

FINDINGS AND DECISION

IN A DISPUTE
between

INNVEST HOTELS GP VI LTD./QUALITY HOTEL
("the Employer")

and

NEWFOUNDLAND ASSOCIATION OF PUBLIC & PRIVATE EMPLOYEES
("the Union")

Policy Grievance

APPEARANCES:

For the Employer:

Presenter: Mr. Harold Smith, QC
Advisor: Mr. Kurt Schoenberg, General Manager

For the Union:

Presenter: Mr. Frank Pittman, Employee Relations Officer, NAPE
Advisor: Ms. Judy Portes, Local President
Witness: Mr. Chris Henley, Employee Relations Officer, NAPE
Ms. Rowena Best, Employee Relations Officer, NAPE
Ms. Judy Portes

Arbitrator: Dr. John Scott

Statement of Grievance reads:

"Violation of a past practise in the workplace. Policy Grievance.

Requested adjustment reads:

"Back pay, across the board adjustment to reflect present and future employees during life of the contract in accordance with Article 25 - 25:01."

The grievance was heard in St. John's, Newfoundland on February 11, 2009.

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed and had authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing have received notice and been informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure were either properly observed or are waived;
- all witnesses were excluded until all their testimony had been heard;
- the Arbitrator will remain seised of the matter for period of thirty (30) calendar days after its publication should issues of interpretation of the Award arise.

ITEMS TAKEN INTO EVIDENCE:

- Consent #1 Grievance 19 May 2008
- Consent #2 Current Collective Agreement, October 1, 2007 to September 30, 2010
- Consent #3 Letter: Mr. Schoenberg to Mr. Pittman, May 27, 2008
- RB #1 Prior Company Collective Agreement October 1, 2004 to September 30, 2007

COLLECTIVE AGREEMENT ARTICLES:

ARTICLE 3 - DEFINITIONS

3.02(q)"Probationary employee" means any employee who has not completed his/her probationary period within the meaning of Article 11.01 of this collective agreement.

3.02(0)"**Part-time employee**" is an employee who has completed his/her probationary period and normally works less than twenty-four (24) hours per week. This designation does not preclude being scheduled for additional weekly hours. A part-time employee may become a full-time employee after having worked a thousand (1,000) hours during the period, calculated from January 1st to December 31st. However, this does not apply in cases of replacements for work accidents, unpaid maternity/paternity leave.

ARTICLE 8 - GRIEVANCE PROCEDURE

8.01 Definition of Grievance

A grievance shall be defined as a dispute arising out of the interpretation, application or alleged violation of the Collective Agreement.

8.07(a) Policy Grievance

Where a dispute involving a question of general application or interpretation occurs, or where a group of employees or the Union has a grievance, it shall be initiated at Step 2. Grievances arising from disciplinary measures shall be initiated at Step 2.

ARTICLE 11 - PROBATION. DISCHARGE. SUSPENSION AND DISCIPLINE

11.01 Probationary Period

11.01(a) The probationary period shall be sixty (60) days worked effective the date of the signing of this collective agreement.

11.01(b) Part-time employees who apply for and receive a full-time position within the same classification shall not be required to work a second probationary period.

11.01(c) During probation, an employee will not have recourse to article 8 "grievance procedure" and article 9 "arbitration procedure" in the case of lay-off and/or termination.

ARTICLE 13 - PROMOTION AND STAFF CHANGES

13.06 The employee whose above-mentioned application has been selected is entitled to a training period up to a maximum of fifteen (15) working days for Front Office positions however five (5) working days for all other positions, after which, if he/she cannot perform adequately, will be returned to his/her previous position.

ARTICLE 18 - VACATION PRIVILEGES

18.01 The Company recognizes the need for rest and recreation on the part of employees and has, therefore, provided the following Vacation Plan.

- (a) All employees are entitled to an annual vacation, whose length and payment are determined by the number of years of continuous service as at December 31 st of the preceding year....

