IN THE MATTER OF AN ARBITRATION:

BETWEEN:

LORD SELKIRK SCHOOL DIVISION,

Employer,

- and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1522,
("CUPE"),

Union.

RE: EA Grievances

AWARD

BEFORE:	MICHAEL D. WERIER, Q.C., Chair KENNETH M. DOLINSKY, Nominee of the Division RICK WEIND, Nominee of the Union
APPEARANCES:	DAVID A. SIMPSON, Counsel for the Division KRISTINE BARR & MORGAN CHAGNON, Representatives for the Union
DATES OF ARBITRATION:	April 26, 27 & 28, and June 22, 2021 (Virtual)

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INTRODUCTION and BACKGROUND

This arbitration involves three interrelated policy grievances dealing with Educational Assistants ("EAs") employed by the Division.

The Union alleges that the Employer has breached the agreement, the *Labour Relations Act* (the "*Act*"), and the *Human Rights Code* (the "*Code*"), by doing three things:

(a) assigning EAs to drive students in their personal vehicles and improperly placing letters in EAs personnel files for refusing to use their personal vehicles;
(b) mandating EAs to have a valid driver's license;
(c) mandating EAs to have access to a reliable vehicle.

The Employer responds that it has the right to do all of the above pursuant to the terms of the agreement, and nothing in the agreement precludes them from doing so, including setting qualifications.

This dispute came to a head in October, 2019. The Union's position is that driving students by EAs was voluntary. The Division maintains that this has been a consistent duty for at least nineteen (19) years, and in any event, they are authorized to require these qualifications and duties.

In 2019 certain EAs objected to driving. The Division received certain representations from EAs outlining their concerns about driving, which included safety, liability and costs which are unreasonable for an employee who earns less than $30,000.00 per year to bear.

The Division took issue with the concerns and reiterated their position that they had the authority to take such actions under the management rights article in the agreement (Article 5), the job descriptions, and Article 25, which contemplates employees using their vehicles for carrying out their duties for the Division.

Estoppel was not an issue raised by the parties.

RELEVANT ARTICLES OF THE AGREEMENT

ARTICLE 5 – MANAGEMENT RIGHTS

5.01 The Board, on its own behalf and on behalf of the electors of the Division, hereby retains and reserves unto itself, without limitation, all power, right, authority, duties and responsibilities conferred upon and vested in by the laws of the province including but without limiting the generality of the foregoing, the right:

- to the exclusive management and administrative control of the school system and its properties and facilities of its employees;
- to hire all employees and subject to the provisions of law, to determine their qualifications and the conditions for their continued employment or their dismissal, demotion, suspension and disciplining, to promote and transfer all such employees;
- to decide upon the means and methods for the most efficient operation of the schools and the duties, responsibilities and assignments of personnel with respect thereto and with respect to administrative activities and the terms and conditions of employment subject to the terms of this Agreement.

5.02 The exercise of the foregoing powers, right, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof and the use of judgment and discretion in connection therewith shall be subject to the terms of this Agreement and in conformance with the laws of the Province of Manitoba.

5.03 The specific terms of this contract shall be the source of any rights that may be asserted by the Union against the School Division.

ARTICLE 9 – CLASSIFICATIONS/RECLASSIFICATIONS

9.01 a) The Employer agrees to maintain the job descriptions and prepare a job description when a new job is created for all positions for which the Union is the bargaining agent. These job descriptions shall be presented to the Union for discussion.

b) When the duties of any job are significantly changed, or when a new classification(s) is established by the Employer, which come within the scope of this agreement the wage rate shall be the subject to negotiations, the Employer shall have the right to temporarily establish a rate of pay until the regular rate of pay for the new classification(s) have been agreed upon. If the Parties are unable to agree on the reclassification and/or the rate of pay for the job in question, such dispute shall be submitted to Grievance and Arbitration for determination. The new rate shall be retroactive to the time the new position was first filled by the employee, or the date of change in job duties.

9.02 Changes in Classification

Employees who are promoted to a higher classification shall be placed on the higher scale at the salary step nearest to, but not less than the rate of pay prior to their promotion.

ARTICLE 25 – USE OF PERSONAL VEHICLE

Employees who are required by the Division to use their own vehicle in carrying out their duties for the Division shall be reimbursed mileage in accordance with Division Policy.

The Division maintains blanket liability coverage for its operations wherein employees are included as named insureds while performing the duties assigned by the Division.

OPENING STATEMENTS

The parties made extensive opening statements and they are summarized below.

Opening Statement of the Union

The Union stated that there were three separate but overlapping policy grievances dealing with the Division changing its policy and requiring EAs to drive. This was a change from the past when they were given a choice.

The Union referred to the job postings for EA positions and that they were all over the map. The Union acknowledged that it bears the onus of showing that the driving of students was voluntary and then said that they can meet that obligation. The Union said

that they don't dispute that EAs drive and it must be as per the policy and under safe conditions.

The Union will be arguing that it is not reasonable to require EAs who earn less than $30,000.00 per year to be required to have access to a vehicle.

The Union stated that the agreement does not support the Division's position. They are well aware of the past practices. Some EAs were asked to drive and did. Others never drove. Others were asked and declined and the Division accepted this.

The Union submitted that the Division's recent decision to direct EAs to use their own vehicles was in violation of the agreement and was an unfair and unreasonable expectation.

