10-31-2007

CEP v Bell Aliant Regional Communications LLP

Innis Christie

IN AN ARBITRATION

BETWEEN:

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA - ATLANTIC COMMUNICATIONS COUNCIL

(The Union)

and

BELL ALIANT REGIONAL COMMUNICATIONS LLP

(The Employer)

RE: Scheduling of Temporary Student Employees

BEFORE: Innis Christie, Arbitrator

HEARING DATES: October 3 & December 18, 2006
October 17 & 18, 2007

AT: Halifax, N.S.

FOR THE UNION: Ronald A. Pink Q.C., counsel
David Wallbridge, counsel
Ervan Cronk, Vice-President Atlantic Region CEP
Dean MacDonald, National Representative CEP
Neil McGillivray, Chief Shop Steward
Noel Pauley, President CEP Local 401 P.E.I.
Kim LeClerc, Shop Steward CEP Local 2289

FOR THE EMPLOYER: David Mombourquette, counsel
Elizabeth Spinney, Manager, Labour Relations and Recruiting
Patrick O'Brien, Director of Labour Relations

DATE OF AWARD: October 31, 2007

[1] Union Grievances 2005-0004-2 and 2005-0007-1, dated February 5 and 10, 2005, alleging that the Employer violated the Collective Agreement between Aliant Telecom Inc. and Council of Telecommunications Unions effective September 20, 2004 – December 31, 2007, which counsel agreed is the Collective Agreement applicable here. The violation alleged is "with regard to scheduling of Temporary Employees & Student Temporary Employees", (quoting Grievance # 0007-1). Grievance # 0004-2 states "Part-time (student temporary – temporary) are required to work either full time or part time hours[;] part time – minimum of 22.5 hr per scheduling work". The "Settlement Requested" by the Union in Grievance #0004-2 is "full redress". In Grievance #0007-1 the "Settlement Requested" is "Current scheduling practice to cease immediately and adhere to Collective agreement. Full Redress."

[2] At the outset of the hearing in this matter on October 3, 2006, the parties agreed that I am properly seized of it, that I should remain seized after the issue of any Award to deal with matters arising from its application and that all time limits, either pre- or post-hearing, are waived.

AWARD

[3] The issue in this Grievance is one of interpretation of the Collective Agreement. The directly relevant words of Article 30.04 a) are:

30.04 a) Part time employees will be scheduled to work a minimum of twenty-two hours and one-half (22.5) hours per Scheduling Week.

[4] The Employer says this does not apply to student temporary employees who work part-time. The Union says it does. The terms "Part Time Employee", "Student Temporary Employee" and "Temporary Employee" are defined in Sub-Articles 21.15, 21.26 and 21.27 of the Collective Agreement. Those, and the other relevant definitions in Article 21, are:

21.08 EMPLOYEE means a person employed in the Company in any classification in Appendix A, except those persons who would be excluded in accordance with the provisions of the Canada Labour Code.

21.10 FULL TIME EMPLOYEE means an employee (regular or temporary) who is normally required to work the standard working hours.

21.15 PART TIME EMPLOYEE means an employee (regular or temporary) who is normally required to work less than the standard working hours.

21.26 STUDENT TEMPORARY EMPLOYEE means a TEMPORARY EMPLOYEE enrolled in a program of post secondary study, who is hired with the understanding that the duration of the employment will not exceed 975 hours in a calendar year and will not extend beyond the duration of their education program. Student Temporary employees will not accumulate seniority but will be considered as part of the bargaining unit.

21.27 TEMPORARY EMPLOYEE means an employee hired with the understanding that the period of employment is not expected to continue more than six (6) months in any consecutive fifty two (52) week period, or such longer period as is defined in Article 31.01.

[5] The Employer's position is that when the above-quoted words of Article 30.04 a) are read in the context of the whole of 30.04 a), these definitions, Article 31.01 and other potentially applicable provisions of the Collective Agreement, it is clear that the phrase "Part time employees" was

not intended to include "student temporary employees". The Employer says that the specific language on student temporary employees in Article 31.01 was intended to make them *not* subject to the 22.5 hour minimum in Article 30.4 a). The Employer argues that if I conclude that is not the clear meaning of Article 30.04 a) the documentary and oral evidence of negotiation history set out below resolves the ambiguity in the Employer's favour. Further, the Employer submits that, if I decide that the Article 30.04 is not patently ambiguous the evidence of negotiation history set out below shows that there is a latent ambiguity, which is then resolved by that same evidence.

