



ONTARIO
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE
DE L'ONTARIO

**GRIEVANCE
SETTLEMENT
BOARD**

**COMMISSION DE
RÈGLEMENT
DES GRIEFS**

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IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

OPSEU (Craig/Grimes)

Grievor

- and -

The Crown in Right of Ontario
(Ministry of Transportation)

Employer

BEFORE

N. Dissanayake
M. Vorster
M. O'Toole

Vice-Chairperson
Member
Member

**FOR THE
GRIEVOR**

H. Law
Union Representative
Ontario Public Service Employees Union

**FOR THE
EMPLOYER**

D. Jarvis
Counsel
Filion, Wakely & Thorup
Barristers & Solicitors

HEARING

July 6, 1992
January 18, 1993
June 16, 1993
August 31, 1993

DECISION

These are grievances filed by Mr. Tom Grimes and Mr. William Craig alleging that the employer had failed to properly implement the terms of a Memorandum of Settlement entered into between the employer and the union on July 17, 1991.

At all relevant times the grievors were employed as Enforcement Officers of the Ministry of Transportation. Their primary responsibility was the enforcement of legislation and regulations on the trucking industry and other public carriers. Their positions were classified at Highway Carrier 2. Both grievors were hired in 1982, and by 1986 they were at the top of the three step pay grid for the classification of Highway Carrier 2. In 1986 a number of individual grievances and a union grievance were filed alleging that the positions occupied by enforcement officers were improperly classified.

While the grievances were still outstanding, the employer unilaterally reclassified all enforcement officer positions from Highway Carrier 2 to Highway Carrier 3. This of course included the two grievors. In March and April of 1989 respectively, the Grievance Settlement Board issued two decisions covering all of the grievances. In substance, the Board determined that the positions in question were

improperly classified and issued "Berry orders" directing that they be properly classified.

This led to negotiations between the employer and union for a new class series called the Transportation Enforcement Officer ("TEO") series. On January 30, 1991 agreement was reached on the wording for class standards covering TEO 1 to TEO 3. The agreement had the result of merging a number of existing classifications within the new TEO series.

The Civil Service Commission approved the new class standard series retroactive to February 15, 1990. Negotiations followed under article 5.8 of the collective agreement for a pay scale for the new class series, and for grid placement of the employees occupying the affected positions. With the assistance of a mediator, on June 27, 1991 agreement was reached. On July 17, 1991 the parties executed formal minutes of settlement.

The present grievances arise out of disagreement as to the proper interpretation of the terms of those minutes of settlement. The relevant portions read as follows:

Wages

the weekly wage rates as of February 15, 1990 for the three classifications in this series shall be as set out below. The Transportation Enforcement Officer 1 classification shall have 2 semi-annual steps. The Transportation Enforcement Officer 2

and Transportaion Enforcement Officer 3
classifications shall each have 3 annual steps.

Transportation Enforcement Officer 1	\$698.08	717.00	
Transportation Enforcement Officer 2	\$779.80	803.04	829.36
Transportation Enforcement Officer 3	\$819.96	846.61	878.45

Implementation

Without prejudice and without precedent and because the new classification of Transportation Enforcement Officer has resulted in the merger of several different classifications, the parties agree that employees will be placed on the Transportation Enforcement Officer salary grids in the following manner:

1. Employees presently classified as Inspector 1, Vehicle Inspection, Inspector 2, Vehicle Inspection, Highway Carrier, Inspector 1, Highway Carrier, Inspector 2, or Highway Carrier, Inspector 3 will be placed on the step of the Transportation Enforcement Officer salary levels that corresponds to their years of service in their former positions as at April 1, 1986 or such later date as may be appropriate.

It is agreed that those employees currently classified as Inspector 1, Vehicle Inspection, Highway Carrier, Inspector 1 or Highway Carrier, Inspector 2 will be reclassified as Transportation Enforcement Officer 1.

Those employees currently classified as Inspector 2, Vehicle Inspection or Highway Carrier, Inspector 3 will be reclassified as Transportation Enforcement Officer 2.

2. Employees who are presently classified as Employment Standards Auditor 2 (atypical) in positions titled Highway Carrier Safety Inspector employed by the Ministry of Transportation will be placed on the Transportation Enforcement Officer 3 grid effective February 15, 1990 in accordance with the Campbell Award. Inasmuch as it is the intent of the parties to re-create history to the extent possible, it is

agreed that employees in this group who are to be placed in accordance with the Campbell Award will be so placed after re-evaluating their original placement on the Employment Standards Auditor 2 grid, taking to account where on the then existing grid the promotional rules would have placed them had the new Transportation Enforcement Officer 1-3 grids been in existence at the time of their promotion to Employment Standards Auditor 2.