By way of remedy the Union stated it was seeking removal of letters from employee personnel files sent to EAs directing them as to the requirement to drive, and that the job descriptions reflect that it is voluntary.

Opening Statement of the Division

The Division opened by addressing the issue of management rights. The grievances deal with challenges to management rights. One grievance challenges the right to assign duties, i.e. driving, and the other two challenge that EAs are required to have certain qualifications to do the job.

The Division stated that the three grievances fall within the ambit of Article 5 of the agreement.

The Division stressed that nothing in the agreement limits their right to assign duties or limits their ability to set qualifications. Article 25 states that employees who are required

by the Division to use their own vehicles in carrying out their duties shall be reimbursed mileage.

The Division stated that the Union was trying to import new provisions into the agreement and trying to fetter their rights. The agreement has expired and the parties are free to advance proposals. At present, there is nothing in the agreement fettering the Division's rights.

The Division maintained that EAs have been driving for years. The Union has not raised issues of ambiguity in the agreement or an estoppel argument. The Division stated that there has not been a change in practise and denies that it has always been voluntary.

The Division said they are authorized to require EAs to drive as per Article 25. Even if the Union perceived it to be voluntary doesn't change the meaning of Article 25.

The Division argued that the requirement to drive was necessary and the Division's willingness to be reasonable shouldn't be used against it. The criteria for using EAs should be negotiated if the Union wishes to make changes.

The Division acknowledged that the job postings that will be in evidence vary in their content, but this doesn't bear on management rights and preclude the Division from exercising their rights as long as they don't act arbitrarily or in bad faith.

The Division stated that the fact some EAs do not want to drive is not a reason to dispense with it.

The Division disputed the Union's allegations that driving with one student is unsafe and the Health & Safety Committee dealt with the issue. The Division asserted that concerns over the lack or inadequacy of insurance coverage while driving is a "red herring". The Division argued that it maintains insurance as required under Article 25. It is a monetary

issue as is insufficient mileage or salary. All these rates have been negotiated by the parties.

The Division stated that it can't be required to bus students. The Union purported to end the practise by writing a letter but the Union can't terminate Article 25. The Union can only plead estoppel but they aren't arguing it. Only the Division could argue it but doesn't need to because of a lack of ambiguity.

The Division argued that all one is left with is that EAs don't want to drive. A ruling against the Division would cause a significant operational impact on it. The Division submitted that it can set conditions of employment and the issue is not what is fair, but what the contract says about its right to assign duties.

NATURE OF THE EVIDENCE

The Union called the following witnesses:

(1) Karen Sinnock, an EA employed by the Division for 26 years.
(2) Darlene Hacking, an EA employed by the Division for 16 years.
(3) Sabrina Taylor, an EA employed by the Division for 12 years.
(4) Karen Smith, an EA employed by the Division for 19 years.

The Employer called the following witnesses:

(1) Shelley Tataryn, Manager of Human Resources of the Division, approximately 4 years in the job.
(2) Debby Grant, Vice Principal of Lord Selkirk High School.
(3) Allan Campbell, Transportation Manager employed by the Division for approximately 3 years.

Thirty exhibits were filed at the arbitration hearing.

EVIDENCE OF THE UNION

Karen Sinnock is an EA who has worked for the Division for 26 years. She has served as President of the Local, which has 261 members, of which 176 are EAs. EA duties vary depending on their location. They assist teachers in the classroom and work with a range of types of students.

She currently works in a satellite dealing with at risk students who do self-paced learning.

Sinnock testified that transporting students by EAs is a choice and is not a duty, task or responsibility.

She has driven students and typically has been asked. She has agreed to do so, but not all the time. She has declined and there were no consequences. She has driven her own vehicle and also has accompanied another EA who was driving a male student. She has also accompanied students on the bus.

Sinnock denied that it was a job requirement to have a license and vehicle. She recalled one job-specific special posting that set out these requirements. The Union grieved and the grievance was later withdrawn because the job was not filled. She stated that she was not aware of other similar postings when she was Union President. She identified a number of job postings that did not include a requirement for vehicle ownership or a driver's license.

Sinnock referred to an email dated September 25, 2017 she sent, in her role as Union Local President, to Shelley Tataryn, the Division's Manager of Human Resources. She was seeking clarification regarding postings and to the reference requesting reliable means of transportation. Tataryn replied that a valid driver's license was not a requirement of the job.

Sinnock identified a letter dated September 17, 2019 from Tataryn to her. Tataryn wrote that EAs were required to use personal vehicles to drive students. Sinnock explained that the Division wanted the Union to deal with it as employees could face discipline up to termination.

Sinnock attended a meeting with the Division on March 11, 2019. Minutes were produced but had not been received earlier. She recalled discussion that employees would be covered for driving under the Division's policy. The employees wanted to know about blanket liability coverage.

The notes reflected that the Manitoba School Board Association had advised that driving a student is an EA choice. The Union agreed and wanted to know the reasons for transporting students. It was explained that one of the reasons was that students got lost going between schools.

The minutes also set out the following:

- Management will look into Summary of Insurance information located on the MSBA Risk Management website to see if this applies to our members.
- Union survey results show that EAs are transporting students to same place. Why can't all travel on school bus (tips, special O, etc…)?
- Use taxi or public transit for work experience?
- Shared survey responses why, where and when EAs are transporting students.
- Union requested the Division to revise the policies that refer to the use of private vehicles and ensure the safety and legal requirements are met when using private vehicles for official business of the Division.
- Union requested a working alone plan and policy that meets the H & S Act as well as a safe work procedure for those who transport students in a personal vehicle.

