide "prospective remedies" occurred in the face of an assertion by the union that "the Board may direct the employer as to how it must comply with the collective agreement" (para. 18). The employer took the position that, "the Board, by retaining jurisdiction over the "implications' of the Hunt decision, does not have jurisdiction to determine if its proposed response to the Hunt decision comports with the collective agreement" (para.19). In effect, the Board was called upon to rule upon the propriety of the employer's proposed contract out and to order that the employer not proceed with the proposed contract out. The Board recognized that any remedial order which in effect prohibits the proposed contract out of the work of producing transcripts would prospectively limit the employer's management rights. The Board held that the Hunt decision did not and could not alter the parties' rights under the collective agreement, including the employer's management rights under article 2. All of the provisions of the collective agreement including article 2 continued to apply to the transcript production work. At p. 15 it noted that "… the Employer does not contest the union's right to challenge whatever actions it takes in regard to transcript services under the collective agreement, through a new grievance, or under statute. It simply contests the GSB's jurisdiction to do so as part of the remedy in the Hunt decision".

[22] At para. 37, Vice-Chair Abramsky concluded:

> In the case before me, however, it is my conclusion that I do not have the jurisdiction to determine whether the Employer's new proposed regulatory model is consistent with the collective agreement, or the Board's decision in Hunt, as part of the remedial aspects of this case. The Employer's plan raises new issues, new facts and new legal arguments and must be contested through a new grievance.

[23] At para. 53, the Board wrote:

> Further, as the case law demonstrates, the remedial power of the Board must be linked to the subject matter of the complaint and cannot address new issues. As well do broad remedial powers do not confer jurisdiction. It is my view that the Employer's proposal in regard to transcript production raises new issues. It was developed well after the decision. Any challenge to it would be based on new facts and require a full hearing and determination. The question of whether that new proposal comports with the collective agreement or violates the Hunt decision does not "flow from" the Hunt grievances. The Board's declaration in Hunt does not give the Board continuing jurisdiction to ensure compliance with the collective agreement in relation to transcript production. It does not negate management's rights under the collective agreement on a go-forward basis.

[24] It is apparent that in Re Hunt, the Board did not consider and reject a request for compliance order in relation to past or current employer conduct. Rather, it was dealing with a request by the union to rule upon the propriety of proposed future action by the employer. Therefore, res judicata or issue estoppel have no application. The Board, in Re Hunt, in fact, contrasted the request before it with the request before the Board in Re Polax Tailoring Ltd., (1972) 24 L.A.C. 201 (Arthurs), where the Board did issue a prospective remedy. At para. 54-55, Vice-Chair Abramsky wrote:

> [54] The situation in *Re Polax Tailoring Ltd*, *supra,* was different. In that case, the Union had sought to enforce the payment of arrears of monies owed under the collective agreement to the Union's benefit fund and retirement fund. It was the second grievance brought by the Union on this issue, and the Company had announced its intention to no longer be bound by the collective agreement. The union requested that the arbitrator make an order prospectively requiring payment of any future arrears so it could move for court enforcement in the event of future breaches, without the necessity of further arbitration hearings. In these circumstances, the arbitrator ruled at par. 17 that he had "the power to make an order, quia timet, restraining future violations of the agreement.' The Latin words "quia timet" mean because of fear or apprehension that rights may be violated.

> [55] In that case, the relief clearly flowed directly from the grievance and the factual situation. There was a continuing obligation to make payments under the collective agreement; there was no question that the monies were owed, or the amount. The Employer simply refused to recognize its obligations under the collective agreement. The prospective remedy was required in the circumstances. The order restraining future violations was, using the words of Vice Chair Dissanayake in *Howe/Dalton/Loach, supra* at par. 29, "absolutely necessary to finally and effectively remedy a grievance."

[25] In contrast to the Re Hunt case, in the present case the union is not requesting the Board to rule upon the propriety of the employer's future plan to contract out the work of producing transcripts. Its request is similar to the request that was granted by arbitrator Arthurs in Re Polax Tailoring Ltd, supra. Like there, the grievance here is about the employer's failure to comply with the collective agreement. As in that case, here there is no dispute that there is a continuing obligation on the employer to apply the collective agreement and that the employer has decided that it would not do so. It continues to be in violation. Therefore, the prospective remedy in the form of cease and desist and compliance orders, flows directly from the grievance.

