Crown Employees
Grievance Settlement Board

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GSB#2001-0534, 2003-2944, 2008-3397
UNION#2001-0551-0001, 2003-0999-0023, 2008-0526-0018

IN THE MATTER OF AN ARBITRATION
Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Hunt et al) — Union

- and -

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

BEFORE	Randi H. Abramsky	**Vice-Chair**
FOR THE UNION	Tim Hannigan Ryder Wright Blair & Holmes, LLP Barristers and Solicitors	
FOR THE EMPLOYER	Len Hatzis and Sean Kearney Ministry of Government Services Counsel	
HEARING	November 10, 2009.	
SUBMISSIONS	November 24, 2009.	

DECISION

[1] The Employer has raised a preliminary objection with respect to the jurisdiction of the Board to issue prospective remedies in this matter. In the alternative, the Employer asserts that the Board should authorize it to commence implementing its proposals regarding transcription services. The Union opposes both motions, asserting that the Board must issue a full and final remedy in this case, which includes prospective relief. In addition, the Union submits that these issues were decided in the Board's decision dated July 17, 2009 and therefore cannot be raised again.

Background

[2] On July 27, 2006, I issued a Decision in this matter (hereinafter referred to as "the Hunt decision"), in which I determined that "the preparation and certification of transcripts is bargaining unit work of the Court Reporters, and I so declare." The decision further states: "All issues regarding the implications of this finding are referred back to the parties, and I will remain seized."

[3] The parties tried, without success, to resolve the outstanding issues that arose as a result of this decision for a substantial period of time. On June 1, 2009, the remedial issues were scheduled for hearing. A teleconference was held on May 29, 2009, at which time I ruled that the June 1, 2009 date would be used to address "a number of process issues (e.g., particulars, order of proceeding)" and "explore potential avenues/steps to resolve this dispute." On June 1, 2009, I issued a decision that set three future hearing dates, and ordered the parties to exchange

particulars and any arguably relevant documents on all outstanding remedial and implementation issues.

[4] On July 7, 2009, the Employer provided disclosure to OPSEU that the Employer had made a decision in regard to the implementation of the Hunt decision, and advised that "Court Services Division has now begun transition and implementation planning including consultation with our justice partners and court users. Employees will be notified of the changes being made to court reporting and transcript production for Ontario on July 21, 2009. The Ministry anticipates rollout to commence in fall 2009 and we expect implementation to be completed within eighteen months."

[5] Upon receipt of this information, the Union brought a motion before the GSB to stay the Employer from proceeding unilaterally with implementing its response to the Hunt decision, pending the Board's hearing to address the outstanding remedial and implementation issues. A hearing on that issue was held on the evening of July 14, 2009, and I issued a decision on July 17, 2009 that held that "the Employer may not unilaterally initiate a process to address the outstanding implementation issues regarding transcript production as outlined in its July 7, 2009 letter to OPSEU." The Employer was ordered to "cease and desist." There is no question that the Employer has complied with that decision.

[6] In the Employer's particulars to the Union dated September 21, 2009, the Employer alerted the Union that it would be raising a preliminary issue as to "whether the Grievance Settlement Board (GSB) has the jurisdiction in the context of this case to consider or determine

prospective remedies. In particular, in light of the grievances and the nature of the dispute the Employer shall seek an Order by way of a preliminary motion that the GSB does not have the jurisdiction to consider the issue of prospective remedies such as how the transcript function is to be delivered in the province of Ontario."

[7] In the alternative, in the event that the Board did not accept that position, the Employer indicated that it would argue that it should be permitted to begin the process of implementation of the changes it proposed.

[8] In the Union's response to the Employer's particulars, the Union asserted in regard to the jurisdictional issue that "it will vehemently oppose the Employer's motion. The GSB has determined that there has been a breach of the Collective Agreement. The GSB has the jurisdiction to remedy the wrong committed by the Employer which, in the Union's submission, includes the jurisdiction to order a prospective remedy in the context of this case."

[9] In terms of the Employer's alternative argument, it asserted that the GSB had "already made a determination with respect to the Employer's desire to unilaterally impose a remedy with respect to this matter in a decision dates July 17th 2009" and that the Employer "was, in essence, seeking reconsideration of the GSB's decision, which is absolutely inappropriate."

