PRELIMINARY OBJECTION: WAIVER

FINDINGS AND DECISION IN A DISPUTE

BETWEEN: **NEWFOUNDLAND AND LABRADOR ASSOCIATION OF PUBLIC AND PRIVATE EMPLOYEES**

(hereinafter referred to as "the Employer")

AND: **UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1252**

(hereinafter referred to as "the Union")

RE: **GRIEVANCE OF HUBERT SUTTON**

(hereinafter called "the Grievor")

Appearances: For the Union: Gerard Ward

For the Employer: Randell Earle, Q.C.

Witnesses: For the Employer: Sheila Greene, Q.C.

For the Union: Hubert Sutton
Chris Henley
Linda Chafe
Ettie Bursey

Arbitrator: Dennis Browne, Q.C.

The Arbitration hearing commenced at the Comfort Inn on February 28, 2007, and concluded on January 10, 2008. At the commencement of the hearing, the parties agreed as follows:

1. That the sole Arbitrator was acceptable to the parties and had jurisdiction to deal with the dispute.

2. That the Arbitrator would take written notes and in the event of conflict, these notes would prevail.

3. That the grievance procedure had been properly followed.[1]

4. That the Arbitrator would remain seized of the matter for a period of sixty (60) days following the date of the Award in the event that any interpretation of the Award or its effect was necessary.

5. That witnesses would be excluded from the hearing.

6. That all parties likely to be affected by the outcome of the arbitration had received adequate notice.

7. That Collective Agreement and statutory time limits for making the Award would be waived.

THE EXHIBITS

The following exhibits were entered by consent:

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[1] The Employer gave notice that there was a preliminary objection to be argued with respect to arbitrability.

C1 Collective Agreement (July 1, 2001 – June 30, 2004)

C2 Grievance Form – June 1, 2006

C3 Job posting – May 23, 2006

C4 Seniority roster – February 2007

Other Exhibits:

SG1 Grievance – May 3, 2006

HS1 E-mail – Furlong/Staff – January 14, 2007

HS2 E-mail – Furlong/Staff – May 29, 2006

HS3 Physician Description – Senior Negotiator – May 23, 2006

CH1 NAPE Local Report Forms

CH2 Correspondence - Carter/Henley – July 31, 1997

CH2 Correspondence – Deir/Henley – November 3, 1997

CH4 Correspondence – Deir/ Henley – September 8, 1998

CH5 Correspondence – Deir/Henley – February 18, 1999

CH6 Correspondence – Hanlon/Henley – December 11, 2000

CH7 M.O.U. – NAPE/UFCW 1252 – February 7, 2001

CH8 Collective Agreement – UFCW (Local 1252) and NAPE (July 1, 1997 – June 30, 2001)

CH9 Correspondence – Executive Committee/Members – July 5, 1999

CH10 Negotiations Protocol – September 27, 1999

CH11 Correspondence – Henley/Puddister – June 3, 2004

CH12 Correspondence – Henley/Healey – September 11, 2006

CH13 Correspondence – Henley/Healey – February 5, 2007

CH14 Correspondence – Healey/Henley – January 29, 2007

CH15 NAPE Local Report Form – May 17, 2001

CH16 NAPE Local Report Form – July 24, 2002

EB1 Correspondence – Furlong/Bursey – July 17, 2001

EB2 Correspondence – Bursey/Hanlon – December 3, 2001

EB3 Correspondence – Hanlon/Bursey – March 11, 2002

EB4 Correspondence – Furlong/Bursey – July 10, 2002

EB5 Correspondence – Hanlon/Bursey – August 5, 2002

NATURE OF THE GRIEVANCE

In a grievance dated June 1, 2006, the Union alleges a violation of Article 11 and other related articles of the Collective Agreement. The Union maintains that the Employer failed to make known all of the requirements for the position of Senior Negotiator as posted May 23, 2006. The Union is seeking full redress.

The Employer denies any violation of the Collective Agreement in the circumstances alleged.

THE FACTS

The grievance alleged that the job posting for the position of Senior Negotiator (Temporary) as posted May 23, 2006, stated that the location for the position was Head Office St. John's but this requirement for the position had been relaxed without notice.

By way of a preliminary objection the Employer maintains that this grievance cannot proceed because there is no Collective Agreement in place due to a lack of compliance with Section

135(d) of the *Labour Relations Act*, R.S.N.L. 1990, c. L-1. This decision relates to that objection.