[26] The Board sees no merit in the employer's argument that the union is not entitled to seek the orders in this grievance because it failed to seek them as part of the remedy in Re Hunt. When the Board makes a declaration that certain conduct is in contravention of the collective agreement, the Board as well as the grieving party is entitled to reasonably expect that the offending party would cease that conduct and comply with the collective agreement. The union is not obligated to seek explicit orders to comply, in anticipation that the employer may not comply. In the present case, the Board's expectation was in fact expressed by the Board in its December 4, 2009 decision, where Vice-Chair Abramsky clarified what the declaration meant. She stated that the declaration means not only that the work is bargaining unit work to which the collective agreement applies, and that it "also had prospective implications, - the employer could not refuse to recognize OPSEU as the exclusive representative, nor could it treat the Court Reporters as falling outside of the collective agreement in regard to transcription work." (para.18). Thus what the employer continues to do to date, i.e. treat court reporters as falling outside the

collective agreement in regard to transcription work, is precisely what the Board has explicitly stated it could not do. In the face of the employer's continuing defiance, the union is entitled to seek orders that would compel compliance through direct orders.

[27] The Board determines that it has the jurisdiction to issue the orders sought. The mandate of the Board under the Act and the collective agreement is to provide a final and binding settlement to the "difference between the parties". The difference the Board is called upon to settle is the employer's alleged failure to apply the collective agreement to the work in question. Once it is determined that such failure constitutes a violation, the mandate of the Board is to provide a final remedy that would end the violation. Cease and desist and compliance orders would meet that mandate.

[28] In OPSEU and Ministry of Community and Social Services (Berry), [1986] O.J. No. 52, at pp. 6-7 (Ont. Div. Ct) the court commented as follows on the predecessor provision of the Crown Employees Collective Bargaining Act, which provided that where a difference between the parties is referred to it, the Board shall "decide the matter" and that such decision is "final and binding":

> The object of arbitration boards, both in the public and private sector, is the resolution of differences. That is the mandate of this Board. It has been stated in unequivocal terms by this court. In R. V. O.P.S.E.U. (1982), 38 O.R. 670, Linden J. said for the Divisional Court, (at p. 675)
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> > …We are of the view that the Board was correct in its interpretation of s. 18(1) in the circumstances of this case. The plain and natural meaning of the words has been adopted by the Board. In order to "decide the matter' at issue between the parties, the Board had the power, pursuant to the wording of s. 18(1), to grant the job to an unsuccessful applicant in appropriate circumstances. That is the clear mandate of the Board pursuant to s. 18(1) and the labour relations jurisprudence of this province. Our courts have interpreted other labour relations legislation in a consistent way in the past in order to arm arbitration boards with sufficient weaponry to perform their responsibilities effectively. Courts have been unwilling to limit the remedial powers of arbitration boards so as to enfeeble them. On the contrary, our courts have sought to ensure that arbitration Boards can effectively bring about the final and binding settlement of all differences between the parties. As

> Mr. Justice Lacourciere states in Re Samuel Cooper & Co. Ltd. and Int'l Garment Workers [1973] 2 O.R. 841 at 846, 35 D.L.R. (3d) 501:
>
> > … the special tribunals created by unions and employers, and directed by statute bring about final and binding settlement of all differences, ought to have the necessary powers to achieve such results. (emphasis added)

The Board's obligation under s. 19(1) is to "decide the matter'. When looked at without the confinement imposed by Article 5.1.2. "the matter" grieved was wrong classification. If the Board concluded that the classification was wrong, its mandate was to effect a proper classification. Its jurisdiction is unrestricted. Its mandate is remedial. In making the decision it made the Board refused to decide the matter, it simply finessed it. In doing so it erred in law. Its error was so serious that, in my opinion, it falls into the category of cases requiring the intervention of this court, in accordance with O.P.S.E.U. v. Forer, supra.

[29] In Re Samuel Cooper, referred to above, the Divisional Court at para. 11, cited with approval the following:

> **11.** The majority award in the Amalgamated Electric Corp. case was given in May, 1950, by Bora Laskin and C.L. Dubin (now Laskin, J. and Dubin, J.A.) as members of a board of arbitration, whose authority to award compensation was challenged because of the difficulty in the enforcement. The following comments made in the majority award at p. 602 are equally applicable here:
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> > As a matter of principle, and in the light of the terms of the Agreement, this Board is of opinion that its power to make a binding decision involves powers to direct such affirmative action as would remedy the breach declared to exist. A declaration or finding divorced from a direction for its implementation does not, in this Board's view, meet the requirements of a binding decision. A decision is binding when it requires the doing or not doing of something by the defaulting party, related to the default of which it is guilty and intended as a remedy for such default. In so far as a declaration carries no obligation of compliance in relation to the specific case, it cannot be a binding decision.