[10] Full argument was heard on the Employer's preliminary objection in regard to jurisdiction on November 10, 2009.

1. Did the July 17, 2009 Decision Already Decide this Issue?

[11] The Union asserts that the Board, in the July 17, 2009 decision, made a determination that the Employer may not implement its plan and that the Employer should not be allowed, at this juncture, to reargue that issue. It contends that the GSB has no power to reconsider its determinations, citing *Re Canadian Broadcasting Corporation and Joyce et al.* (1997) 34 O.R.(3d) 493 (Ont. Div. Ct.); *Re OPSEU (Ross Grievance) and Ontario (Ministry of Municipal Affairs and Housing)* [2009] O.G.S.B.A. No. 54 (Gray); *Re OPSEU (Transition Grievance) and Ontario (Ministry of Community Safety and Correctional Services)*[2005] O.G.S.B.A. No. 56 (Briggs). It contends that the principle of issue estoppel applies, and that the Board's earlier decision must be respected and adhered to. *Re Ontario Liquor Board Employees' Union and Ontario (Liquor Control Board of Ontario)* [2002] O.G.S.B.A. No. 10 (Mikus); *Re City of Toronto and CUPE, Local 79* [2003] S.C.J. No. 64 (S.C.C.). The Union submits that there is nothing different about the situation now than there was in July, and that the Employer is raising the same question – whether the Employer may implement its response to the Hunt decision unilaterally.

[12] The Employer asserts that the issue is not the same. The Employer submits that the scope of the Board's jurisdiction has never been determined and that there is, therefore, no issue estoppel to apply. The Employer, it submits, has fully adhered to the Board's determination not to implement its plan until the matter could be addressed by the Board. It submits that this motion is the first step in addressing the matter before the Board.

[13] I conclude that the July 17, 2009 decision did not address the issue of the scope of the Board's jurisdiction in regard to prospective remedies in this case. Although the Employer argued that the Hunt decision did not impact its Article 2 management rights to manage the business or constrain the Employer's right to act unilaterally, the issue was not framed as a jurisdictional argument. The scope of the Board's remedial authority/jurisdiction in this matter has not been raised before. As stated in paragraph 13 of the decision: "The question presented today is whether [the Employer] can implement its plan to deal with the Hunt decision unilaterally at this time. In my view, the Employer's implementation of its plan at this point in time circumvents the hearing process underway and undermines the integrity of the Board's processes."

[14] The decision also did state that "[t]o accept the Employer's argument would allow the Employer to determine the appropriate remedy, and require the Union to challenge that decision." The Board determined that "that would be inconsistent with the parameters of the dispute resolution process that is in play in this instance. Once a decision has been made and the arbitrator is seized with implementation of a decision, as is the case here, the parties try to come to an agreement with respect to the remedy. If they cannot do so, they return to the Board, they present their respective positions, and the Board makes a determination." While this paragraph, especially the first part of it, may appear to determine that the Board's remedial power encompasses how the Employer is to implement the Hunt decision, the remainder of the paragraph, as well as paragraph 13, makes it clear that it is the Employer's unilateral action that is in dispute in the July 17, 2009 decision. They must "return to the Board… present their respective positions, and the Board makes a determination."

[15] Accordingly, the Employer's jurisdictional motion is not an attempt to re-litigate the issue that arose in July 2009. There is no issue estoppel, because the issue is not the same. In regard to the Employer's alternative argument, I do find that the Board has already decided the issue of unilateral implementation, but a determination on that issue is not required because of my determination on the jurisdictional question.

Does the Board have jurisdiction to order prospective remedies in this case?

[16] The parties' vigorously dispute whether the Board, by retaining jurisdiction in the Hunt decision over the "implications of this finding", has jurisdiction to determine prospective remedies. The Employer, as set out in its particulars and the July 7, 2009 memo, has proposed what it terms a "regulatory model" for the delivery of transcripts, which it described as follows:

> Ministry court reporters will continue to take the in-court record using a standardized audio recording method and will continue to act as independent contractors when preparing transcripts. The transcript ordering party will choose a transcriptionist from a list of professional, qualified transcribers, which could include but would not be limited to, the reporter in the courtroom. The Ministry will set standards for in-court certification and training, while building on the strengths of the current system and our dedicated staff. The Ministry will act as a regulator and support an independent, professional industry for transcript production.