ARTICLE 25 - AMENDMENT BY MUTUAL CONSENT

25.01 It is agreed by the parties to this Agreement that any provision in this Agreement, other than the duration of Agreement, may be amended in writing by mutual consent and such amendment(s) shall form part of this Agreement.

SCHEDULE "A"

<u>Department</u>	<u>Classifications</u>	<u>Probation</u> 60 days 80%	<u>Training</u> 180 days 90%	<u>Final Rate</u>
<u>Front Office</u>	<u>Front Desk Person</u>			
	01-10-2007	\$10.70	\$12.03	\$13.37
	01-10-2008	\$11.02	\$12.39	\$13.77
	01-10-2009	\$11.46	\$12.89	\$14.32

OPENING STATEMENTS

FOR THE UNION Mr. Pittman indicated that the Union seeks an interpretation of the language of the Collective Agreement, particularly of Schedule A, which, in the Union's submission, is being misinterpreted by the Employer.

Mr. Pittman pointed out that Article 8.01 defines a grievance as "a dispute arising out of the interpretation, application or alleged violation of the Collective Agreement." The Union seeks to have the grievance heard in the light of the general definition set out in that article .

The Union undertook to show the proper interpretation of the provisions of the Collective Agreement in dispute.

The issue is whether or not the required period of 60 days probation is to be included within the 180 days training period set out in the Schedule A. The Employer submits that the two periods are discreet. As a result, in the Employer's view the final rate of pay is not due until employees reach a total of 240 days, which is the sum of the 60 day probation plus the training period of 180 days. The Union argues that, as set out in the Schedule A, the 60 day probation period forms part of the overall 180 day training period, and that the final rate of pay is therefore due once employees complete a total of 180 days.

FOR THE EMPLOYER Mr. Smith urged that the grievance be dismissed on its face by virtue of a number of irremediable flaws in the grievance itself. The grievance claims to be about "past practise". However, past practice is an aid to interpretation. As such, it is not a substantial right and not subject to grievance. The Employer therefore seeks to have the matter dismissed.

EVIDENCE

THE FIRST UNION WITNESS was Mr. Chris Henley, ERO for NAPE since 1991 and Chief Negotiator for the October 1, 2007 - September 30, 2010 Collective Agreement (Consent #2).

Asked to explain his understanding of the intent of Article 8.07 (a) "Policy Grievance", Mr. Henley said that the wording is clear and requires that a grievance be initiated where there is any "dispute" that involves a question of general application or interpretation. That is the case in the instant grievance since the Parties clearly require an interpretation to resolve their dispute as to its meaning.

All the clause really means that it is not just a question of an employee having a complaint. The bargaining unit can have a complaint and an interpretation issue.

Asked to provide his understanding of Article 25.01, Mr. Henley said that...

During the course of any collective agreement there may be things that crop up that may need to be addressed by the Parties. This (provision) is fairly standard in all our collective agreements. After a contract there maybe issues that require fine tuning in order to make the Collective Agreement work. Lots of times the Parties agree to this with respect to implementation ... and this clause lets this happen.

Asked to provide an understanding of Article 11.01(a) Mr. Henley said:

This sets the effective date of a probationary period. In almost every collective agreement we have probationary periods. The language may differ and specific conditions may differ, but the concept is you must have a probationary period and the employee shows his best and the Employer is able, during the period, to assess whether the employee is suitable and able to do the job. The issue is to train and test for a particular period, and then it is a "yes" or "no" at the end of the period. The Collective Agreement says there is no grievance if it doesn't work out.

Asked whether the probationary period is part of the training period, Mr. Henley said:

Oh yes. Going into a work environment, employees require familiarization with the work to be done; and under supervision he learns how the job is to be done. This includes general behaviour. What is clear is it is taught through a hands on supervision. It is ongoing.