The Division did not get back to the Union with a summary of the insurance.

The Union did provide the results of their survey of their members. 137 out of 178 responded. 105 out of 137 had driven during their employment. 51 out of 137 had driven during this school year.

Sinnock reviewed the grievances filed by the Union. She stated that the Union's health and safety concerns had not been addressed, including being alone with a student and not being provided with a cell phone. She confirmed that all 178 EAs had not been required to have a license or a vehicle. She confirmed that it has always been a choice to drive. The Division has other options such as the use of buses.

On cross-examination Sinnock clarified that when the Union stated driving was a choice for the EA, the Division didn't disagree. She agreed that the notes of the March 11, 2019 meeting did not include all the Division responses.

Sinnock stated that many EAs drive to work and that EAs had been driving for a long time. She never objected earlier because it was always a choice.

She agreed that she never said it was unsafe to drive prior to 2019, but maintained that was not the basis for her challenge. She was challenging it because it was now made mandatory.

She allowed that the survey reflected that driving is a very regular occurrence for EAs, and that the purpose of driving students is to facilitate programming.

Sinnock confirmed that she had been a member of the Union Bargaining Committee and was familiar with the agreement and Article 5. She agreed that in the abstract, having a driver's license can be a qualification in some instances and that management has the right to set qualifications.

Sinnock maintained that it is necessary to have the driving requirement in the job description, otherwise it is not valid. Even though the job description referred to "other duties as assigned", she had always received confirmation that driving wasn't a requirement.

Sinnock confirmed that the Union was not seeking a new classification and that it had the recourse to grieve. She agreed that Article 25 includes the word “required”.

Sinnock confirmed that School Board Policy on the Use of Private Vehicles on School Business (Reviewed June, 2011) stated that the Board recognizes the need for school employees and volunteers to use their own vehicles for school purposes on occasion.

She also confirmed that Board Regulations (Reviewed June, 2011) stated that staff members shall have valid driver’s licenses and use properly registered vehicles for the transportation of students.

Sinnock agreed that while certain postings did not set out the requirement for a license and vehicle, others did. As to a posting with these requirements in 2018, Sinnock was unable to confirm whether it was grieved or whether the job was filled. She understood the job was not filled and the grievance was withdrawn on the advice of their Union representative.

Sinnock was specifically referred to a series of postings:

- A posting for an EA position at Lord Selkirk School for March 2016 – June 2016. (may require travel with students, valid Manitoba Driver’s License);
- An EA position at Regional Support Centre for November 2010 – June 2011. (drive students (i.e. school activity);
- An EA position at Lord Selkirk School, regular position, beginning October 4, 2010. (job duties include transporting a student to Winnipeg on a regular basis and valid driver’s license and use of personal vehicle required).

Sinnock testified that she didn’t see these postings until reviewing the exhibits for arbitration.

Sinnock acknowledged that she was an EA at the high school in 2010 and transported students to Winnipeg.

Sinnock stated that the Division could use buses if EAs refuse to drive. She was aware that EAs could refuse to do unsafe work. If there were safety concerns, they could file a complaint with Workplace Safety and Health. She confirmed that she knows the Division has insurance as per Article 25.

Sinnock was referred to her email of September 2017 to Tataryn. It was suggested that in the email Sinnock did not reference driving students. Sinnock replied that Tataryn was responding to how employees got to work and doesn't reference transporting students.

Darlene Hacking has been employed by the Division as an EA for approximately 16 years. She commenced work at the Regional Support Centre in response to a posting which didn't identify the job. She transitioned to other schools and has been at the High School for six years.

She drove students quite a bit early on and didn't drive at the High School until 2018. She drove a student to the police station a couple days a week.

In September 2019 at the request of the Division, she detailed her reasons for not being available to drive students. They were as follows:

1. I do not feel comfortable transporting students in my vehicle.
2. Compensation of mileage is insufficient to account for the added insurance and wear and tear on my vehicle.
3. I don't feel safe transporting students off school property.
4. I could be falsely accused by students or their parents of something I did not do.
5. I believed I had a choice of whether I would participate in driving students.
6. I feel overwhelmed by the responsibility of transporting students.
7. Quite often I'm dropped off at work, because my husband needs to use the car.

She explained the basis for her discomfort. She had an experience driving a student who became mad in the car because they were delayed in traffic, and he thought he would be late. He had a history of reacting, slamming fists against the wall and leaving the room.

She was afraid because of the way he reacts. Hacking explained that she was “pretty much done” driving.

Hacking explained her understanding as to whether she had a choice to drive.

She knew she would be driving. It was her job. It didn’t come without worry. The driving requirements weren’t always on the schedule. In 2019 she received the schedule and she felt she should have been asked. She didn’t like to decline but she had to. The assignment involved driving two male students.

She testified that her family has two cars, but there is not access every day.

She stated that she did not believe that the reference to other duties in the job description applied to transporting students.

Hacking referred to Tataryn’s letter to her of October 4, 2019. Tataryn stated that the Division viewed the driving of students as safe work and that EAs were required to drive if instructed. Failure to comply could result in discipline up to and including termination. Hacking had never been disciplined. Hacking reiterated she did not feel safe driving.