[6] Article 31 of the Collective Agreement is headed "TEMPORARY EMPLOYEES AND STUDENT TEMPORARY EMPLOYEES". Part 31.01 is the only part of Article 31, and, indeed, the only provision in the Collective Agreement other than Article 21.26 quoted above, that refers to student temporary employees. It provides;

> 31.01 The period of employment for a Temporary employee will not exceed six (6) months in any consecutive fifty-two (52) week period, except in cases of backfill for Child Care Leave of Sickness Absence, or where otherwise mutually agreed by the Council and the Company. The period of employment for a Student Temporary employee will not exceed 975 hours in a calendar year and will not extend beyond the duration of their education program.
>
> The Company agrees that the total number of Student Temporary employees in the bargaining unit will not exceed four percent (4%) of the total number of employees in the bargaining unit, during the period between September 7 and April 30.

[7] I note that the wage scales in Appendix B on p. 136 of the Collective Agreement booklet indicate the hours in a standard working day for the Employer's various classifications of employees, as 8 for technicians and

mechanics and 7.5 for others. The 975 hours specified in Article 31.01 as the maximum for a Student Temporary employee is not a random number. It equals 26 weeks of work at 7.5 hours a week, which, measured differently, is the same as the maximum period of employment permitted any Temporary 7.5 per day employee in any consecutive 52 week period.

[8] The other seven parts of Article 31 refer to temporary employees and do not use the phrase "student temporary employee". I note particularly, however, Article 31.07:

> 31.07 All provisions of the Collective Agreement apply to Temporary employees, except where they conflict with the provisions of this article or where it is specifically stated that the provision applies only to regular employees.

[9] The Union takes the position that the phrase "Part time employees" in Article 30.04 a), read in context, clearly does include "student temporary employees", and that, therefore, evidence of negotiation history is not admissible. Even if it is, the Union submits, the documentary and oral evidence set out below does not favour the Employer's view of the mutually intended meaning of Article 30.04 a).

[10] **The Facts.** On September 17, 2001 the Canada Industrial Relations Board ordered the merger into one bargaining unit of the nine bargaining units with which the Employer's corporate predecessors had collective agreements, with several different unions covering four provinces. In March 2002 collective bargaining commenced. The unions had to find a way of coordinating their bargaining, and did so by forming the Council of Atlantic

Telecommunications Unions, which is signatory to the Collective Agreement. The Council has since merged into The Communications, Energy and Paperworkers Union of Canada.

[11] Negotiations were difficult and finally broke down in April 2004, when the new bargaining unit of some four thousand employees went on strike. April 23 was the last day of face-to-face bargaining between the parties' committees. The Federal Mediation and Conciliation Service had worked diligently to bring about a settlement, and continued to do so throughout the strike, but a tentative agreement was not reached until September 2, 2004. The Collective Agreement was signed and is effective September 20, 2004.

[12] **The Course of These Arbitration Proceedings.** The first hearing in this matter was on October 3, 2006. Having agreed to my jurisdiction and the like, counsel then agreed that the "temporary student employees" here in issue had not, in fact, worked the minimum 22.5 hours prescribed by Article 30.04 a) for "part time employees". They also agreed that when the hearing reconvened on December 18 the Employer would seek to introduce certain evidence of negotiating history which they have now agreed I am not to take into account. I therefore will say no more about the December 18 hearing.

[13] **Patrick O'Brien's Testimony.** The only testimony before me for consideration is that of Patrick, O'Brien, Director of Labour Relations and Recruiting for the Employer. He was "second in command" on the Employer's bargaining team that negotiated the Collective Agreement. He reviewed all proposals made to the Union and received from it.

[14] **Negotiation History.**

Through Mr. O'Brien the Employer introduced in evidence a series of proposals and counter-proposals starting with the union proposals of March 4, 2002 and ending with the a "Summary of Tentative Agreement" dated September 2, 2004. I will not address each of these documents as it relates to the issue here, but will focus on those upon which counsel laid some stress.

[15] In its January 22, 2003 proposals the Employer put forward a definition of "casual employee", because Mr. O'Brien testified, it was seeking flexibility, such as it had enjoyed in its New Brunswick operations.

> CASUAL EMPLOYEE means an employee hired with an understanding that they will be scheduled to work on an hourly or daily basis as required with no commitment to a minimum number of hours per week but with consideration given to the employee's availability. Casual employees will not accumulate seniority but will be considered as part of the bargaining unit.

Mr. O'Brien agreed that the Union made it clear it was not going to agree to a provision the permitted the creation of a casual work force, so, he also agreed, and that point the "casual" term "fell off the table".

[16] The term "Student Temporary Employee" first appeared in the Employer's July 14, 2003 proposals, as follows:

> 21.5 STUDENT TEMPORARY EMPLOYEE means an employee enrolled in a program of post secondary study, who is hired on a hourly or daily basis as required with no commitment to a minimum number of hours per week but with consideration given to the employee's availability. Student Temporary employees will not accumulate seniority but will be considered as part of the bargaining

> unit. Student Temporary employees will be considered as Part time employees under this agreement.

This, Mr. O'Brien agreed, alarmed the Union negotiators, who saw it as "casualization through the back door".