[17] The Union opposes this proposal on a number of grounds, and asserts that it is in direct contravention of the Hunt decision, and its conclusion that the production of transcripts is work of the Court Reporters as "employees", not "independent contractors." As set out in its particulars, the Union states that it is "absolutely essential that the GSB order a prospective remedy in this matter, particularly in light of the bad faith demonstrated by the Employer in

seeking to unilaterally implement a remedy in direct contravention of the GSB's order, the Collective Agreement, and related statutes." It continues:

> The Union respectfully submits that the remedy in this matter must recognize that Court Reporters performing work including the preparation of transcripts are employees performing bargaining unit work and are represented by the Union as their exclusive bargaining agent.
>
> The Union believes that in order to remedy the violation in these circumstances, the GSB should order the Employer to post and fill full-time Court Reporter Positions which include the duties relating to taking the record and producing transcripts, in accordance with the Collective Agreement.

[18] 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.

[19] The Employer asserts 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. The Board's remedial powers, it submits, are limited by the grievance, which did not involve prospective actions by the Employer. Any inclusion of prospective remedies, which were not sought in the grievance or during the hearing, would, in the Employer's view, constitute an improper expansion of the grievance.

[20] In making a determination on this issue, it is important to review what was decided in Hunt. There were two grievances involved in this matter. The first, a group grievance filed by three classified Court Reporters, alleged that they had "been forced to perform authorized duties on overtime hours with no overtime pay, contrary to Article OAD 8.31 [and 8.4] of the collective agreement." The settlement desired was "Full redress to include overtime pay owing for the last ten years calculated on government T4's for this period, based on the Ministry's standard of seven pages per hour."

The second was a policy grievance, which states:

> The work associated with the preparation and production of type transcripts and certifying them as accurate is bargaining unit work to which the collective agreement applies.
>
> The settlement desired was:
>
> 1. A declaration that the work associated with the preparation and production of typed transcripts and certifying them as accurate is bargaining unit work to which the collective agreement applies.
>
> 2. That the Union and all affected persons be made whole including interest.
>
> 3. Any other remedy that the Board deems appropriate.

[21] After many days of hearing regarding how transcription services were performed in the province of Ontario and the control (or lack of control) that the Employer exercised, the Board accepted the Union's position that transcription work was the work of the Court Reporters as employees, not as independent contractors, as the Employer had asserted.

> The determination was as follows:
>
> I determine that the preparation and certification of transcripts is bargaining unit work of the Court Reporters, and so declare.

[22] 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 outside of the collective agreement in regard to transcription work. The decision was based on the evidence and facts established at the hearing.

[23] The decision, however, did not alter the parties' rights under the collective agreement, nor could it do so. Article 22.13.6 provides that "[t]he GSB shall have no jurisdiction to alter, change, amend or enlarge any provision of the Collective Agreement." The Employer retained whatever rights it has under the collective agreement, as did the Union.

[24] That includes Article 2 of the collective agreement. Article 2 of the Collective Agreement states:

Management Rights

> 2.1 For the purpose of this Central Collective Agreement and any other Collective Agreement to which the parties are subject, the right and authority to manage the business and direct the workforce, including the right to hire and lay-off, appoint, assign and direct employees; evaluate and classify positions, discipline, dismiss or suspend employees for just cause; determine organization, staffing levels, work methods, the location of the workplace, the kinds and locations of equipment, the merit system, training and development and appraisal; and make reasonable rules and regulations; shall be vested exclusively in the Employer. It is agreed that

> these rights are subject only to the provisions of this Central Collective Agreement and any other Collective Agreement to which the parties are subject.

[25] The Hunt decision did not declare that only part of the collective agreement applied to transcription services.