Hacking said she was devastated and an emotional wreck as a result of the letter.

She felt none of her points in her letter mattered to the Division. She said she was older, it was a big responsibility and should not be forced on EAs. The job shouldn’t involve driving a personal vehicle.

On cross-examination, Hacking maintained she did not want to drive with a student irrespective of the job description, referring to other duties as assigned. She conceded that when she started driving students, it was her job to do so. At some point she felt she could not drive because it was unsafe. She has never complained to Workplace Safety

and Health and was unaware of the Division's safe work procedure. She acknowledged that the Division had a safety process in place.

Hacking testified that EAs only get paid mileage for driving and that there is not any compensation for wear and tear to your vehicle or for maintenance costs. As to insurance coverage she allowed that her knowledge is based on word of mouth and that she hadn't discussed with the Union.

She acknowledged that she has never been falsely accused by a student. She stated that she had not been provided any training for driving students.

Sabrina Taylor was hired 12 years ago as an EA and assists teachers with students in the classroom and performs lunch duties.

She didn't recall if her job posting contained a requirement for having a driver's license or access to a vehicle. As she recalled, these items were not discussed at her interview in 2009.

She was asked to drive in either her first or second year of employment. At times she refused and the school found an alternate driver.

She has been working at the High School for 10 years. She has declined requests to drive students. When she drove she had not experienced a safety concern but she couldn't guarantee what could happen as "kids are different today and unpredictable". She also stated she had concerns about the insurance coverage while driving students.

On October 3rd she attended the EA meeting where Debby Grant spoke on behalf of the Division. She told the EAs that they had to drive if asked and the vehicle is an extension of the classroom.

She received the letter from Tataryn dated October 4, 2019. She was not very happy with its contents. She was informed that she could possibly be terminated and this was not right because driving was not in her job description. She stated that job descriptions in 2018 did not make any reference to having a license or a vehicle.

Taylor summarized her concerns as follows. Driving involves taking on a huge responsibility and she is not in a position financially to handle it. EAs are not trained and the Division has no idea as to what kind of driver she is or anything about the condition of her car. She was not hired to be a taxi driver. Her job is to work with students in the classroom.

On cross-examination Taylor allowed that her job posting may have included the requirement for a license and a car. In addition to driving many occasions early in her career, she drove a student in 2018/19.

Taylor maintained that after 2018/19, the issue that changed was the liability issue in that EAs weren't covered based on information from MPI. She acknowledged that the Division stated that EAs were covered and Article 25 of the agreement stated that they were covered.

The only clarification received from the Division was that EAs were only covered under this Article if the student damaged the vehicle. She agreed that she was covered under her no-fault coverage with MPI.

Taylor agreed that driving students to programs was positive and good for them and facilitated their opportunities.

Taylor confirmed that she had never experienced a mechanical breakdown while driving or had been abused or had accusations made against her. She also admitted that the problems she referenced in her correspondence only became an issue in 2019. She

stated that children have changed a lot and she felt it was not safe to put her alone with a student.

On re-examination she stated that she isn't left alone in a classroom and shouldn't be left alone in a car with a student.

Karen Smith, an EA for 19 years is employed at Happy Thought School. She has never been asked to drive. She didn't recall the posting saying that a license or vehicle was required and she didn't recall it being stated at her job interview.

She testified that she wouldn't feel comfortable driving as she wouldn't feel safe or comfortable and she wouldn't want the responsibility.

EVIDENCE OF THE DIVISION

Shelley Tataryn has been the Human Resources Manager for the Division for approximately four years. She has responsibilities for dealing with EA issues, including postings and job descriptions.

Tataryn related that transporting students by EAs is a requirement in a number of the Division schools including transport to the pool at the High School. Driving is not considered voluntary and may be required depending on your assignment.

Tataryn explained that she is familiar with Article 25 of the agreement providing for employees submitting forms for mileage. Her first recollection of issues being raised by EAs about driving probably arose in 2018. Questions were being asked about needing a license and about insurance.

Grievances came to her attention and she became aware of the 2018 St. Andrews School grievance which involved a posting which set out requirements for a driver's license and a vehicle. The job was filled and ultimately the grievance was withdrawn.

Three other grievances were filed in 2019 and 2020. In the fall of 2019 concerns were raised about procedures and a Safety Officer worked to create safe work procedures. EAs raised questions at a meeting about insurance coverage and safety concerns while driving. The Division was advised that a group of EAs were refusing to drive students. It was the first time it came up. Debby Grant was asked to follow up.

On September 17, 2019, Tataryn wrote to Karen Sinnock. She outlined things that were done under the agreement and stated that if there were safety concerns, the school should be informed first, and then it can be investigated prior to a referral to Workplace Safety and Health.

Tataryn stated in her letter that EAs had been driving students for nineteen years. The prior Superintendent confirmed this. Tataryn referred to safe work procedures which were done in conjunction with the Union in 2018. The Union never indicated that there would be a refusal by EAs to drive students.

There was a reference in the letter to Workplace Safety and Health. Tataryn was led to believe that issues of safety were the reason for the work refusal.

In the last paragraph of her letter Tataryn wrote:

> "This refusal has a serious impact on the Division's ability to provide programming and support to its students, and in particular to its special needs students. Accordingly, the Union's prompt attention to this matter is critically important. In the absence of an adequate response as outlined above, the Division will have no choice but to consider other measures to address the refusal to perform assigned work."