[17] The proposals also included:

> HOURS OF WORK
> 30.04 a) Part-time employees will be scheduled to work a minimum of thirty (30) hours per pay period with the exception of Student Temporary employees who will not have a defined number of hours.

Mr. O'Brien agreed in cross-examination that the Employer had included the exception here for student temporary employees because "otherwise they would be treated like everybody else".

[18] Finally, the proposals included:

> 31.01 The period of employment of a Temporary Employee will not exceed eighteen (18) months in a thirty-six (36) month period, unless mutually agreed by the Council and the Company.
> The period of employment for a Student Temporary Employee will not exceed the duration of the Student's program of post secondary study.

[19] Mr. O'Brien testified that the Union did not like "the New Brunswick approach" generally and did not want any language specifically about students. He testified that the Union was very much aware that the Employer

hired student temporary employees, but that, probably, they were hired during the school year only in New Brunswick. The Union, he testified, fought for a long time against the use of the words "student" and "casual".

[20] The Employer's February 24, 2004 proposals first contained language in the general shape of what is now Article 21.26:

> 21.26 STUDENT TEMPORARY EMPLOYEE means a TEMPORARY EMPLOYEE enrolled in a program of post secondary study, who is hired to work on an hourly or daily basis with the understanding that the period of employment will not continue beyond the duration of their education program. There is no commitment to a minimum number of hours per week but consideration will be given to the employee's availability. Student Temporary employees will not accumulate seniority but will be considered as part of the bargaining unit. Student Temporary employees will be considered as Part time employees under this agreement.

[21] The February 24, 2004 proposals also set out other specific provisions about student temporary employees, including, in language unchanged from July 14, 2003, the predecessor of Article 30.04 a), which is central to this Award:

> HOURS OF WORK
> 30.04 a) Part-time employees will be scheduled to work a minimum of thirty (30) hours per pay period with the exception of Student Temporary employees who will not have a defined number of hours.

Also, unchanged from the July 14, 2003 proposals:

31.01 The period of employment of a Temporary Employee will not exceed eighteen (18) months in a thirty-six (36) month period, unless mutually agreed by the Council and the Company. The period of employment for a Student Temporary Employee will not exceed the duration of the Student's program of post secondary study.

[22] The Union's response of March 8 proposed that the words "with the exception of Student Temporary employees who will not have a defined number of hours" be struck from Article 30.04 a) and that the words "The period of employment for a Student Temporary Employee will not exceed the duration of the Student's program of post secondary study" be struck form Article 31.01.

[23] On March 11 the Employer renewed its February 24 proposals for Articles 21.26, 30.04 a) and 31.01. The Union's response made it clear that it wanted no reference to student temporary employees.

[24] Mr. O'Brien testified that just prior to the strike deadline the Vice-President Operations for New Brunswick took the position that it would not be fair if the Collective Agreement prevented students from "coming in for March breaks", and that he, Mr. O'Brien, took that seriously. He said that in the Employer's last proposal on April 23, just hours before the strike commenced, changes were introduced to try to convince the Union that there was no intention to abuse the use of student temporary employees, and to address the concern about students coming in for March breaks.

[25] The "Company Conditional Offer for Settlement" dated April 23, 2004 was intended to be the Employer's final attempt to avert the strike. Article 21.14, the definition of "PART TIME EMPLOYEE" was unchanged from March 11; that is, it was the same as the definition in the Collective Agreement before me here.

[26] The definition of "TEMPORARY EMPLOYEE" in Article 21.27 had changed, in the minor respect indicated below, to the wording that now appears in the Collective Agreement.

> 21.27 TEMPORARY EMPLOYEE means an employee hired with the understanding that the period of employment is not expected to continue for more than six (6) ~~consecutive~~ months *in any consecutive fifty two (52) week period*, or such longer period as is defined in Article 31.01.

[27] The definition of "STUDENT TEMPORARY EMPLOYEE" in what is now Article 21.26 had changed significantly from the March 11 proposal set out above. The words "who is hired with the understanding that the duration of employment will not exceed 975 hours in a calendar year and will not extend beyond the duration of their education program", which are now in the Collective Agreement, replaced the words "who is hired to work on an hourly or daily basis with the understanding that the duration of the employment will not extend beyond the duration of their education program", which had been in the Employer's March 11 proposals. Most importantly, in the Employer's April 23 proposals the sentence, "There is no commitment to a minimum number of hours per week but consideration will

be given to the employee's availability for work." in the Employer's March 11 proposals had been replaced by, "Student Temporary employees will be scheduled to work a minimum of 7.5 hours per scheduling week".

[28] As Mr. O'Brien testified, up to that point the Employer had obviously not agreed to what the Union now says the Collective Agreement provides for; the 22.5 per week minimum set out in Article 30.04 a) for Student Temporary Employees.