Mr. Henley also provided his understanding of Article 3.02(o) definition of part time employee, noting that the Article stipulates that

"A part time employee may become a full time employee after having worked a thousand (1000) during the period calculated from January 1 to December 31..."

Mr. Henley testified that the 1000 hours would include the probationary period.

The 1000 hours is the qualifier period. It used to be so many days, but we looked at it, and the Employer suggested we use hours, so we went to a 1000 hours... Every hour that someone works counts towards the 1000.... You can't get 1000 hours in sixty days, so every hour counts.

Mr. Henley also confirmed his understanding that Article 18, (Vacation Privileges), includes the time worked during the probationary period. "Yes, they are all the hours worked."

Invited to comment on the wording of Schedule A, Mr. Henley testified that:

The Employer says that the 60 day probationary period is not part of the 180 day training period. The Union claims that the 60 days are included in the 180 day training period.

Asked if he is aware of any mutual agreement under Article 25.01 that would enable the Employer to amend Schedule A, Mr. Henley said, "No, there was no mutual consent." He also offered his opinion that the intent and wording of Schedule A agreed by the Parties provides that:

The first sixty days is at 80%, and on the 61st day the employee goes to the second level; while on the 181st day the employee goes to full pay. That is what was intended.

ON CROSS EXAMINATION Mr. Henley testified that there is nothing specifically referenced in Article 25.01 that covers the terms, "back pay" or "across the board adjustment" as set out in the Grievance (Consent #1).

It does not specifically refer to these issues, not in the Article itself. But the grievance does say that we've agreed to amend the Collective Agreement only under Article 25.01, and that the future must be treated the same as the past.

Asked whether the progression from 80% to 90% to full pay is set out in prior collective agreements, Mr. Henley said:

Prior to the previous Collective Agreement there was a probationary rate and a job rate.... Under Schedule A of the Collective Agreement, a front desk person hired as of 01-10-2009 would earn \$11.46 per hour for 60 days, and then would earn \$12.89 for 120 days.

Asked why the Collective Agreement speaks of training as taking "180 days" rather than "120 days" and whether, on his view, probationary people are underpaid for the 60 sixty days, Mr. Henley said: "No, because they are probationary."

Asked what Schedule A has to do with Article 25.01 as suggested by the Grievance, Mr. Henley answered: "25.01 is the amending article, so it really has nothing to do with Schedule A."

ON REDIRECT EXAMINATION, Mr. Henley testified that the 120 days remaining after the sixty day probationary period has elapsed is a further training period amounting to 180 days in total. Asked why the probationary period is paid at a lower rate, Mr. Henley said:

The issue has to do with previous agreements that had probationary and job rates. During negotiations they agreed to put in the third level, and they are calling it "training" days. I don't know why. The only training days in the Collective Agreement are the five days referenced in 13.06 and another reference to 15 days. That's the only references to training in the Collective Agreement. All the training is what we have referred to as on-the-job training by a lead hand / supervisor. It's a lead hand process.

THE SECOND UNION WITNESS was Ms. Rowena Best, Employee Relations Officer for NAPE for the last six years. Ms. Best was Chief Negotiator for the 2004 - 2007 Collective Agreement between the Parties, the Agreement immediately prior to Consent #2. Ms. Best identified that immediately prior Collective Agreement as RB #1.

Asked whether RB #1 had contained any changes over the collective agreement that had preceded it, Ms. Best said:

Yes. We changed the probationary period to include a probationary period, a training period, and then a final rate, whereas previously there had just been a probationary period and a final rate.

Asked what she meant by using the verb "to include" in her answer, Ms. Best testified:

It's all part of the probationary period, but for the first sixty days the rate is 80% and for the next 120 days they are still probationary but it is at 90%. Once they complete the 180 days they go to the final rate.

Asked why the training period was put in to the Collective Agreement, Ms. Best testified:

The training period wasn't in the prior Collective Agreement... On the 61st day the employee moves to the training rate and then on the 181st day the employee goes to the final rate.