[26] It is against this background that the case law must be considered. The case law supplied by the parties, particularly by the Union, clearly establishes that the GSB has broad remedial authority. This was established in *OPSEU (Berry et al.) and Ontario (Ministry of Community and Social Services* [1986] O.J. No. 152. In that case, the issue was "whether the Board had power to require the employer to find or create a classification for the grievors." The majority of the Board had held that even though the grievors were not properly classified they did not fit the classification they sought, and therefore the grievance had to be dismissed. A dissent by Professor Paul Craven determined that the GSB should have ordered the Employer "to classify the grievor properly." The Court decided that the Board did have that power, stating at p. 6-7:

> Simply to dismiss the grievances when it acknowledges that the grievors are wrongly classified is to empty the grievance procedure of any meaning. It is commonplace of the law that the existence of a right implies the existence of a remedy.
> …
>
> The board's obligation under s. 19(1) [of the Crown Employees Collective Bargaining Act] 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. …

[27] This broad remedial power was further endorsed in *OPSEU (Anderson et al.) and Ontario (Ministry of Natural Resources)*(1990), 75 O.R. (2d) 212 (Ont. Div. Ct.). In that case,

the Divisional Court of Ontario concluded that "[t]he power to implement a proper classification must necessarily include the power to review the contents of the classification for sufficiency and instruct management to alter or amend the class standard to reflect properly the duties, responsibilities, etc., of the grievors." The Court continued, at p. 8:

> The power to require management to create a proper classification necessarily includes the power to require management to get it right. To hold otherwise would restrict the unrestricted remedial jurisdiction, referred to in Berry, to effect a proper classification. To hold otherwise would defeat the legislative object of efficient and final settlement of grievances. It would promote the very mischief described by the board: multiplicity of proceedings, exhausting and protracted delay, frustration, needless inefficiency.

[28] The extensive remedial power of arbitrators has also been recognized by the Supreme Court of Canada in *Alberta Union Of Provincial Employees v. Lethbridge Community College* [2004] S.C.J. No. 24 (S.C.C.), where the Court upheld the power of a board of arbitration to award damages in lieu of reinstatement in an appropriate case. The Court stated at par. 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 breadth of the employment context risks impairing their role as final arbiters of workplace disputes. …

[29] I also find the GSB's decision in *OPSEU (Howe/Dalton/Loach) and Ontario (Ministry of Correctional Services* (1994), 42 L.A.C. (4th) 342 (Dissanayake) to be particularly instructive. In that case, a dispute arose as to the scope of the board's remedial jurisdiction in the event that the sexual harassment grievances of the three grievors were upheld. Specifically, the issue was whether the board could order the employer to take specific action against the alleged harassers, namely, that they be transferred or discharged. The issue was framed as follows: "Does the

Grievance Settlement Board have jurisdiction to direct the employer to take any specific disciplinary action against a member of management, as a remedy in a sexual harassment/discrimination grievance?"

[30] "The starting point for a review of this board's remedial jurisdiction", the Board stated, "was Section 19(1) of the *Crown Employees Collective Bargaining Act* and its mandate that the Board 'shall decide the matter.'" The Board quoted at length from the *Berry* and *Anderson* cases as well as an earlier GSB decision in *Re Courtney*, GSB No. 912/88 (Wilson), in which the Board stated at pp. 82-83 that "[t]he real question therefore is not what powers this board has, but what specific orders out [sic] to be made on the facts in a case if a violation has been found." In that case, although the board found that it had the remedial power to order the removal of the harasser by a transfer or discharge, the facts presented did not warrant such an order. The Board there held at p. 85 that "[s]uch an order would only be justified if there was no hope of remedying the situation without such an order."

[31] Following the decisions in *Berry* and *Anderson*, the Board concluded that just as some incursion into management's exclusive rights relating to the classification of positions was required in *Anderson*, a similar incursion would occur if the Board ordered the removal of the harasser by a transfer or discharge. But such an incursion, as in *Anderson*, would be incidental to the employee's right to grieve and the board's power to effect final settlement of the grievance.

[32] Following *Re Courtney*, the Board determined that its jurisdiction to order that a harasser be transferred or discharged depended on "whether a particular remedial order is absolutely necessary to finally and effectively remedy a grievance…" (Par. 29) The Board continued:

> If the grievor can be redressed without such an order, the granting of such an order will not be "necessarily incidental" to the employee's right to grieve and the board's statutory duty to finally decide grievances, as contemplated by the courts. It would rather be an incursion by the board into the prohibited zone of management rights. Similarly, if such an order is not absolutely necessary to remedy the grievance, it takes the flavour of punitive action as opposed to remedial action. In other words, it is the necessity of a particular order to remedy a grievance, which makes it a remedial order within the board's powers rather than an unauthorized exercise of management functions or punitive action.