[29] Article 31.01 was also changed in the Employer's April 23 proposals, but only to reflect the changes in the definitions of "TEMPORARY EMPLOYEE" and "STUDENT TEMPORARY EMPLOYEE". It read:

> 31.01 The period of employment for a Temporary employee will not exceed six (6) months in any consecutive fifty-two (52) week period, except in cases of backfill for Child Care Leave of Sickness Absence, or where otherwise mutually agreed by the Council and the Company. The period of employment for a Student Temporary employee will not exceed 975 hours in a calendar year and will not extend beyond the duration of their education program.

[30] That is, Article 31.01 in the Employer's April 23 proposal was the same as it now appears in the Collective Agreement except that the second paragraph, imposing the 4% cap, was not there.

[31] Mr. O'Brien testified that in the negotiations that brought the strike to an end the parties never negotiated face to face on the question of whether the 22.5 hour per week minimum in Article 30.04 a) was to apply to student

temporary employees, but, he said, the Employer did not intend it to, and "knew that students couldn't work 22.5 hours anyway", during the school year. He agreed in cross-examination that the Union had never explicitly agreed to this.

[32] The "Summary of Tentative Agreement" dated September 2, 2004 which is in evidence contains, at the bottom of page 3, the following changes from the April 23 "Proposal" (I note that all the quoted words, except the heading, are in larger font than is used elsewhere in the "Summary of Tentative Agreement", and, except for headings, are the only bolded words in the document):

> **Article 21.26 and 31 (Temporary Student)**
>
> **Amend definition in 21.26 to delete the sentence re minimum 7.5 hours per scheduling week.**
>
> **Amend Article 31 to restrict the number of Temporary Student employees to four percent of the total number of employees in the bargaining unit between September 7 and April 30.**

These changes are, of course, reflected in Articles 21.26 and 31 as they appear in the Collective Agreement, quoted at the outset of this award.

[33] **Practicalities of Administering the Collective Agreement.** Mr. O'Brien also testified about the way in which student temporary employees are utilized by the Employer.

He testified that student temporary employees are hired without regard to the posting provisions of the Collective Agreement, on the basis of an interview and assessment of their skills, and the Employer's needs. They understand that they are being hired for the whole summer, with holidays off but no vacation time and that they will not be working the best shifts. They also understand that the Employer may need them in the Autumn for some evening and weekend shifts and for three weeks over the Christmas period and for two weeks around March break.

[34] Depending on what jobs they are hired for, Mr. O'Brien testified that, like other temporary employees, student temporary employees are given swipe cards to access buildings and computer access. Some are given an AmEx card to access the Employer's expense allowance system. Other temporary employees are laid off after six months, unless the Union agrees to an extension, in accordance with the Collective Agreement, but student temporary employees stay on for the duration of their program of study if they wish to and perform satisfactorily. Until then they do not go through the payroll and other human resources processes of ending employment as other temporary employees must.

[35] Mr. O'Brien testified that at the end of September 2007 the Employer employed 93 student temporary employees, i.e. about 2.3% of the workforce; well below the 4% it is allowed by Article 31.01 to employ between September 7 and April 30. He said that during the summer student temporary employees probably work full time, 37.5 or 40 hours per week, depending on their jobs, and during the school year most work from no hours to one shift per week. If the student temporary employees were

terminated at the end of the summer Mr. O'Brien said his understanding is that those who wanted to work part time during the school year would get jobs elsewhere. The Employer would then loose the benefit of the training they had received. Not to have the student temporary employees work part time and in the breaks would cause many of them to lose touch with their rapidly changing tasks. He suggested that for those who work outdoors lack of any continuing contact with their jobs might pose a safety risk.

[36] **The Issues.** As I stated at the outset, the issue here is one of interpretation of the Collective Agreement; specifically whether Article 30.04 a) applies to student temporary employees:

> 30.04 a) Part time employees will be scheduled to work a minimum of twenty-two hours and one-half (22.5) hours per Scheduling Week.

The Union says it does apply to student temporary employees who work part-time. The Employer says it does not,

[37] The first question is whether, read in the context of the Collective Agreement as a whole, the reference in Article 30.04 a) to "Part time employees" unambiguously applies to student temporary employees who work part time. That question is answered by taking the generally accepted approaches to the interpretation of collective agreements. If there is no patent ambiguity the next question is whether the negotiation history in evidence demonstrates a latent ambiguity in the Collective Agreement on the matter of the application of Article 30.04 a) to student temporary employees. If a latent ambiguity is revealed, I will consider the same negotiation history

to assist in resolving any doubt about whether the parties must be taken to have intended that Article 30.04 a) is to apply to student temporary employees.