The Article 3 Recognition Clause states that the Employer association recognized the certified bargaining agent of the United Food and Commercial Workers, Local 1252, ("Local 1252") as the sole and exclusive bargaining agent for all employees, save and except the President, Secretary/Treasurer, In-house Legal Counsel/Solicitor and Executive Assistant. A previous Collective Agreement effective July 1, 1997, to June 30, 2001, contained the same recognition clause.

There is some history. Prior to Local 1252's certification as bargaining agent, the NAPE Staff Local 7001 ("Staff Local") was represented by the Union of Business Agents and Associate Employees (UBAAE). There were previous collective agreements between the Employer and UBAAE. In the fall of 1996 there was a strike. During that strike the Staff Local required money. In the result the Staff Local relinquished its affiliation with UBAAE and chose Local 1252 as their bargaining agent. Local 1252 would bankroll the strike; the Staff Local would maintain their autonomy and conduct their local affairs. The first Collective Agreement between these parties was set pursuant to an Order of the Labour Relations Board dated August 4, 1998. A two year agreement was ordered at that time which was in effect from July 1, 1995, to June 20, 1997.

On September 27, 1999, the parties executed a Negotiations Protocol. The Negotiations Protocol was signed by Chris Henley, President of the Staff Local. That Negotiations Protocol stated in part:

- **Proposals will be exchanged on September 27th, 1999. Once the proposals have been exchanged, no new proposals can be put forward unless both parties agree.**
- **All Articles and Sub-Clauses of the Collective Agreement which have not been referred by proposal will be automatically renewed as per the Collective Agreement from July 1, 1995 to June 30, 1997.**

- **If either party withdraws a proposal which it originally initiated and the other party has not countered on, then the issue automatically converts back to Current Agreement language.**
- **When one party agrees with the other party's position on a particular issue, they will signify agreement by expressing the same in the next exchange of proposals and then the item will be considered settled.**
- **Current Agreement signifies July 1, 1995 to June 30, 1997.**

The parties concluded a Collective Agreement effective July 1, 1997, to June 30, 2001. Officials from UFCW, Local 1252, were not involved in these negotiations.

March 11, 2002, correspondence from the Employer to the Staff Local President states in part:

> **At the Board meeting of November 23, 24, and 25, 2001, the Board ratified the recently negotiated UFCW Local 1252/NAPE Collective Agreement.**
>
> **A question arose in the Board's mind concerning the interpretation or application of Clause 12:12(c) which reads as follows: …**
>
> **We wish to serve formal notice that NAPE's interpretation of this clause as it relates to benefits is that the individual who displaces another employee as a result of being incapacitated is entitled to receive the benefits assigned to the position to which the senior employee bumps.**
>
> **…**
>
> **While NAPE does not envision difficulties with the application of this clause, I have been instructed to advise you of NAPE's interpretation by way of this letter.**

On April 16, 2002, the parties executed another Collective Agreement. Signing on behalf of the United Food and Commercial Workers Union, Local 1252 – NAPE Staff were Phyllis Loder, Chris Henley and Ettie Bursey. Ettie Bursey was President of the Staff Local at the time. Ettie Bursey also signed Letters of Intent appendixed to the Agreement.

There was evidence of various correspondence, including a July 10, 2002, letter from the Employer to Ettie Bursey, President - UFCW, Local 1252, which stated in part:

> **The Executive of NAPE is seeking approval of the Staff Local to hire on contract a person to carry out a research project (or series of projects) for a six (6) month term.**
>
> **The individual will be hired through the Public Policy Internship Program at Memorial University.**
>
> **President Tom Hanlon or I will be available to discuss this with your (sic) should you require any additional information.**
>
> **…**

On June 3, 2004, the President - Staff Local wrote the employer as follows:

> **RE: Staff Collective Agreement**
>
> **Please be advised that at a meeting of the Staff Local on June 2, 2004, it was decided unanimously that we would write and request that the current Collective Agreement be extended for two (2) years without any change.**
>
> **I hope that you and your Executive will concur.**

A September 11, 2006, a letter from the Local Union President to the Employer stated in part:

> **RE: Staff Contract Negotiations**
>
> **Further to our conversation of today's date on the above referenced topic, I am writing as President of the Staff Local and chief spokesperson for the Negotiating Team with the following without prejudice offer.**
>
> **Without opening the NAPE Staff contract for any other reason, we would be prepared to extend the contract for the next two years with the understanding that the same general increase of 3% per year, which was granted to the Public Service, be given to the staff in the same time frame.**

> **If this offer is agreeable to you and your Negotiating Team, we would be happy to sign an appropriate MOU. If your Team is not in agreement, then you can let us know and we will prepare a full set of proposals.**
>
> **…**

The Chair of the Employer's Negotiating Team wrote Chris Henley, President of UFCW Local 125 on January 29, 2007, as follows:

> **I am happy to inform you that NAPE's Negotiating Committee received approval on its recommendation to NAPE's Provincial Board of Directors at its January 26 and 27, 2007, meeting, to accept your proposal on behalf of NAPE Staff on September 11, 2006.**
>
> **I will be in contact with you in the coming days to have the proper Memorandum of Understanding drawn up and signed.**
>
> **…**

On February 5, 2007, Chris Henley, the President of NAPE Staff Local 7001 (UFCW, 1252) wrote the Employer as follows:

> **Re: Staff Negotiations**
>
> **Further to your letter of January 29, 2007 concerning the above-referenced topic, I am happy to hear that our proposal has been accepted by the Provincial Board of Directors.**
>
> **With this letter, you can consider the matter formally closed and the contract will be extended until 2008.**
>
> **Again, on behalf of the NAPE Staff Local, I would like to thank you and your Negotiating Team for your cooperation in this matter**.

The grievance was filed June 1, 2006.

POSITION OF THE PARTIES

The Employer

It is the Employer's position that the matter is not grievable. The employee is working out of the St. John's office and is also required to attend to functions in the Central Newfoundland office. The facts do not support the grievance. This grievance was filed not as a result of a job competition, but rather as a result of the filing of a grievance by Elaine Price alleging personal harassment. The Union cannot come to an Employer and grieve when the foundation of the grievance is the harassment of another employee. Article 43.02 is relevant. A victim is to be protected from repercussions resulting from a harassment complaint. *

The Employer's preliminary objection is based on the fact that the Union has not complied with the requirements of Section 135(d) of the *Labour Relations Act*, R.S.N.L. 1990, c. L-1. There is evidence that the certification is held with the UFCW, Local 1252. The NAPE Staff Local pay UFCW, Local 1252, to represent them. It is UFCW, Local 1252, which determines whether a matter goes to arbitration. UFCW, Local 1252, has a board of directors and a constitution. It is the UFCW, Local 1252 which is required to execute the Collective Agreement pursuant to Section 135(d) of the *Labour Relations Act*. In this instance, this was not done. There was a failure to comply with those provisions of the Act.

The Collective Agreement has not been executed as required in law and the parties cannot contract out of public legislation. There has been case law in reference to this very issue. The Labrador West Integrated School Board decision was subject to judicial review and confirmed by the Supreme Court, Trial Division. This case is similar.

Section 135 of the *Labour Relations Act* is enabling legislation and cannot be waived. The *Labour Relations Act* in this Province is an extensive piece of public policy legislation. Because the Union has not complied with the Act there is no collective agreement under which this grievance can proceed. It follows that the preliminary objection must be upheld.

* **The parties did not pursue this particular issue in their submissions pertaining to the preliminary objection. It appears that this issue was intended to be dealt with as a part of the substantive issue relating to this grievance.**

The Union

This grievance pertains to the job posting of Senior Negotiator. Seniority was ignored as the requirements for the position were relaxed after the position was filled. In the result there is a violation of Article 11 and all other related articles of the Collective Agreement.

As to the preliminary objection, the Employer's position is not on point. The Employer has always dealt with the Staff Local which has autonomy. Correspondence entered into evidence supports that position, as does the testimony of the various witnesses. There is evidence that the Employer sought the Union's permission in hiring students and in other day to day issues. To accept the Employer's argument now would have the effect of stating that there never was a Collective Agreement in place. Certainly, that runs contrary to the contract the parties have been following over the years.

The Employer has signed Collective Agreements with this Union and these contracts have been recognized as governing the relationship between the parties. The fact is that this Local Union has had little involvement with UFCW, Local 1252, other than the filing of grievances. The certified bargaining agent agrees with the practices of the Local Union.