[33] These cases establish that even though a remedial order may impact on managerial rights, the Board has the authority to make such an order when it is necessary to do so to remedy the grievance. Accordingly, based on the jurisprudence, it is not sufficient for the Employer to assert that the decisions regarding the production of transcript work fall within the realm of a management right, which cannot be usurped by the Board. If it is necessary to do so, in order to fulfill its mandate to provide a full and final resolution of a grievance, the Board has the authority to issue remedial orders that impact on managerial rights.

[34] As stated in *Howe/Dalton/Loach, supra* at par. 29, "whether a particular remedial order is absolutely necessary to finally and effectively remedy a grievance is directly linked to the question of whether the board has jurisdiction to grant that order." Thus, whether the Board has jurisdiction over how the Employer responds to the *Hunt* decision, on a prospective basis, depends on whether that issue "is absolutely necessary to finally and effectively remedy the grievance."

[35] That question, in turn, entails an examination of what was grieved. If the remedy flows from the original grievances, and is "absolutely necessary" to effectuate a full resolution, then the Board has jurisdiction even though the matter involves a managerial right. If the issue does not flow from the original grievances, and is a new issue, the Board does not have remedial jurisdiction flowing from the Hunt decision. It should be 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, though 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.

[36] Another factor to consider is the admonition of Ontario Court of Appeals in *Re Entrop v. Imperial Oil Ltd*. (2000) 50 O.R. (3d) 18 (Ont. C.A.), at par. 57, that jurisdiction does not flow backwards from a board's broad remedial powers but must be based on what issues are actually before the board or tribunal. There, the Court stated:

> The Board cannot work backwards from its remedial powers to enlarge the subject matter of the complaint. In other words the Board's remedial powers cannot confer jurisdiction over a matter if the Board had no jurisdiction over it at the outset. The range of remedies available to the Board, though broad enough to include future practices, must be linked to the subject matter of the complaint.

To the same effect is *Re Amalgamated Transit Union, Local 583 and City of Calgary* (2005), 139 L.A.C. (4^{th}) 1 (Hart).

[37] 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.

[38] In *Re Dana Corp. and I.A.M.A.W., Local 2330 (Hepditch*)(2005), 143 L.A.C. (4th) 251 (Shime), the grievor alleged that she had been improperly discharged. The grievor had been discharged for failing to comply with the terms of two earlier awards by Arbitrator Kevin Burkett which dealt with two three-day suspensions. At issue was which arbitrator had jurisdiction over the discharge – Arbitrator Shime or Arbitrator Burkett.

[39] Summarizing the case law presented to him, Arbitrator Shime set forth the following principles (citations omitted) at pp. 254-255:

1. An arbitration board must decide the matter or matters submitted to it and no more; the arbitration board cannot enlarge the scope of the submitted issue nor can it decide any other grievance other than the one before it.

2. An arbitration board may complete an award but must be careful that it does not adjudicate new facts or new issues or substantive events that occur subsequent to the award.

3. An arbitration board when imposing conditions should be cautious, when remaining seized, not to arrogate to itself under the guise of implementing conditions, the right to decide about subsequent new facts and new issues of a substantive nature that should properly be the subject matter of a further grievance and a further independent arbitration. Also, an arbitration board should not impose open-ended conditions extending beyond a reasonably limited period so as to capture subsequent new facts and events. …

4. And finally, an arbitration board does not have the authority to enforce its award and should be cautions not to enforce its award in the guise of implementing conditions.

Based on the facts of that case, Arbitrator Shime concluded at p. 256 that the grievor's discharge was a new matter, and that Arbitrator Burkett's jurisdiction "could not be expanded upon beyond the original matters referred to arbitration, which were three day suspensions."

[40] The same conclusion was reached in *Re Elgin Abbey Nursing Home and Service Employees Union, Local 210* (1999), 78 L.A.C. (4th) 385 (Kirkwood). In that case, Arbitrator Kirkwood allowed a discharge grievance, reducing the penalty to a two-month suspension. She also remained seized to resolve any difficulties with the implementation of the Award. The Union argued that the grievor should be placed into a position that had been posted four days after her suspension was over, since she was the senior qualified employee. At the time of the posting the grievor was still discharged and thus unable to apply, and the discharge hearing was proceeding. The Union did not raise this issue during the hearing.