She was indicating that so much of programming depends on going places with individual students. She raised it with Debby Grant and no other schools refused since then.

Tataryn received a list of Darlene Hacking's concerns dated September 23, 2019 (as noted at page 13 of this Award).

She responded that driving is a duty and is not dangerous work. Tataryn explained that it had been part of EA's duties for as long as she could determine.

Tataryn described receiving letters from EAs expressing concerns about driving, including concerns about mileage and vehicle accidents. There was no indication about safety incidents occurring. These included letters from Taylor and Hacking.

In her letter of response dated October 4, 2019, Tataryn referenced the job description as a way of explaining that it is a job requirement. Tataryn acknowledged that the job description of March 2018 did not reference driving. It falls under other duties as required as it depends on the assignment. Tataryn explained that not every EA drives as part of their duties.

Tataryn was referred to summary notes from the meeting on March 11, 2019 which she attended along with other Division representatives and Union representatives.

The purpose of the meeting was to talk about EAs driving. She was not aware that EAs refused to drive after the meeting.

Tataryn was referred to the summary of a Workplace Safety and Health meeting held on February 25, 2019. It references a Working Alone Policy which was addressed in 2018. The summary also referenced that the Union shared that there was to be a meeting with Division management and the Union to discuss EAs driving students.

Tataryn also identified the December 9, 2019 minutes of a Workplace Safety and Health meeting. It reflected that questions were raised about who has seen the safe work procedure which was in place.

Tataryn testified that this Division procedure had been rolled out at the end of March, early April 2019.

Tataryn acknowledged that there were concerns expressed by the employees about insurance coverage. Her understanding from the Division's broker was that all employees were covered. There had not been a grievance respecting coverage. Nothing had been documented about any incidents.

Tataryn testified that she requested her assistant to compile job postings with a requirement for a driver's license. She identified examples from 2012 – 2016.

Tataryn referenced an exchange of emails between herself and Sinnock a few months after she commenced employment. The emails were about EAs getting to work. There were no discussions that she recalled about driving students.

Tataryn explained that if EAs are not required to drive students, programming will be impacted and students will suffer. Busing was not an option. Costs would be much more.

On cross-examination Tataryn explained that when she stated in her email exchange with Sinnock, "Previously it was asked for a valid driver's license however I understand it is not a requirement of the position, however getting to work is important," she was not fully aware of all of the EA duties. She explained that was the statement she made and she did not reference a specific job posting.

Pressed to explain what she meant, she allowed that she didn't remember all the details, and she was asking Sinnock if she had concerns with it. When she stated a driver's

license was not required she was talking about going school to school, but it is important that EAs get to work.

Tataryn maintained that she didn't believe she had agreed that EAs were not required to drive at work.

She was referred to a 2017 job posting for an EA1 position. She said it was possible it didn't have listed a requirement for a license and a vehicle. Neither did 3 postings in 2019. Tataryn acknowledged that all the duties and requirements should be on the posting.

Tataryn agreed that two job descriptions from 2018 did not set out that a license or vehicle was required.

It was put to Tataryn that based on the postings, job descriptions and her email exchange with Sinnock, that it was evident there was no requirement for EAs to have a driver's license and a vehicle. Tataryn disagreed because what she learned after September, 2017, was that the practise had been ongoing for EAs. They completed information on forms for a driver's license and vehicle.

As to discussions about insurance coverage, all Tataryn recalled was explaining that EAs were covered.

Tataryn stated that she was not aware of the safety incidents that Hacking talked about prior to writing her on October 4, 2019.

Tataryn agreed that the 2018 EA job descriptions did not stipulate that a license or car was required. She also acknowledged that she omitted parts of the job description (6th bullet) when setting it out in the letter.

Tataryn testified that other duties as required in a job description include the right to require driving of students. She allowed that it should be in the job description, but its absence probably had to do with the fact that it was done and not thought of when the job description was revised.

Tataryn stated that some postings list the requirements and others don't. If a program requires it, it is a requirement. It may not be a requirement all the time. She agreed that it should be on every single posting.

Tataryn denied that her letter to the EAs was disciplinary. She maintained the letter wasn't threatening.

On re-direct Tataryn confirmed that the first time she became aware that EAs were refusing to drive was in September, 2019.

Debby Grant is a Vice Principal at the High School and is a teacher and in the Union. She oversees Grade 10 and student services. She has been with the Division since 2005/2006. She oversees 27 EAs. She worked as a physical education instructor at Happy Thought School (Kindergarten to Grade 9).

EAs went to off-site events with her. The school held Special Olympics events and EAs drove students to the school. When she was a phys-ed teacher EAs drove special needs students to athletics events and field trips so the students didn't have to spend the entire day.

She could not remember an EA ever refusing to drive. In 2018 she was involved with a special needs kindergarten student who needed transport. A posting set out a requirement for a license and access to a vehicle. The Union grieved. She was not aware of what happened to the grievance. The position was filled.

Grant was at the High School in 2019 when EAs refused to drive a student to a placement. The objections centered on the student. The EAs did not want to drive.

Grant described the various assignments performed by EAs including, but not limited to, working in the classroom, driving to and from work experiences, driving to appointments including medical ones, and support on the bus. EAs are assigned tasks. It is never presented as a choice. There were no refusals to drive students before 2019 to her knowledge.