Clearly, estoppel and waiver applies here. The Employer has, by its words and actions, recognized the Staff Local and the Collective Agreement. The Employer cannot now appear in arbitration following ten (10) years of collective bargaining and state that there was never in fact any collective agreement between the parties in the first place. There is clear undisputed evidence of recognition over a long period of time. There has been plenty of opportunity at the bargaining table for the Employer to raise any of these issues. The Employer never did and always recognized the bargaining relationship throughout negotiations and in various collective agreements.

In support of its position, the Union referred to excerpts on estoppel from Brown and Beatty's Labour Arbitration in Canada 2:2000 and the various cases, including: Treasury Board and NAPE Re: Group Grievance – Correctional Officer (Browne) (Unreported, 1997); and Treasury Board and NAPE Re: Group Grievance – Marine Services (Browne) (Unreported, 1999). It is the position of the Union that these preliminary objections should be dismissed and the arbitration proceed to the substantive issue.

CONSIDERATIONS AND REASONS FOR THE DECISION

The relevant articles of the Collective Agreement include:

Article 2 Definitions

2.01 (o) "Union" is defined as the United Food and Commercial Workers, Local 1252

Article 3 Recognition

3.01 The Association recognizes the certified bargaining agent of the United Food and Commercial Workers, Local 1252, as the sole and exclusive bargaining agent for all employees, save and except the President, Secretary/Treasurer, In-House Legal Counsel/Solicitor, and Executive Assistant.

Section 2.(1)(w) of the *Labour Relations Act*, R.S.N. 1990, c. L-1, states:

2. (1) In this Act

…

(w) "trade union" or "union" means a local or provincial organization or association of employees, or a local or provincial branch of a national or international organization or association of employees within the province that has as 1 of its purposes the regulation in the province of relations between employers and employees through collective bargaining but does not include an organization or association of employees or a council of trade unions that is dominated or influenced by an employer;

135. An application to the board or a notice or a collective agreement may be signed,

(a) where it is made, given or entered into by an employer who is a natural person, by the employer personally;

(b) where it is made, given or entered into by several natural persons who are jointly employers, by a majority of the natural persons;

(c) where it is made, given or entered into by a corporation, by 1 of its authorized managers or by 1 or more of its principal executive officers;

(d) where it is made, given or entered into by a trade union or employers' organization, by the president and secretary or by 2 officers, or by a person authorized for the purpose by resolution passed at a meeting of the trade union or employers' organization.

The Employer has raised a preliminary objection. The Employer therefore bears the burden of proof.

Sack and Poskanzer in Labour Law Terms: A Dictionary of Canadian Labour Law define "burden of proof" as follows:

> burden of proof — obligation to prove one's case by affirmatively establishing the facts in dispute; the burden of proof in arbitration and other civil proceedings requires proof of the facts by a preponderance of evidence ….

Brown and Beatty in Canadian Labour Arbitration at 3:2400 state:

> The obligation of having the onus or burden of proof means that the party bearing it will not succeed when, on the basis of the evidence adduced and argument presented, the result has not been pointed to one way or the other in the mind of the arbitrator. That is, for the party with the onus of proof to succeed, the scales must tip in its favour.

The Union has stated in part that the Employer has waived its rights in reference to raising an objection based on Section 135(d) of the *Labour Relations Act*.

In <u>Labour Arbitration in Canada</u> Mitchnick and Etherington write at p. 173:

> 10.6.3 Waiver
>
> In cases in which a breach of procedural provisions concerning discipline is alleged, it is frequently argued that the claim should be denied because the grievor's conduct made it impossible for the employer to comply with the agreement, or because the grievor and the union either waived their rights or should be estopped from enforcing them. The leading decision of Arbitrator Burkett in *Canada Post Corp. and C.U.P.W.* (Gibson) (1992), 29 L.A.C. (4th) 7 deals with all three types of arguments. Although it recognizes that, where an employee's conduct prevents the employer from complying with notice requirements (as, for example, where the employee "disappears"), the union may be precluded from relying on the employer's subsequent breach of procedural requirements, the case appears to set a fairly high threshold for misconduct that will be sufficient to relieve the employer of its collective agreement obligations. Serious misconduct on the part of the employee constituting a repudiation of all obligations under the agreement may be required.
>
> Arbitrator Burkett also sets stringent standards for a finding of waiver. He reiterates his observation in *Hickeson-Langs Supply Co. and Teamsters, Local 419* (1985), 19 L.A.C. (3d) 379 (See Chapter 10.6) that arbitrators should be reluctant to find that a substantive right has been waived. He goes on to hold that, while waiver may be implied from a party's conduct, the waiver must be intentional and voluntary, and the other party must have altered its position in reliance on it. The union must clearly and unequivocally waive the procedural safeguard, and the waiver must occur with full knowledge of the rights that the procedure was intended to protect and of the effect that waiver will have on the process. Moreover, the arbitrator ruled, there must be direct evidence that the union put its mind to the question and purposely waived the employee's right. In the absence of such evidence, an arbitrator should be reluctant to infer waiver from the mere failure of the union to raise the procedural breach during the grievance procedure. Estoppel arguments were rejected on the basis of similar reasoning.

Here the Employer's preliminary objection is that the Collective Agreement does not meet the requirements of Section 135 (d) of the *<u>Labour Relations Act</u>*, R.S.N.L. 1990, c. L-1. The case upon which the Employer is relying, the <u>Labrador West Integrated School Board</u> case, deals with the Newfoundland *<u>Teachers Collective Bargaining Act</u>*, and not Section 135(d) of the *<u>Labour Relations Act</u>*. I am not satisfied, based on the evidence and the submissions, and the language of Section 135(d) of the Act, that the Employer has proven that any failure by the Trade Union to follow the proper procedural requirements of Section 135 of the Act would

render the Collective Agreement a nullity in this instance. However, there is a further reason why this preliminary objection cannot succeed.

It is the Employer's position that the Union's signatories to the Collective Agreement, the employee Staff Local representatives who signed on behalf of the Trade Union, are neither the President, Secretary, nor Officers of the Trade Union. The Trade Union, Local 1252, has, over the years, acquiesced to the practice of the Staff Local executing Collective Agreements on its behalf. Prior to this arbitration, this issue was never raised by the Employer. Indeed, based on the exhibits entered into evidence, it would be reasonable to conclude that the Employer and the Staff Local have a good working relationship.

There is evidence that the parties have been before the Labour Relations Board where a first Collective Agreement was imposed pursuant to the provisions of the Act. The November 3, 1999, Collective Agreement was executed by the Staff Local, as was the current Agreement. Extensions and amendments to Agreements were executed in a similar manner.

The documentary evidence shows that in matters pertaining to Collective Bargaining and issues arising in the workplace the Employer dealt exclusively with the Staff Local and not the Trade Union over a period in excess of ten years. There have been mutual benefits within the collective bargaining relationship over a ten year period as is clear from the evidence. The Employer has always recognized the Staff Local as the appropriate vehicle for conducting collective bargaining.

Throughout the relationship, the Staff Local assumed the responsibility to execute Collective Agreements and to deal with the Employer in all collective bargaining matters. The evidence of the President of Trade Union, Local 1252, was that Local 1252 only requires notification of grievances filed with the Employer. Other than that, the Staff Local is autonomous, conducting its own affairs at it sees fit.

I find it disingenuous for the Employer to raise this preliminary objection some ten years into this collective bargaining relationship. Given effect, this would result in an injustice to the employees who comprise the Staff Local. Certainly, it does nothing to further the interests of collective bargaining and the good faith required therein. Good faith requires an absence of ulterior motive or intention to take advantage.[2] There is certainly no labour relations purpose to be found in this untimely objection.

After considering all of the evidence, the jurisprudence, the Act, and the Collective Agreement, I find that the Employer's right to raise a preliminary objection based on s. 135(d) of the *Labour Relations Act* has long been waived.

For these reasons, the preliminary objection is denied. The grievance may proceed to arbitration.

DECISION

In conclusion, having carefully considered the relevant Articles of the Collective Agreement, all of the evidence and arbitral jurisprudence as it relates to this matter, I find that the preliminary objection is denied and the grievance may proceed to arbitration.

DATED at St. John's, in the Province of Newfoundland and Labrador, this 12th day of February, 2008.

Dennis M. Browne, Q.C.

[2] Sack and Poskanzer Labour Law Terms: A Dictionary of Canadian Labour Law