There was no cross or redirect examination.

THE THIRD UNION WITNESS was Ms. Judy Portes President of the Local Union, She has been House Keeper for thirteen years and has served on the Union executive in various capacities for nine years. Ms. Portes filed the instant grievance.

It was brought to my attention that some employees had expected to begin receiving the final rate of pay on the 181st day, and when it did not come they asked me to look into it. It was common knowledge among the staff that you got your final rate of pay on the 181st day.

Ms. Portes confirmed her understanding that the 60 days was included in the 180 days, and testified that there were five staff people who did not receive the full pay on the 181st day and three who did.

Yes. Three people have received the full rate starting on the 181st day; but with Kurt's letter (Consent #3) there were a couple who had received it and another staff member who also received it, a maintenance man, Mr. Paul Norman.

Ms. Portes confirmed that the 3 step process began with the 2004 Agreement (RB #1).

That was when that was negotiated... The three people who got their final rate of pay on the 181st day all happened after the change in the Collective Agreement since 2004. The other people who didn't get their increase in pay after the 181st day had to wait for the 240 days to go to the final rate of pay. The Employer is adding the sixty day probation to the 180 day training period. That's where the 240 days is coming from. The employees' interpretation is that once they reach 181 days they get their full rate of pay.

ON CROSS EXAMINATION Ms. Portes confirmed that Article 25.01 does not make any specific reference to wages of any kind. She added, however, that:

Article 25.01 does deal with the issue in that if it would have been agreed then the amendment that would have gone hand in hand.

Asked whether it is her testimony that some amendment was agreed between the Parties that the increase to full rate would occur on the 181st day, Ms. Portes answered:

No, there's no agreement to amend what the Collective Agreement says about the 181st day. We're complaining that the Parties did not sit down to agree the matter. That is what the reference to Article 25 is about. Article 25 has been violated because they would not sit down. It was not going any further.

(For the Union Mr. Pittman noted that the Union is not claiming violation of Article 25.01.)

Ms. Portes acknowledged that in his (Consent #3) letter Mr. Schoenberg acknowledged there had been two mistakes made in respect to early payment of the final rate. She also said that "four or five members of the bargaining unit did not get the final rate at the 181st day."

Asked how it is possible to establish a past practice based on these facts, she answered:

If you give it to some and not to others then there is a past practice.... you always get the final rate when you get to the final rate day.

Ms. Portes acknowledged that the Collective Agreement does specify 180 days at 90%, and was asked whether, on her preferred interpretation, the Collective Agreement should require 120 days at 90%. Ms. Portes answered: "No. We say that 60 days is at 80%." Asked whether, it is her view that those who received the lower 80% rate for sixty days were under paid Ms. Portes said: "Maybe it is."

ON REDIRECT EXAMINATION Ms. Portes confirmed that for the first sixty days the probationary employees are paid at 80% and then advance to the "training" period on the 61st day at which point they begin to be paid at 90%.

Three employees did get the final rate at 181 days. This happened after the Collective Agreement had been changed in 2004.

NO FURTHER EVIDENCE: Citing Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para 2:1300, the Employer relied on the lack of inherent jurisdiction in an arbitrator to allow a grievance formed so defectively as the instant grievance statement, and chose to call no evidence. The hearing proceeded directly to argument.

ARGUMENT

FOR THE UNION, Mr. Pittman argued that the instant grievance is grounded in a dispute between the Parties as to the general application of a Collective Agreement provision negotiated initially in 2004 and continued into the current Collective Agreement. The Grievance is properly brought under Article 8.07(a), and as such, must be heard on its merits, in the Union's view.

Prior to the initiation of the problem clause in the 2004 Collective Agreement, there was no "training" period. After the training period was introduced in 2004, three people were paid full rate after they had completed 180 days; that is they received full pay after a total of the 60 day probationary period and together with the further 120 days, totalling 180 days. Later, five other people did not get their pay at 181 days point, but were delayed in receiving full pay until their 241st day.