[41] Arbitrator Kirkwood held that the jurisdiction that she retained in the Award was "very narrow." She continued at p. 389-90:

> Therefore an arbitrator cannot, after issuance of an award, decide matters which were not submitted at the hearing, cannot add to or expand the award, but merely complete the award, if necessary by directing what is lacking to effectuate the remedy. The jurisdiction to direct the implementation of the remedy must also remain within the parameters of the collective agreement. …. There is no right to raise new issues.

[42] She determined at pp. 393-394 that issues related to the posting of the position "would not merely be completing the award by giving effect to the remedy… but would be embarking on an entirely different and separate issue, and one that was not grieved." *See also, Re Fanshawe College and OPSEU (01CO49)* (2002), 113 L.A.C. (4th) 328, at par. 15 (Burkett);

[43] Similarly in *Re Western School Board, District 2 and Newfoundland and Labrador Association of Public and Private Employees* (unreported decision of Christine A. Fagan, Jan. 30, 2006), the arbitrator considered her remedial jurisdiction to order reinstatement after a determination that the Employer improperly assigned non-bargaining unit personnel to perform the duties of a bargaining unit position. The arbitrator, in the original decision, had issued a declaration and had remained seized in the event that the parties were unable to agree on remedy. At the remedial hearing, the Union sought an order that one of the grievors "be reinstated to her full-time receptionist/secretarial position." The Employer opposed that request arguing that, among other things, the request for reinstatement was a new issue which constituted an expansion of the grievances. It also argued that such an order would be punitive and would unfairly affect management's rights to respond to the award.

[44] The arbitrator agreed with the Employer's position, finding that "reinstatement is not required for the purpose of setting a just and equitable remedy to the grievance." The arbitrator noted that "damages are the common remedy associated with improper work assignments" and that a reinstatement order would "have the effect of derogating from [the Employer's] management rights to make changes to comply with the collective agreement."

[45] The grievances that were filed in this case asserted that transcript production and certification were the work of Court Reporters, as employees, and that the collective agreement applied. Based on the facts presented, the Board agreed. The remedies sought – overtime pay, a declaration and to be "made whole" – do not address prospective remedies. The words "full

redress" or "any other remedy that the Board thinks appropriate" are insufficient to put the Employer on notice that far broader remedies, including restrictions on its management rights, would be sought. *Western School Board District 2 and The Newfoundland and Labrador Association of Public and Private Employees, supra* at p.8; *Re Elgin Abbey Nursing Home, supra* at p. 390. Even under a broad and liberal reading of the grievances, prospective remedies were not part of the Hunt grievances.

[46] The Union is correct that the remedies sought were not limited to overtime, but include all rights under the collective agreement that flow to the employees and the Union. But it was never contemplated, at the time, that the decision would impact the Employer's right to respond to the decision, or limit the Employer's rights under the collective agreement prospectively. The remedy outlined in the Union's particulars – posting full-time Court Reporter positions – or its assertions at the hearing on this motion that the Board should direct the Employer as to how it must comply with the collective agreement in the future was never raised or contemplated.

[47] The Union argued that it was seeking a declaration that transcript production is the work of employees in the bargaining unit and that the collective agreement applies to that work. That is exactly what *was* declared in the Hunt decision. But that means that all of the collective agreement applies, not selective parts, and the collective agreement includes management's rights to manage and direct the workforce.

[48] The Union further asserts that it is not claiming that the Employer can never act to change the Court Reporters' work or functions in the future, but needs an order now so that the

Employer's proposal which, in its view, "is seeking to transfer bargaining unit work to individuals they [the Employer] believes to be third parties…..", does not result in the parties being back before the Board, once again arguing whether the persons doing this work are independent contractors, dependent contractors or employees. It asserts that the Employer's regulatory proposal involves only "slight modifications" from the situation that existed before. The Union is concerned that unless the Board acts through its remedial powers to prevent this situation through a prospective order that transcript production is bargaining unit work, labour relations mischief will ensue with a never-ending trip to the GSB to re-litigate essentially the same issue, creating a vicious cycle of litigation , expense and frustration. The Union points to the Employer's proposal that the Court Reporters "will continue to function as independent contractors" to demonstrate that the Employer's proposal is simply a repetition of what existed before, and completely ignores the Board's determination in Hunt that this was the work of the Court Reporters as employees, not independent contractors.