She works with Tataryn and Hacking. They gave many reasons for refusing to drive including safety concerns, the fact Taylor shared a vehicle, and Hacking didn't have her vehicle all the time.

Grant reiterated that driving students is part of the EAs assignment. So many students at the High School need help. Needs are constantly changing for students. Block funding changes led to more EAs being used all the time instead of one EA assigned to a student.

Grant testified that without EAs driving, it would be very difficult to follow through on programming. At her school alone they have 37 students aged 15 – 21 and they go to events in different places in one day. There are rural schools that have students that need to be driven. Without EAs driving, there wouldn't be the manpower to sustain certain programming.

Grant stated that she had not received any reports from EAs about any incidents concerning safety.

Grant said that there is always flexibility if an EA didn't have a car available on a given day. The school can go to a back up plan in staffing and it has a buddy system.

Grant hires EAs at the High School. Typically she asks if applicants have a license and a car because it may be necessary. If they don't have these requirements, it can be an impediment to getting the job.

Grant referred to the Division's Safe Work Procedure Policy on Transporting Students to Offsite Activities. Every year, except the past year, the Division goes through these procedures with EAs and asks for their driver's licenses and vehicle registration. In 2019 there were refusals expressed at a meeting and a follow up.

Safe work procedures were drafted. She was not aware if they were addressed at the Workplace Safety and Health meeting.

Grant related that EAs had been transporting students for at least fifteen years in the Division and in other parts of the province.

On cross-examination Grant acknowledged certain EA job descriptions did not refer to a license or vehicle being required but the job description doesn't deal with all the EA responsibilities. Grant could only speak to the interviews she conducted on the issue of whether applicants were told they needed a license and a vehicle.

It was suggested to Grant that if the job description was silent as to these requirements and applicants weren't asked, the requirements were not valid. Grant responded that the job descriptions don't cover all expectations and roles of the EA.

It was put to Grant that some EAs are not required to have a license and vehicle. Grant responded that it depends on the needs. The system has changed and the needs of the students have changed.

It was suggested to Grant that it didn't make sense that some EAs didn't fill out the Employee Driver Form. Grant responded that as far as she was aware, all teachers fill it

out, including herself and teachers. If there are EAs who are not expected to drive, then she was not sure it was filled out.

Grant attended a meeting on October 3, 2019 with EAs to go over procedures regarding driving students. She denied that she told the EAs that vehicles were an extension of the classroom.

She reiterated that she had never received details of safety incidents that needed documentation. Before she was at the High School, there was a situation where a student's behaviour was changing and two EAs were involved in transporting the student. Lastly Grant said it was not her role to determine whether an EA should be fired if they refuse to drive.

Allan Campbell testified. Campbell has been the Transportation Manager for the Division for approximately three years. He supervises sixty bus drivers. He has no role with EAs.

School buses cost approximately $2.92/km. Some costs are fixed (eg. salary) and some are variable (eg. fuel).

There are not sufficient resources to transfer individual students. There is not capacity to transport students individually.

SUBMISSION OF THE UNION

The Union submitted that the three grievances, all taking the same position, should be allowed based on the evidence provided at the hearing.

The Union referenced various articles in the agreement and said the agreement should be read as a whole. They noted that Article 1 states "it is the desire of both parties to recognize the mutual value of joint discussions and negotiations in all matters pertaining

to working conditions". The Union stated that the Employer changed its position in the fall of 2019 by requiring EAs to drive students.

In Article 5.01 the right of the Division to decide upon the means and methods for the most efficient operation of the schools and the duties, responsibilities and assignments of personnel is subject to the terms of the agreement, and Article 5.02 makes the exercise of the Board's powers and policies, rules, regulations and practices subject to the terms of the agreement and *The Labour Relations Act*.

Article 9.01 deals with Classifications / Reclassifications. The Union argued that the requirement for a license and vehicle is not in the job description and if it was, it would trigger a process which includes the right to refer a dispute over pay to arbitration.

Article 25 is entitled Use of Personal Vehicle. Employees who are required by the Division to use their own vehicle in carrying out their duties are to be reimbursed mileage. Under this article, the Division maintains blanket liability coverage covering employees while performing duties assigned by the Division.

The Union stated that the Division rests its case based on this article, but it is not so simple. If you read it as they suggest, all they have to do is pay mileage. The Union suggested that it comes into play if management determines and puts it into a job bulletin that a car and license is required. The Union argued that you can't read Article 25 in isolation and it must be read in conjunction with Article 9 and the agreement as a whole.

The Union alleged that the Division unilaterally changed its practice when it required EAs to drive. The letters sent to EAs were disciplinary and should be set aside.

The Union referenced Article 26, which deals with discipline and discharge. Just cause is required and EAs were entitled to Union representation. Management breached this requirement and letters were handed out without regard for the agreement. In sum, the Union argued that the discipline must be set aside.

The Union referenced the grievances dealing with the requirement for a license and access to a vehicle. Sinnock testified that EAs always had a choice as to whether to drive. She had driven from time to time and on occasion declined. This was accepted by the Division.

Tataryn's emails to Sinnock confirm that there wasn't a requirement for a license and a vehicle. Job descriptions in evidence dated 2018 did not set out a requirement for a vehicle or a license.

A summary of a meeting in December, 2019 set out that driving a student was an EAs choice and management did not disagree with that statement at the meeting.