[38] **Decision.** I have decided that Article 30.04 a) must be read as intended by the parties to apply to student temporary employees. When that article is considered in the context of the Collective Agreement as a whole there are some aspects of the text that lend support to the Employer's position that it was not intended to apply to student temporary employees, although the most obvious interpretation is that it does. The negotiating history certainly suggests disagreement on the issue during negotiations, if not ambiguity, but in the end the negotiating history confirms that most obvious meaning of the words. It indicates that in the end, in respect of the application of Article 30.04 a) the parties settled on words that treat student temporary employees like other temporary employees,

[39] For the Employer, Mr. Mombourquette first submitted that I should take the standard approach to interpretation of the the Collective Agreement as described by Brown and Beatty in *Canadian Labour Arbitration* (4th ed. CD-ROM), paras. 4:2000, 4: 2100 and 4:2110 (footnotes omitted):

> **4:2000 INTERPRETATION OF COLLECTIVE AGREEMENTS**
>
> Because the basic source of an arbitrator's jurisdiction is found in the collective agreement, in most arbitrations the main task is to construe a word, phrase, section or group of sections in the collective agreement. Conceptually, however, the task of interpreting a collective agreement is no different than that faced by other adjudicators in applying statutes, private contracts and other authoritative directives. And generally speaking, arbitrators view and approach their function in much the same way.

4:2100 The Object of Construction: Intention of the Parties

It has often been stated that the fundamental object in construing the terms of a collective agreement is to discover the intention of the parties who agreed to it. ...

...in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions. ... When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies. ...

4:2110 Normal or ordinary meaning

In searching for the parties' intention with respect to a particular provision in the agreement, arbitrators have generally assumed that the language before them should be viewed in its normal or ordinary sense unless to do so would lead to some absurdity or inconsistency with the rest of the collective agreement, or unless the context reveals that the words were used in some other sense. ... It has been stated, however, that where there is no ambiguity or lack of clarity in meaning, effect must be given to the words of the agreement, notwithstanding that the result may be unfair or oppressive, or that they were deliberately vague to permit continuing consensual adjustments.

[40] I find the words of Article 21.26 and 21.27 themselves introduce some uncertainty about the Union position that the classification "Student Temporary Employee" is a sub-set of "Temporary Employee", although I have concluded that is the most natural reading. Article 21.26 states that "Student Temporary Employee means a Temporary Employee ... who is hired with the understanding that that the duration of employment will not exceed 975 hours in a calendar year...". Article 21.27, on the other hand, states that "Temporary Employee means an employee hired with the understanding that the period of employment is not expected to continue for more than six (6) months ...". If those "understandings" are considered to

be the defining characteristics of the two classifications of employees there is some logical difficulty in fitting the first within the second. Nevertheless, the Collective Agreement does say that "Student Temporary Employee *means* [emphasis added] a Temporary Employee" with added characteristics.

[41] Further, in addressing the "express provisions" of the Collective Agreement, Counsel for the Employer submitted that perusal of the text reveals that where the parties intended to tie substantive provisions of the Collective Agreement to defined categories of employees they used the terms capitalized in the definitions in Article 21. They did not refer specifically to student temporary employees in Article 30.04 a), so, he submitted, they cannot be taken to have intended to refer to them.

[42] I do not find this to be a persuasive argument. Article 21.26 commences by stating "STUDENT TEMPORARY EMPLOYEE means a TEMPORARY EMPLOYEE enrolled in a program of post secondary study..." . The plain meaning of these words is that a student temporary employee is a temporary employee, with other particular characteristics. This wording suggests that student temporary employees are not, as counsel for the Employer submitted, treated in the Collective Agreement as a third category of employees, who, along with regular employees and temporary employees, may be full-time or part-time. Rather, it suggests as counsel for the Union submitted, that "student temporary employee" is a sub-set of "temporary employee".

[43] Counsel for the Employer, however, found support in the argument that the parties intended "student temporary employee" to be a separate

classification, in that if student temporary employees were intended to be considered as temporary employees and, therefore within the general definition of "employee" in Article 21.08, the parties would not have thought it necessary to state specifically in Article 21.26 that they are part of the bargaining unit.

[44] In the same vein, counsel for the Employer submitted if the parties had not intended "student temporary employee" to be a separate classification, the would not have thought it necessary to state in Article 21.26 that they do not accumulate seniority, because Article 11.02 provides, in part: "Temporary employees are not regular and therefore do not accumulate seniority".

[45] Counsel for the Employer also referred to Article 13.02 which provides for job postings. In paragraph 13.02 d) "Temporary" is listed among the categories of vacancy, but, he said, as Mr. O'Brien testified, student temporary employee vacancies are not posted, and the Union has never suggested they should be. I note in passing that Article 13.01 states "Temporary vacancies may be posted at the Company's discretion".

[46] Counsel for the Employer also submitted that Article 30.03 b), which provides "The Company cannot change the employment status of a full time employee to part time without the agreement of the employee and the Council" has similarly never been applied to student temporary employees, which suggests they were intended to be a separate category, not simply temporary employees and therefore, by the definitions in Articles 21.08 and 2.27, ordinary temporary full time or part time employees as defined in

Articles 21.10 and 21.15. I note that counsel for the Union responded to this argument by saying that Article 30.04 b) would apply to student temporary employees, but that they would never reach the 1500 hour mark by virtue of the 975 hour cap in Article 21.26.