After filing the grievance the Union received the Consent #3 letter from Mr. Schoenberg, General Manager, in which the Employer claims there was a mistake in paying the full rate after 180 days. In the Union's view, however, the mistake is being made now in the Employer's refusal to pay until the 241st day. There is no reference in the Collective Agreement to "240" days. There are only references to 60 days and 180 days.

Furthermore, it should be noted that the Collective Agreement does not specify what percentage constitutes the final rate. It does not say "100%". It just records the varying dollar amounts of what it calls the "final rate" for each classification and anniversary date.

Clearly, there is reference to 1,000 hours in Article 3.02(0), which defines a "Part-time employee" as

an employee who has completed his/her probationary period and normally works less than twenty-four (24) hours per week. This designation does not preclude being scheduled for additional weekly hours. A part-time employee may become a

full-time employee after having worked a thousand (1,000) hours during the period, calculated from January 1st to December 31st...

All hours must count if this provision is to make sense.

It should also be noted that Article 13.06 is the only article that references "a training period". The SCHEDULE "A" reference to "Training", is designed to include the 60 day probationary period but to pay for it at a higher rate, rather than to extend the period as a whole.

Mr. Pittman referred to Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 4:2100 which sets out the principles guiding interpretation of a collective agreement. He also called attention to para. 4:2110 which requires that normal ordinary meanings must be attached to the provisions of a collective agreement. Special note should be taken of the fact that there is no mention of 240 days in the Collective Agreement, and there is no mention of 100%, as Mr. Schoenberg's letter suggests, in the Collective Agreement

Mr. Pittman also called the Arbitrator's attention to *Brown and Beatty* at para. 4:2300, which requires the arbitrator to look at the purpose of a particular provision. When seen from this perspective, it is the Union's contention that the Arbitrator must rule that the proper interpretation is that the final rate of pay is payable at 181 days.

FOR THE EMPLOYER Mr. Smith argued that the Arbitrator should bear in mind *Brown and Beatty* commentary at para. 2:1300, particularly in determining whether, as the Employer itself has set out in its opening statement, the Arbitrator considers the grievance properly formed, and whether he has authority to deal with it under the Collective Agreement. There are three grounds on which an arbitrator may be seised of any matter: the Collective Agreement, statute, and the submission to arbitration in the form of the filed grievance. As para. 2:1300 makes clear, the definition of the grievance is crucial.

There is no inherent jurisdiction in an arbitrator. The jurisdiction must be defined by the statement of grievance. In this case the grievance does not stand up. There is no past practice which can be relied upon, since it is an aid to interpretation and not a substantial grievable right. There is no matter for the Employer to answer here. In any case, there has been no evidence of a past practice. Past practice is not established on the basis of one or two events, especially since it is clear that an error was made. The Union says that there has been some past practice, but the

Employer has no knowledge of any. It is not grounded in the Collective Agreement. A mistake is just that. It is not a past practice. The Employer did not require repayment of the money paid. It simply ceased allowing the error to continue.

Article 25.01 has not been violated. There was no side agreement specifying that the parties should be paid on the 181st day. That Article cannot be breached. Lack of jurisdiction requires the Arbitrator simply to dismiss the grievance.

The Employer's decision not to call evidence is based on the grievance as stated. There is no evidence that any of the matters claimed occurred. The grievance must, therefore, fail. The Union is arguing that there is an underlying dispute here and that that underlying dispute has to do with the interpretation of the Schedule A.

It is clear that the Employer acted in good faith and in an attempt to dispel any confusion in crafting its response in evidence as Consent #3. The evidence is clear that there is simply no ambiguity in the Collective Agreement. The Union says there is an ambiguity. We agree that after the 181st day there is a change but the point is that there is 180 days of training and until that is completed there is no change. Days one to sixty are paid at 80% and then there's 120 days during which there is at pay 90%. Those are 180 days of training. That's what the normal ordinary meaning of the Collective Agreement calls for.