The Union referred to a driving survey it conducted of its members. 137 EAs responded out of 178 surveyed. 77% had driven students at some time during their employment and 37% had in 2019.

The Union reviewed some of the testimony from the witnesses.

Hacking in early years was not asked to drive. In 2018/2019 she was asked and wasn't comfortable driving with two students. She testified that she felt it was her choice and she had safety concerns. She was not given a choice and felt overwhelmed.

Taylor stated that the posting did not make it a requirement. She wrote about her concern about safety to Tataryn on September 23, 2019. She attended a meeting on October 3, 2019 where Grant told the group that a car was an extension of the classroom. She confirmed receiving Tataryn's letter of October 4, 2019 in which the Division confirmed that it was within its legal rights to direct employees to transport students in their personal vehicles.

The Union referred to Karen Sinnock's evidence that she didn't recall the requirement being in a posting or being asked about it at her interview. She had not been asked to drive in 19 years.

The Union reviewed Tataryn's cross-examination evidence. She confirmed that there wasn't a reference to a requirement to drive in a half time term EA posting in 2019, and no reference in Job Description 2 to requiring a vehicle or license in 2018.

She was asked about her September 17, 2019 letter to Sinnock which referenced the Division having no choice but to consider other means to address the refusal to perform assigned work. Tataryn said it was a duty. She said the Division could require a Clerk-Typist to drive. She confirmed the link between Article 9 and Article 25 and said they had to be read in conjunction with each other and the rest of the agreement.

In her communications to staff she deleted certain words that are in the March 28, 2018 job description and said it may not be a requirement all the time. Tataryn also agreed the requirement should be in the job description.

The Union submitted that some EAs declined to drive and this was accepted prior to September, 2019. There was no discipline nor any evidence of a problem getting others to drive. The Union argued that there is a world of difference between being asked to do something and being told.

The Union stated that the agreement provided a process for resolution.

The Union referred to the following authorities.

1. *Labour Arbitration in Canada* – (Third Edition) Lancaster House. Chapter 17: Interpreting the Collective Agreement.
2. *Re United Automobile Workers, Local 112, and De Havilland Aircraft of Canada Ltd.*, 1961 CarswellOnt 240, [1961] O.L.A.A. No. 2, 11 L.A.C. 350 (Laskin).

3. *Re Steel Co. of Canada Ltd. and United Steelworkers, Local 1005,* 1973 CarswellOnt 1533, 4 L.A.C. (2d) 68 (Weatherill).

4. *Re Board of Governors of the Riverdale Hospital and CUPE, Local 79,* 1983 CarswellOnt 2437, [1983] 0.L.A.A. No. 44, 11 L.A.C. (3d) 267 (Brandt).

5. *Re Hickeson-Lange Supply Co. and Teamsters Union, Local 419*, 1985 CarswellOnt 2615 (Burkett).

6. *Re DTZ Canada Inc. and LIUNA, Local 183 (Garcia)*, 2017 CarswellOnt 2527, 130 C.L.A.S. 149, 275 L.A.C. (4th) 436 (Surdykowski).

7. *Re University of Manitoba and the Association of Employees Supporting Education Services (AESES)* CarswellMan 791, [2011] M.G.A.D. No.32 (Werier).

8. *Re IWK Health Centre v. N.S.G.E.U.*, 2011 CarswellNS 650, 108 C.L.A.S 36, 211 L.A.C. (4th) 326 (Kydd).

9. *Re City of Winnipeg and CUPE Local 500*, 2001 CarswellMan 932, 65 C.L.A.S. 145 (Peltz).

10. *Thunder Bay (City) v. C.U.P.E. Local 87, 1999 CarswellOnt 2943, [1999] L.V.I. 3047-6, [1999] O.L.A.A. No. 642, 57 C.L.A.S.134 (Baum).*

The Union reviewed certain general principles regarding management rights. Management rights are not absolute and there is a duty to act fairly, reasonably and without bad faith, without arbitrariness and in a non-discriminatory fashion. (See *Metropolitan Toronto v. CUPE, Local 43*, 1990 69 DLR (4th) 268, Ont. C.A.)

The Union highlighted the rules of construction in interpreting an agreement. An arbitrator should apply the plain meaning rule so as to ascertain the intention of the parties. It is necessary to look at the words used. In the instant case, this applies to the agreement and the job description.

The Union referenced Arbitrator Laskin (as he was then known) in *De Havilland Aircraft*. In that case, the grievor alleged he was assigned work outside his classification and was entitled to compensation. The job description of a structural assembler required the doing of moderate re-work consistent with the above. Arbitrator Laskin stated at paragraph 13 that “ordinary principles of interpretation require that effect be given to all words agreed

upon in the context in which they are used, at least to the point where absurdity would result."

Ultimately, he decided that the work done in fact exceeded the description in the job description and the grievor was entitled to compensation at the rate of the higher classification.

The Union said the case was applicable here as the job descriptions didn't consistently set out the requirements to have a license, and a vehicle to drive.

Turning to discipline, the Union cited Arbitrator Weatherill's decision in *Steel Co. of Canada Ltd.* The grievor alleged that he was denied the assistance of a Union Steward. The facts were that the grievor was denied the right to have a Steward present at a meeting, which was contrary to the terms of the agreement. Accordingly the grievance succeeded.

The Union submitted that in the instant case there were rights to Union representation set out in Articles 13 and 26 and that the Division ignored these rights.