[47] Counsel for the Employer emphasized the 975 hour cap in Article 21.26, which, while it is in the definition part of the Collective Agreement, is clearly substantive in several respects. For ease of recall I repeat it here:

> 21.26 STUDENT TEMPORARY EMPLOYEE means a TEMPORARY EMPLOYEE enrolled in a program of post secondary study, who is hired with the understanding that the duration of the employment will not exceed 975 hours in a calendar year and will not extend beyond the duration of their education program. Student Temporary employees will not accumulate seniority but will be considered as part of the bargaining unit.

Counsel for the Employer submitted that the 975 hour per calendar year cap was intended to be a "complete code" of the limitations on the hours of work of student temporary employees. He argued that the Union could not have thought they were getting that limitation and the minimum of 22.5 hours provided for other temporary employees by Article 30.04 a) as well. If that were so, he said, why would the Employer want to hire student temporary employees under Article 21.26; why not simply hire them as temporary employees under Article 21.27:

> 21.27 TEMPORARY EMPLOYEE means an employee hired with the understanding that the period of employment is not expected to continue for more than six (6) months in any consecutive fifty two

(52) week period, or such longer period as is defined in Article 31.01.

[48] Counsel for the Union responded that what the Employer got under Article 21.26 was different way of measuring that would be to the Employer's advantage in its utilization of student temporary employees.

[49] I have set out these arguments demonstrate that there are some aspects of the text of the Collective Agreement that lend support to the Employer's position that Article 30.04 a) was not intended to apply to student temporary employees, although, as I have made clear above, the most obvious interpretation is that it does.

[50] Characterizing the Union's position as a "technical and legalistic argument", Counsel for the Employer relied on the testimony of Mr. O'Brien on the practicalities of administering the collective agreement in challenging, to paraphrase para. 4:2100 of Brown and Beatty, quoted above, "the reasonableness of [the Union's] interpretation, [its] administrative feasibility, and whether [the Union's] interpretations would give rise to anomalies."

[51] Counsel for the Employer submitted that if Article 30.04 a) applies to student temporary employees the effect would be that the Employer could only hire them for the summer, which was never its intent and has not been the practice since the Collective Agreement came into effect. (I note that APPENDIX M to this Collective Agreement provides, in part, that "all *past* [emphasis added] provincial practices ...having a general employee

application including members of the Bargaining Unit, are considered to be discontinued...")

[52] In the Employer's submission, applying Article 30.04 a) to student temporary employees would mean that in the Autumn they would have to be scheduled to work 22.5 hours per week rather than a shift or two in the evenings or on weekends. Most would not want, or be able, to work that much and, if they did, they would reach the 975 hour per calendar year cap and could not be used in the Christmas break. Similarly, if student temporary employees worked the March break and 22.5 hours per week through the Spring they would not be able to work the whole summer. Counsel adopted Mr. O'Brien's concerns about the effect of having to terminate student temporary employees and rehire them in order to avoid these effects. Counsel for the Union challenged these scenarios, in some respects.

[53] It must suffice to say that, while I have taken these practical concerns seriously in attempting to understand what intentions I can ascribe to the parties as to the correct interpretation and application of Article 30.04 a), at most they suggest that the application of Article 30.04 a) to student temporary employees is not be as unambiguous as it appears on its face. I turn, therefore, to the negotiating history in evidence before me.

[54] Counsel for the Union opposed the admission of the negotiation history set out above, although in his closing argument he suggested that, if it were admitted, it favoured the Union's position. That is, he submitted that the apparent intent of the parties as revealed by the course of negotiations in evidence was that Article 30.04 a) would apply to student temporary

employees. I agree with him, and will not therefore dwell unduly on the admissibility of that evidence, which was sought by counsel for the Employer.

[55] Both counsel referred to my Award in *Strait Crossing Joint Venture and International Union of Operating Engineers/Iron Workers* (1997), 64 L.A.C. (4th) 229, in which I reviewed the law on the admissibility and use of evidence of negotiating history and which has itself been quoted with some frequency since. In admitting the evidence of negotiating history brought in through Mr. O'Brien's testimony quoted above, I have adhered to what I said there:

> The parties to collective bargaining must find their rights in the collective agreement, not in what is said during negotiations when "much is said and much can be misinterpreted". (See the quote from arbitrator George Adams in *Sudbury District Roman Catholic Separate School Board* (1985), 15 L.A.C. (3d) 284, below), but this stricture is relaxed not only where the words of the collective agreement are patently ambiguous, but also where there is cogent evidence that apparently clear words were given a special meaning by *both* parties.
>
> The authorities are clear that the extrinsic evidence properly admissible to show a latent ambiguity may include direct evidence of what the parties said in negotiations. Brown and Beatty, *Canadian Labour Arbitration* (3rd ed., looseleaf), state in para. 3:4400;
>
> > ...the general rule at common law is that extrinsic evidence is not admissible to contradict, vary, add to or subtract from the terms of an agreement reduced to writing. ...
> >
> > Although many arbitrators have accepted the common law principles and limited the introduction of extrinsic evidence accordingly, others have taken the view that the legislative provisions, such a s. 44(8) of the *Ontario Labour Relations Act*, permit the admission of parole evidence at the discretion of the arbitrator. ...Where an ambiguity is patent, that is, where it appears on the face of the agreement, an arbitrator may resort to extrinsic evidence as an aid to its

> interpretation. Where an ambiguity is latent, that is, where it is not apparent on its face, an arbitrator may rely upon extrinsic evidence not only as an aid to resolve the ambiguity once established but also to disclose the ambiguity.

The learned authors footnote the non-labour law case of *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.* (1969) 3 D.L.R. (3d) 161 (Ont. C.A.) as support for the proposition quoted. They also cite many arbitration awards.

In para. 3:4420 Brown and Beatty state that, apart from past practice, the most significant form of extrinsic evidence is the history of negotiations. ... and go on to say;

> ... Evidence of that kind, however, must address the issue of interpretation and ought to be relied upon only if it is unequivocal.

Most arbitrators dealing with issues of latent ambiguity have relied on and quoted from the reasons of Gale C.J.O. in *Leitch Gold Mines*, where his Lordship said, at pp. 215-6;

> Where the language of the document and the incorporated manifestations of initial intention are clear on a consideration of the document alone and can be applied without difficulty to the facts of a case, it can be said that no patent ambiguity exists. In such a case, extrinsic evidence is not admissible to effect its interpretation. On the other hand, where the language is equivocal or if unequivocal but its application to the facts is uncertain or difficult, a latent ambiguity is said to be present. The term "latent ambiguity" seems now to be applied to all cases of doubtful meaning or application.
>
> ...

Extrinsic evidence may be admitted to disclose a latent ambiguity, in either the language of the instrument or its application to the facts, and also to resolve it...

At p. 536 of the *Noranda* decision, after quoting the last sentence from *Leitch Gold Mines* set out above, Dubin J.A. said; [Ontario Court of Appeal in *Re Noranda Metal Industries Ltd., Fergus Division v. International Brotherhood of Electrical Workers* (1983), 44 O.R.(2d) 529]

> ...assuming that [the arbitrator] failed to make that finding [that the words in question were ambiguous] before admitting the extrinsic evidence, it was unnecessary for him to do so since he was entitled to entertain the extrinsic evidence with a view to determining whether that evidence disclosed the ambiguity in the words expressed.

> The only extrinsic evidence under consideration there was evidence of what had been said during negotiations.
>
> On this highly persuasive authority it is clear that evidence of what went on in negotiations is admissible to show that apparently clear language is in fact ambiguous, as well as to clear up a patent ambiguity or a latent ambiguity which been revealed by other extrinsic evidence.
>
> ... My purpose in quoting so extensively from the authorities on this subject is to make it clear that, while evidence of negotiating history may be relied upon, including evidence of what was said during negotiations, both to show that language is ambiguous and to resolve that ambiguity, such evidence must be clear and cogent. Evidence of what people thought, even when corroborated by evidence of their actions, does not easily meet that requirement. Such evidence does not alone provide a basis for concluding what the parties agreed upon, or appeared to have agreed upon. I note that Brown and Beatty in para. 3:4420 quoted above refer only to "documentary evidence" (which, on the authorities is, I think *too* narrow) and stress that the evidence "ought to be relied upon only if it is unequivocal."

[56] Counsel for the Union stressed that a primary aim of the Union during the negotiations of the Collective Agreement before me here was job security. I agree with Counsel for the Employer that there is no evidence to that effect before me but I do accept Union counsel's submission that the evidence discloses strong Union antipathy toward "casualization" of the work force, as Mr. O'Brien agreed in cross-examination with respect to the Employer's proposed "casual employee" term "falling off the table".

[57] I also accept that this antipathy included what Union counsel termed "casualization through the back door" by what the Union perceived as potential abuse of the use of student temporary employees. This was achieved in part by the second paragraph of Article 31.01:

> The Company agrees that the total number of Student Temporary employees in the bargaining unit will not exceed four percent (4%) of the

> total number of employees in the bargaining unit, during the period between September 7 and April 30.

It was also achieved in part by the 975 hours in a calendar year cap in Article 21.26, but, on viewing the negotiating history, there is no reason to think that having Article 30.04 a) apply to student temporary employees was not also something the Union sought.

[58] Throughout most of the negotiations the Union opposed proposals by the Employer which would have allowed student temporary employees to work without being subject to the minimum number of hours required for temporary employees in general. In its final proposal before the strike the Employer made a last ditch effort to satisfy the request of New Brunswick management in particular that, if there was to be a minimum number of hours for student temporary employees, it be a low one. Specifically, the Employer proposed 7.5 hours per week, which it coupled with the 975 hours in a calendar year cap, in an attempt, Mr. O'Brien said, to avoid the strike.