If the Arbitrator were to take the Union's view it would, in effect, make the probationary period redundant and meaningless which is not permissible under the Collective Agreement. The Arbitrator is really being asked, in effect, to amend the Collective Agreement which is not the role of an arbitrator as is made clear at *Browne & Beatty 2:1202*.

In the alternative Mr. Smith argued that Palmer and Palmer *Collective Agreement Arbitration in Canada*, 3rd Edition (pp. 120-121) provides a clear test. It is the responsibility of the grievor to show the preferability of the grievor's interpretation. The onus is on the Union to show the preferability of its interpretation of the Collective Agreement, not just that it is equally valid with the Employer's. If equality were established, then the grievance would still fail.

To include the 60 days within 180 days set out in SCHEDULE "A" flies in the face of the Collective Agreement. Article 11 makes clear there is no continuity for the probationary period. The 180 days are separate from the probationary period. Other matters in the Collective

Agreement hang on a 60 day probationary period having meaning.

In the Employer's view, therefore, there are two points that the Arbitrator must bear in mind. First, the grievance as presented cannot be sustained. There is no evidence of any violation as claimed, and therefore no remedy that can be offered.

As to what the Union claims is the real issue, the interpretation offered by the Union is simply inconsistent with the Collective Agreement. There has been no interpretation advanced by the Union that could be regarded as preferable to the Employer's.

IN REBUTTAL ARGUMENT, Mr. Pittman again pointed to Brown and Beatty at para. 2:1300 and noted that the Arbitrator can be seised of a grievance that does actually require attention. The Arbitrator does have such authority. There is an issue here. It has to be addressed. The Arbitrator does not have the right to ignore the real issue here, as Brown and Beatty make clear.

In the Union's view it is an absurdity to argue that the probationary period does not count toward the 180 days. The language does not support Mr. Schoenberg's reference to 100% in his letter. Where does the Collective Agreement refer to 100%? Nor is there any reference to 240 days in the Collective Agreement.

The Union grieved this matter at the first occasion an employee failed to receive the final rate on the 181st day.

CONSIDERATIONS

Positions of the Parties:

The Union submits that the instant Policy grievance arises out of a dispute over the Employer's failure to observe the requirements of Schedule "A" of the Collective Agreement by delaying payment of full salary to new employees until their 241st day, whereas, in the Union's view of the Collective Agreement, full salary is due on the 181st day.

The Employer responds that the grievance must be denied as unsustainable on various grounds. In the Alternative, the Employer also submits that the grievance can not succeed because the Union's interpretation of the provision in dispute is not preferable to the Employer's.

Jurisdiction of the Arbitrator:

The Employer argued that the Policy Grievance as submitted is improperly formed: 1) in that it complains of a violation of "past practise in the workplace", a matter which is not, in itself,

subject to arbitral adjudication; and 2) in that it requests a remedy under Article 25 which is not open to an Arbitrator to provide.

The Union argued that the grievance is appropriately submitted and must be sustained in its present form as a policy grievance, which is defined at Article 8.07 as proper "Where a dispute involving a question of general application or interpretation occurs". Such a grievance is also admissible under Article 8.01 definition of grievance: "A grievance shall be defined as a dispute arising out of the interpretation, application or alleged violation of the Collective Agreement."

Finding:

In their submissions, both Parties referred to Brown and Beatty *Canadian Labour Arbitration* (4th ed.) para 2:1300 "The Submission to Arbitration" which reads, in part:

Just as the collective agreement defines the general scope of the arbitrator's jurisdiction, so the submission to arbitration defines his jurisdiction in the particular case. As was stated by one arbitrator:

This board is mindful of the fact that, unlike the Courts, it possesses no inherent jurisdiction and its jurisdiction and authority in the absence of the mutual agreement of the parties, is that conferred upon it by the collective agreement and the grievance or submission to it.