[49] The Union submits that it was exactly this type of situation that arose in the *Anderson* case, *supra*, leading to the Court's conclusion that "[t]he power to require management to create a proper classification includes the power to require management to get it right." Likewise, here, the Union asserts that the Board has the remedial power to make sure the Employer gets it right. In support of its contention that, in appropriate cases, a board of arbitration may order prospective relief, the Union also cites to *Re Polax Tailoring Ltd. and Amalgamated Clothing Workers of America (Collective Agreement Grievance)* (1972), 24 L.A.C. 201 (Arthurs); *Samuel Cooper & Co. Ltd. and International Ladies' Garment Workers' Union et al.* [1973] 2 O.R. 841 (Ont. Div. Ct). It also cites to a number of cases where the GSB ordered the Employer to take

affirmative action, including *OPSEU (Union Grievance) and Ontario (Ministry of Community Safety and Correctional Services)* (2004), GSB No. 2002-0163 (Briggs); *OPSEU (Thompson Grievance) and Ontario Ministry of Correctional Services* [2002] O.G.S.B.A. No. 14 (Harris).

[50] The Employer counters that the new model contains "major modifications" – not minor ones - and that the Employer has learned from the factors considered in the Hunt decision in developing its plan. It contends that the facts would be entirely different and would require substantial new evidence. It asserts that in that situation, a new grievance must be filed. It contends that it would be improper for the Board to rule, through its remedial power in Hunt, on a completely new fact situation. In support, it cites to *Re Algonquin College and OPSEU Local 415 (Workload Information Grievance)* [2007] O.L.A.A. No. 621 (Slotnick); *Re Imperial Tobacco Canada Ltd. and Bakery, Confectionery, Tobacco Workers and Grain Millers, Local 364T (Potvin Grievance*)[2000] O.L.A.A. No. 779 (Keller); *Re Elgin Abbey Nursing Home, supra; Re OPSEU (Ranger) and Ontario (Ministry of Community Safety and Correctional Services)* (2006), 156 L.A.C. (4th) 282 (Leighton). In *Colonial Furniture (Ottawa) Ltd. and Retail, Wholesale & Department Store Union, Local 414* (1995), 47 L.A.C. (4th) 165, 177 (Lavery), the arbitrator, in considering the scope of his remedial authority, held that "there must be a clear link, an obvious nexus or a rational relationship between the breach of the collective agreement, its consequences and the remedy order by the arbitrator and, further, the remedy must not be punitive."

[51] The Employer's statement in its proposal that Court Reporters would "continue to function as independent contractors" was a truly unfortunate choice of words. It certainly

appears, as the Union asserts, to ignore the Board's conclusion in Hunt that transcript preparation and certification was the work of Court Reporters as "employees", not independent contractors.

[52] However, the Union's contention that prospective relief is required now, while admitting, as it must, that the Employer may change things in the future without the matter falling within the ambit of the Hunt decision, raises the question of where the line is drawn? It is one year, two years, five years or more after the decision? It has already been more than three years since the decision. The selection of any specific time period within which changes would be within the ambit of the Hunt decision would be arbitrary.

[53] 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.

[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."

[56] The same is not true here. The Employer's regulatory proposal raises new facts and issues that were not encompassed in the original Hunt grievances. Some of the legal issues that will arise may be same, as the Union asserts, but the facts are not. In addition, because preparation of transcripts is bargaining unit work, a whole host of new legal issues and arguments – many of which are set out in the Union's particulars - may be made that did not arise in the Hunt case.

[57] Accordingly, for the reasons set forth above, I conclude that under the specific facts of this case, the Board does not have jurisdiction to order prospective relief.

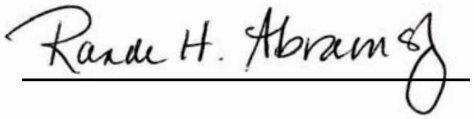
Conclusions:

1. The issue of the Board's remedial jurisdiction was not decided in the July 17, 2009 decision and there is no issue estoppel that arises from that decision.

2. Under the specific facts of this case, the Board does not have jurisdiction to order prospective remedial relief.

3. I remain seized in regard to all other remedial issues arising from the Hunt decision.

Dated at Toronto this 4th day of December 2009.



Randi H. Abramsky, Vice-Chair