[59] In the Collective Agreement the 975 hours cap was retained but the 7.5 hours per week minimum for student temporary employees disappeared. On the face of it, what reason did the Employer have to suppose that by dropping the 7.5 hour minimum the Union was agreeing to what it had opposed all along? There is no evidence before me to support that supposition. Without any special provision the minimum the 22.5 hour weekly minimum for part time employees, regular and temporary, would apply, which was what the Union had demanded throughout.

[60] In determining whether Article 30.04 a) applies to student temporary employees I have sought the intent of the parties primarily in the words of the Collective Agreement. While there are some indications that not every reference to temporary or part time employees is intended to apply to student temporary employees, there is nothing to indicate that under Article 30.04 a) the treatment of student temporary employees is to differ from that of other temporary employees. Negotiating history indicates that the parties did, indeed, bargain with very different intents on this issue; but on the face of that evidence I can only conclude that the Employer dropped its demand that student temporary employees be treated differently from other temporary employees in terms of the minimum hours per week for which they must be scheduled to work, and that the Union succeeded in its demand that they not be.

[61] In sum, the negotiating history, while it shows disagreement on this issue right up to the final stage of bargaining, favours the Union, not the Employer. The Employer agreed to drop the language it had insisted upon up to that point. The Union did not.

[62] The evidence introduced by the Employer that most persuasive of its position is Mr. O'Brien's to the effect that, from the Employer's point of view, it will be highly impractical to apply Article 30.04 a) to student temporary employees, to the point where the Employer may have to cease using them except for summer work. From the Employer's point of view, I agree that would be an unfortunate outcome. The question for me, however, is whether, given those impracticalities, I can attribute to the parties a mutual intent not to include student temporary employees in Article 30.04 a), when

the words of the Collective Agreement do so expressly, and the negotiating history strongly suggests otherwise.

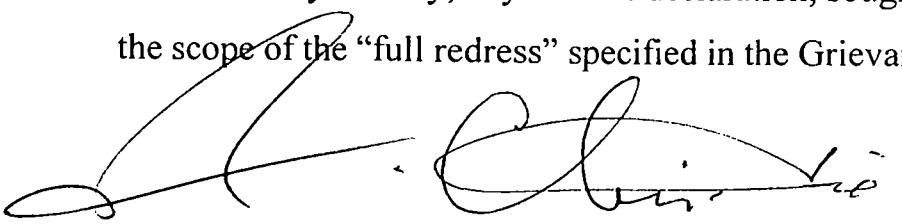
[63] Specifically, Mr. Mombourquette, for the Employer argued that, if student temporary employees continue to be employed, as they have been, virtually full-time for four months in the summer, employing them for 22.5 hours per week though the Autumn would mean that they could not be employed, as they regularly have been, during the Christmas period, because they would have reached the 975 hour maximum per calendar year imposed by Article 21.26. Similarly, if they were employed for the March break, as they have been, and were required to work 22.5 hours a week thereafter, by May they would have used up many of the hours they would have available to work for the summer.

[64] As Mr. O'Brien suggested in his testimony, the only way around this would be to terminate each temporary summer student as he or she reached his or her 975 maximum and rehire to start a fresh period. It suffices to say that, if this were permissible under the Collective Agreement, for the reasons given by Mr. O'Brien it would be administratively difficult and expensive. Mr. O'Brien and Mr. Mombourquette may well be correct, also, that many students would be unwilling or unable to work for the Employer for 22.5 hours a week and would simply quit after the summer, or not take the job at all. This could well prevent the Employer from developing a group of trained employees, some of whom may be good prospects for permanent employment.

[65] I realize it is somewhat repetitious to specify these difficulties again, but I do so to make it clear that I have borne them in mind in reaching my conclusion here. These do not appear to me to be trivial concerns, but it is not for me to decide whether hiring student temporary employees is a good thing for the Employer, for the Union, or in general. My role is to determine what, objectively assessed, the parties appear to have intended when they concluded the Collective Agreement through collective bargaining. If what they ended up with proves to have been ill-considered from a practical point of view, they are free to agree on how to make it work better.

[66] **Conclusion and Order.** For all of the above reasons this Grievance is allowed. I find and declare that in hiring student temporary employees for less than the 22.5 hours per week minimum required by Article 30.04 a) the Employer breached the Collective Agreement.

As agreed by the parties, if they are unable to reach agreement on matters arising from the application of this Award I will reconvene the hearings in this matter to deal with them. Specifically, I hereby retain jurisdiction to determine any remedy, beyond this declaration, sought by the Union within the scope of the "full redress" specified in the Grievances.



Innis Christie
Arbitrator

29P