The submission may consist of the written grievance or it may be an independent document. But regardless of the form, once the submission is made the arbitrator cannot of his own volition extend, amplify, or add to the issues, or substitute other issues for or in lieu of the issues defined by the submission to arbitration. However, if there is agreement to do so or if there is conduct amounting to acquiescence in the modification of the submission then the arbitration board may thereby acquire jurisdiction.

Necessarily, the arbitrator will be required to construe the submission to arbitration or grievance in the context of the collective agreement to determine its scope. For example, one arbitrator has held that a representation rights issue could not be separated from the merits of a dispute, so that the subsequent amendment of a grievance to deal with this issue was permissible. In this regard a distinction must be made between a grievance which is merely lacking in particularity and one which fails to define or include a matter and thereby put it in issue in the dispute. If the written grievance is merely too vague, that will not affect the arbitrator's jurisdiction and it may be cured by giving particulars, or by granting an adjournment. However, an award will be quashed if an arbitrator orders the discharge of an employee for failure to pay dues as required by the union security provision, where the submission to arbitration does not expressly confer upon him the authority to do so...

I note that, in her testimony, the Union Officer who filed the grievance, Ms. Portes, explained why the statement of the policy grievance was framed as a "Violation of a past practise in the workplace....", and why it requested remedies ("Back pay, across the board adjustment to reflect present and future employees...") that are not actually mentioned in the article referenced, Article 25 - 25:01, but provides, rather, that "... any provision in this Agreement... may be amended in writing by mutual consent and such amendment(s) shall form part of this Agreement."

She explained that the grievance had been triggered by the Employer's policy change. Initially the Employer paid two or three new employees their full salary on the 181st day under Schedule "A". Then the Employer began delaying the payment until the 241st day. At this point Ms Portes filed the instant policy grievance because in her view, the Employer's action was an improper change in what the Union's took to be agreed policy under the Collective Agreement. In her view, any such a change must be made, if at all, under the mutual consent process set out in Article 25 - 25:01. But as this alleged policy change in payments due had not been mutually agreed under Article 25.01, she requested that the process set out in that article be observed.

With respect, I find I am not persuaded by the Employer's argument that, because of fatal flaws in the form of the grievance and because the remedy sought is not one an arbitrator can provide, I am without jurisdiction in the matter. While I find the reasoning Ms. Portes used in stating the grievance rather complex, it does explain the rather unconventional way in which she framed it based on her understanding of the issues. The wording of the grievance is recognisably consistent with the actual events and changes of which the Union complains.

Further, I note that the Employer was, in fact, aware of the actual nature of the grievance and of the pay timing requested, as it was presented and argued before me. This is shown in Consent #3, (Mr. Schoenberg's May 27, 2008 letter to Mr. Pittman) in which the Manager says that the earlier pay timing at the 181st for two or three employees was done in error.

Thus, in keeping with arbitral jurisprudence set out in *Brown and Beatty* above, it is clear that the Employer had acquiesced in the form of the instant grievance by responding to it as actually complaining about a substantial right set out in the Collective Agreement, and thus the pay-related remedy sought as one lying within the purview of an Arbitrator. I find that, as set out above and in light of Consent #3, I acquire jurisdiction to deal with the grievance before me.

The Preferred Interpretation?

Union Counsel, Mr. Pittman, cited Brown and Beatty *Canadian Labour Arbitration* (4th ed.) at para. 4:2100 "The Object of Construction: Intention of the Parties", which reads, in part, as follows:

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. As one arbitrator, quoting from Halsbury's Laws of England, stated in an early award:

"The object of all interpretation of a written instrument is to discover the intention of the author, the written declaration of whose mind it is always considered to be. Consequently, the construction must be as near to the minds and apparent intention of the parties as is possible, and as the law will permit."