[30] In Alberta Union of Provincial Employees v. Lethbridge Community College, [2004] S.C.J. No. 24, the Supreme Court of Canada was dealing with the jurisdiction of an arbitrator to make an award of damages in lieu of reinstatement following a finding that

there was no just cause for termination. At. p. 54, the court made the following observation:

> **54** For arbitration to be effective, efficient and binding it must provide lasting, practicable solutions to workplace problems. Commensurate with the notion of exceptional circumstances as developed in arbitral jurisprudence is the need for arbitrators to be liberally empowered to fashion appropriate remedies, taking into consideration the whole of the circumstances. To rob arbitrators of access to the full breath of the employment context risks impairing their role as final arbiters of workplace disputes. Arbitrators are well positioned on the front lines of workplace disputes to weigh facts and assess credibility as the circumstances warrant.

[31] The Board concludes that this is a case where it clearly has the jurisdiction to make cease and desist and compliance orders. Indeed, if the Board finds otherwise, it would be a failure to exercise its jurisdiction.

[32] It is unnecessary for me to review the jurisprudence on the jurisdiction of an arbitrator to provide remedies that have the effect of impacting upon or restricting the employer's exclusive management rights. The orders sought here have absolutely no impact on management rights. The union is not requesting, and the Board would not be providing, orders to the employer on “how to” carry out the function of producing transcripts. The union only seeks orders that the employer cease the on-going violation and that it apply the collective agreement to what is admittedly bargaining unit work performed by bargaining unit employees. As union counsel correctly pointed out, the employer’s exclusive management rights under article 2 do not include a right to violate the collective agreement or to not apply the collective agreement to bargaining unit work performed by bargaining unit employees.

[33] The employer’s argument that the union has not made out a prima facie for any remedy is premised on its view that court reporters are financially better off when treated as independent contractors, rather than as employees in the bargaining unit. Assuming that view to be correct, that is not a reason for the Board to refuse the orders sought. If that reasoning is accepted, an employer would be entitled, for example, to individually negotiate with bargaining unit employees for financial terms more favourable than their

entitlement under the collective agreement, and refuse to recognize the collective agreement or the bargaining agent. Because the employees are "financially better off" under that arrangement, there would be nothing the union could do to compel the employer to abide by the collective agreement or to recognize its status exclusive bargaining representative of those employees. The collective agreement, as union counsel pointed out, is not only about money. In any event, the enforceability of a union's representation rights and the terms of a duly executed collective agreement is not contingent upon whether the subject employees are better off, financially or otherwise, under the collective agreement or outside it.

[34] The Board declines the employer's request that it receive evidence from the employer about the adverse consequences that would flow, before deciding whether to exercise the jurisdiction to issue the requested orders. This is a sort of "undue hardship" argument to the effect that if the employer is compelled to comply with the collective agreement, it would cause the employer significant operational problems and harm. Assuming such consequences would result if the orders in question are issued, that in the Board's view is not a legitimate or appropriate reason for it to refuse the orders and allow further continuation of the employer's admitted violation.

[35] Article 22.13.6 provides that "the GSB shall have no jurisdiction to alter, change, amend or enlarge any provision of the collective agreement". If the parties intended that the obligation to comply with the collective agreement applies only as long as such compliance does not result in undue harm or hardship, it was open for them to negotiate such a qualification. They have not done so. For the Board to refuse to uphold and enforce the agreed upon terms of the collective agreement on the basis that it would cause harm or hardship to one of the parties, would be to add to the collective agreement a qualification that does not exist. That would be in contravention of the proscription in article 22.13. 6.

[36] It follows from the foregoing that none of the submissions advanced by the employer causes the Board to refuse the remedial orders sought by the union. Therefore, the Board orders as follows:

(1) The employer shall forthwith cease its violation of the collective agreement by failing to apply the collective agreement to Court Reporters, who the Board has declared to be employees performing bargaining unit work when producing transcripts.

(2) The employer shall forthwith apply the collective agreement to court reporters performing bargaining unit work of production of transcripts, and shall not treat them as independent contractors.

[37] The Board remains seized with jurisdiction with regard to any disagreement between the parties as to the implementation of the orders made herein, and with respect to all of the other grievances before it.

Dated at Toronto this 1st day of March 2013.

Nimal Dissanayake, Vice-Chair