(Emphasis added)

The dispute relates to the effective date of the reclassification within the new TEO classification and the grid placement of the two grievors. The union takes the position that as a result of the employer's unilateral reclassification the grievors were "presently" (i.e. as of the date of signing July 17, 1991) classified as Highway Carrier 3. It is agreed that under the new series their positions get assigned to TEO 2. The union takes the position that the settlement requires that employees be placed on the step of the TEO salary levels "that corresponds to their years of service in their former positions as at April 1, 1986". The union points out that as at April 1, 1986 the grievors had held their positions as Enforcement Officers for 4 years. Since a TEO 2 under the settlement reaches the maximum step of the grid in 3 years, it is the union's position that the two grievors must be placed at the maximum step of the TEO 2 salary grid. It is alleged that the employer breached the

terms of the settlement by placing the grievors at the bottom step of the grid.

The employer submits that the phrase "presently classified" must be taken to mean "classified as of April 1, 1986". In addition, it is contended that the years of service to be considered in grid placement must be the years of service in the employee's former classification. In other words, the employer would have the Board read the phrase "in their former positions" as meaning "in their former classifications".

Employer counsel recognized that given the language used, his interpretation at first glance may look awkward. He submitted that the Board should "read in" the date of April 1, 1986 and deem "position" to mean "classification", because that was the deal struck on June 27, 1991 as understood by both parties and because the union's interpretation causes confusion in the implementation.

Faced with language that on its face appeared to support the union's interpretation, counsel sought to adduce extrinsic evidence relating to the negotiations that preceded the execution of the settlement. He put forward two grounds as to why that should be permitted. First, he submitted that such evidence would establish that during negotiations the union

made representations which would estop it from taking the position that it now takes as to the meaning of the settlement. Secondly, counsel argued that extrinsic evidence was admissible because the terms of the settlement are replete with patent and latent ambiguities. The majority of the Board ruled that the extrinsic evidence would be received for the purposes of the estoppel argument, but subject to a determination to be made later as to whether the evidence is admissible on the grounds of ambiguity.

The employer's estoppel argument is not supportable by the evidence. In order to establish an estoppel there must be a clear representation by the union either by words or action, that it agrees with the employer's position on the disputed issues. The final deal was struck on June 27, 1991 between Ms. Kathy Brown on behalf of the employer team and Mr. Brian Gould representing the union negotiating committee in the presence of a mediator. While Ms. Brown testified that she understood that Mr. Gould had agreed to the employer's position, she could not point to anything that Mr. Gould may have said or done to communicate such agreement. Nor was there any written exchanges between the parties indicating such agreement. This evidence falls far short of the standard required to prove a representation for purposes of establishing an estoppel.

Now we turn to consider whether the Board should rely on extrinsic evidence relating to negotiating history leading up to this settlement. Such evidence may only be used by the Board as an aid to interpreting the language of the settlement, if the Board finds the language used to be patently or latently ambiguous. Patent ambiguity is where the language used is on its face ambiguous. This would be the case where particular words or phrases used have different possible meanings. We have no difficulty concluding that the disputed language in the settlement document is not ambiguous on its face. The words "presently" and "position" have well understood plain meanings and are not by themselves capable of conflicting interpretation. Therefore, we find that there are no patent ambiguities in this document.

Latent ambiguity is where the language, though clear on its face, creates ambiguity in application and in practice. However, one must be very careful in determining whether a latent ambiguity exists. Often the language used by the parties may be capable of different interpretations and constructions. The notion of latent ambiguity, however, does not include generally "all cases of doubtful meaning or application". [Leitch Gold Mines Ltd. v. Texas Gulf Sulphar Co. Inc., (1969) 1 O.R. 469 at p. 524]. As arbitrator Weatherill stated in Re Int'l Nickel Co. of Canada, (1974) 5. L.A.C. (2d) 331 at p. 334, the notion of latent ambiguity

"should not be, and was not intended to be taken so far as to open the door to the admission of extrinsic evidence whenever a disagreement as to the construction of a document arises. If that were allowed, the strength of a document such as a collective agreement would be greatly reduced, and the well-established rules respecting the admission of extrinsic evidence would be meaningless". The mere fact that the application of the plain meaning of the language used leads to unfair or illogical results also should not automatically lead to the admission of extrinsic evidence. The process of collective bargaining is such that not infrequently, under the severe pressure to reach a settlement and end protracted negotiations, parties may agree to language despite the irrationality or unfairness. Sometimes a party may be willing to live with such a result because as a trade off it had gained concessions from the other party in an area it considers to be more important. Therefore lack of rationality or fairness does not necessarily lead to a conclusion that the document is latently ambiguous.

In our view, for there to be a finding of latent ambiguity in terms of ambiguity in application, the party alleging ambiguity must not only establish that the language leads the irrational or inconsistent results, but that such irrationality and inconsistency was such that it is reasonable

to conclude that the parties could not possibly have intended such results.