And further:

"But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention."

Accordingly, 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. Thus, where the parties had detailed in the collective agreement specific elements of management rights, without limitation as to the manner in which they would be applied, an arbitrator was held to have erred in implying that those rights were to be exercised fairly and without discrimination....

When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the purpose of the particular provision, the reasonableness of each possible interpretation, administrative feasibility, and whether one of the possible interpretations would give rise to anomalies...

Mr. Pittman also called attention to para. 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.

Mr. Smith, for the Employer, pointed out that Palmer and Palmer *Collective Agreement Arbitration in Canada* 3rd Edition at p. 120 (paras. 4.6-7) states an important principle of arbitral interpretation:

...It is well to recall that the onus is on the grievor, whether employer, union or employee to establish the preferability of his interpretation of the relevant collective agreement provision....

Therefore, if the weight of evidence and arguments supporting the Union's view as to the proper interpretation of the contract is equally balanced by the weight of evidence and arguments supporting the Company's contention as to the interpretation of the contract, the grievance must be said to fail. (*Welland Vale*, 5L.A.C. 1945 at 1948-1949 Anderson 1954)

I also note, for completeness, Arbitrator Teplitsky's comment (Palmer and Palmer *Collective Agreement Arbitration in Canada* 3rd Edition p. 120 n.11) which reads, in part:

...A board of arbitration must decide the true meaning of the collective agreement. It cannot, in cases where the meaning is uncertain or the provisions ambiguous, abdicate its responsibility to adjudicate by deferring to management's opinions and upholding its interpretation if it is reasonable ...

Clearly, the Union carries the onus to establish, on the balance of probabilities, that its interpretation of the provision is to be preferred.

Finding:

With respect, I find that I am not persuaded that the Union's interpretation is to be preferred in the instant matter. I note, first, that the Agreement states, at Article 3.02(q), that

"Probationary employee" means any employee who has not completed his/her probationary period within the meaning of Article 11.01 of this collective agreement."

Article 11.01(a) then provides that:

"The probationary period shall be sixty (60) days worked effective the date of the signing of this collective agreement."

I note that, at Articles 11.01(b) and (c), rights other than pay-related rights are conferred on employees and the Employer that obtain as a result of having completed (b), or during the life (c) of, that limited 60 day time period. I am persuaded, therefore, that the Probationary Period, as such, stands as a specific and separate issue within the Collective Agreement.

There are, therefore, beyond Schedule "A", at least two provisions in the Agreement that prescribe a "probation period" of explicitly limited duration, requiring that it be 60 days. I see nothing in either Article 3.02 or Article 11 or elsewhere in the Collective Agreement that situates a probationary period within a longer period of training; and nothing in either of those articles to imply or suggest that Schedule "A" intends the 60 day probationary period to fall within the 180 day training period.

I note Ms. Best's testimony that during negotiations the Parties had changed the probationary period to include a probationary period, a training period, and then a final rate.

"Yes. We changed the probationary period to include a probationary period, a training period, and then a final rate; whereas, previously, there had just been a probationary period and a final rate."

However, I see nothing in the Collective Agreement that reflects, or gives effect to, this change to the probationary period. Further, I see nothing in Schedule "A" to show that the interpretation put forward by the Union is preferable to the Employer's. The phrases "60 days" and "180 days" as they appear in the column headings in Schedule "A" denote distinct durations as a normal, ordinary meaning, and one that is consistent with the Collective Agreement read as a whole. If the Collective Agreement intended that the 180 day training were to include the 60 day probationary period, different, and more explicit, language would be required in order to make that clear.

Therefore, with respect, I find that the Employer's interpretation is preferred.

DECISION

In light of the above considerations, I therefore find that

THE GRIEVANCE IS DENIED.

Respectfully submitted as the decision of the Arbitrator.

John A. Scott, PhD.
Sole Arbitrator

March 10, 2009