In the present case, a careful review of the settlement as a whole, establishes that the language used if applied literally, does lead to such illogical and untenable results that it is reasonable to conclude that the parties could not have intended such consequences. The settlement as a whole clearly indicates that the parties intended its terms to apply to all employees in the stated classifications, including those who had left employment prior to the date of settlement. Thus, for purposes of retroactivity, the document is said to cover "all persons who are or were classified as ...". However, in implementing the new classifications it refers to "employees presently classified as". If the plain meaning of "presently" is taken to mean the date of execution of the settlement, ie. July 17, 1991, the implementation will be limited to those persons who were classified in the stated classifications as of July 17, 1991. It would not apply to those employees who had left employment prior to that date. It is our conclusion that having provided for retroactivity for all employees who "are or were" classified in the various classifications, the parties must have intended the implementation of the new classifications also to apply to the same broad range of employees. This is because, unless an employee who was classified at some earlier point was entitled

to reclassification under the agreement, no question of retroactivity would arise. The parties could not have intended to exclude from the settlement all employees who were not presently (ie. as of the date of the settlement) classified in the subject classifications.

Similarly, while the word "position" in normal usage in labour relations has a meaning well established and distinct from the word "classification", in the context in which it is used, it does not make sense. The reference is to "their former positions". The settlement assumes that every employee covered by it has a "former position". However, they do not. For example, Grimes and Craig have had former classifications, but have held the same position of enforcement officer throughout. They do not have a former position. Even after the implementation of the settlement agreement their position remains the same. What changes as a result is not the position but the classification.

We have concluded that this case meets the stringent test for finding latent ambiguity justifying reliance on extrinsic evidence in order to interpret the document in question.

When considering extrinsic evidence relating to negotiations that preceded the execution of the written agreement, the Board must ascertain whether that evidence

indicates that the parties had reached a common understanding as to what the written words mean. Sometimes, extrinsic evidence may not reveal such a common understanding. While the parties may consent to the language used, it may be that each party had a different understanding as to what that language means in the particular agreement. Where this is the case, the extrinsic evidence will be of no assistance in interpreting the written document. The Board then will have to objectively interpret the language as written.

In the present case, we heard detailed evidence from employer and union witnesses who were involved in a series of negotiation meetings that preceded this settlement. The key witnesses were the respective chief spokespersons who struck the ultimate deal between them with the assistance of a mediator. On the disputed language, employer chief spokesperson Ms. Kathy Brown testified that throughout the negotiations the employer persisted with the position that an employee's years of service in the classification he held as at April 1, 1986 determined his or her grid placement effective April 1, 1986 and that from there you move forward in time to determine the grid placement under the new classification. She testified that while the union had initially fought for a step for step grid placement, she understood that the union accepted the employer's position at the end. She further testified that during negotiations

neither side was concerned about employees' positions and that she was not even aware what positions existed. She testified that always the discussion focused on employee classifications, although the words "position" and "classification" may have been used interchangeably. It was her understanding that the phrase "former positions" was used in the agreement to refer to former classifications.

Mr. Gould, the union's chief spokesperson, who struck the deal with Ms. Brown testified that he did not understand that the union team at any time gave up its step for step position on grid placement. While he may have subjectively believed that, his belief is not consistent with our objective interpretation of the evidence, including Mr. Gould's own testimony.

The evidence establishes that this was not a case where the parties went away with different understandings as to how the agreement works. It is clear that both sides used the terms "classification" and "position" interchangeably during the negotiations. More importantly, under cross-examination Mr. Gould admitted that when he used the phrase "years of service in their former positions", he meant to refer to the employees' former classifications. The evidence also establishes that when Mr. Gould wrote "presently classified" in para 1(a), he meant classified as of April 1, 1986. This

is consistent with the evidence from both employer and union witnesses that the intention was to start at 1986 and move forward in time to place an employee on the grid. The drafting of the language was left to Mr. Gould. Mr. Gould candidly admitted that he had to struggle trying to put into written form a complex agreement. Nevertheless, the extrinsic evidence establishes that the parties had understood that the new classifications would be implemented effective April 1, 1986 and that from that date the parties intended to move forward in time. That is consistent with the use of the phrase "or such other later date as may be appropriate" which is clearly intended to permit the inclusion in the settlement of employees who joined subsequent to April 1, 1986.

Similarly, the evidence is not in dispute that the parties intended to count the employee's years of service in his former classification in determining grid placement. Both employer and union chief spokespersons testified that the negotiations were concerned with classifications and that the words "position" and "classification" were used interchangeably. Mr. Gould candidly admitted that when he used the phrase "in their former positions" in the document he meant to refer to former classifications.

The evidence indicates that the language used by Mr. Gould does not clearly convey the intention of the parties as

agreed upon. As union counsel points out the employer team had an opportunity to review the language prior to signing and to point it out. However, the role of this Board is not to penalize one side or the other for its inadequate drafting or negotiating skills. Our role is to ascertain the true intention of the parties.

The evidence before us establishes that the deal struck between the parties was in substance complied with in the manner the employer applied its terms to the grievors Grimes and Craig. The written document, when interpreted in light of the evidence relating to negotiating history confirms that.

Accordingly, the grievances are hereby dismissed.

Dated this 27 day of March, 1995 at Hamilton, Ontario



N. Dissanayake
Vice-Chairperson



M. Vorster
Member



M. O'Toole
Member