In *Riverdale Hospital*, the grievor alleged an unjust discharge by virtue of a procedural violation of the agreement in that he was entitled to have representation present when he was given the reasons for the discharge.

The Union argued that Article 26 in the agreement at hand had broader language and a breach of the agreement occurred.

Arbitrator Brandt set aside the termination in *Riverdale*, but noted that the Employer was not precluded from proceeding again with the discharge in the presence of the Union.

In *DTZ Canada*, the Union grieved a written warning to an employee alleging there was not just cause for discipline. The discipline was imposed on the basis of hearsay evidence and was set aside by Arbitrator Surdykowski.

The Union argued that in the instant case the Division could have interviewed the employees before disciplining them. The Division violated the Grievors' rights. The Union argued that the October 4, 2019 letter was strongly worded and mentions discipline, and serves as a warning.

The Union stated that this discipline should be set aside for the reasons outlined above.

In *IWK Health Centre* the Union filed a policy grievance alleging that the classification of Respiratory Therapist became substantially altered when certain additional responsibilities were added. The Union noted that the article in the agreement (Article 33.01) was similar to Article 9.01(b) in the instant case.

In *IWK* it was decided that there was a substantial change and the grievance was allowed. The parties were directed to negotiate a new rate of pay. The Union stated that this is how these articles should operate if a voluntary duty moves to a mandatory one.

The *City of Winnipeg* decision dealt with dissimilar facts, but the Union specifically referenced paragraph 96 where Arbitrator Peltz stated:

> "Reading these provisions of the collective agreement together, I conclude that the purpose and intent of the parties was the following, as applied in the context of the current case. Before the City takes action by revising existing positions or changing methods of operation which affect conditions of employment, the Union will be notified. The proposed changes will then be discussed by the parties. Under Article 6, there is express resort to an Appeal Board as well as arbitration. Under Article 27, there is a 90 day waiting period before the City is allowed to implement a change covered by that provision."

The Union maintained that if one reads this agreement as a whole, Article 25 cannot be read in isolation, but in concert with Articles 5 and 9.01(b).

The Union stated that the Division had unilaterally ended a consensual practice. They did not amend the job description because they didn't want to trigger Article 9.01(b). The Union submitted that is unfair, unreasonable and in breach of Section 80 of *The Labour Relations Act* and the agreement.

In *City of Thunder Bay*, a group grievance challenged the Corporation's requirement that they use their personal vehicles on Corporation business. The agreement set out obligations to consult and meet for the purpose of discussing workplace related issues.

Arbitrator Baum found that the job descriptions stated that use of a personal vehicle may be required and that this set out a general standard and the meaning remained to be clarified. It was the City's failure to consult with the Union as to the actual use of the vehicle which was being challenged.

The Board determined that the language in the agreement limited the exercise of management rights and the failure to consult was a breach of the agreement.

The Union noted that in the instant case, the job description was silent while it was clear in the *IWK* decision.

The Union submitted that the grievances be allowed.

SUBMISSION OF THE DIVISION

The Division opened its submission by emphasizing this case is about management rights and the Union's attempt to fetter those rights. It is not about discipline or Union representation, or about a reclassification request pursuant to Article 9 of the agreement.

The Union says that the Division cannot require the bargaining unit members to drive, have a driver's license or have access to a vehicle. Those are the issues and the Division argued that it has not violated the agreement in any way. The Union is asking for there to be words read into the agreement.

The Division referred to Article 5 – Management Rights. The second and third bullets are the important sections (reproduced earlier). The Division stated that the Union has not pointed to an article which fetters the management rights.

The Division disagrees with the Union's position that driving students was voluntary. Even if this was accurate, this doesn't prevent the Division from exercising its rights to require EAs to drive students.

The Division said that the Union argument is circular. They argue that the Division can't make the EAs drive. So if you put it in the job description or in a posting, they argue that you can't do that.

The Division stated that the Union can't control what goes into the job description and the Union recognizes management's rights to set out duties in a job description, and the law recognizes that right.

The Division stressed that EAs have performed these duties for decades. It is not a new job or a change in the role, but it is a change in the attitude of the EAs towards driving. The Division stated that the Union's own evidence was that a majority of EAs have driven in the course of employment. The Division's evidence is that there were not any refusals to drive students until 2019.

The requirements have been in the job postings for many years (postings in 2010, 2011, 2012, 2013 and 2016). These postings have never been challenged and the Division argued that it defies logic to say it was always voluntary.

In 2018 a Union grievance challenging the requirements was withdrawn. While Sinnock testified that the job was not filled, the Division pointed out that most of the evidence was to the contrary.

The Division's evidence is that if EAs did not drive it would create problems as the key is to meet the needs of the students. Grant testified that block funding results in the Division needing a sufficient number of EAs to drive.

The Division stated that they assign duties and employees are expected to comply. Hacking testified that she didn't want to drive and the Division stated that is why the parties are at arbitration.

Taylor drove in 2018 and refused in 2019 because students have changed and new cars are not safe. The Division pointed out that not one witness could point to a safety issue arising. An example was offered that a student's behaviour could have escalated at a stop sign, but it didn't.

The Division noted that it has a safe work protocol and a functioning Safety Committee. The Division argued that the Union can only reach an agreement to fetter management rights at the bargaining table. They haven't done so.

The Division commented on the Union's argument regarding the alleged disciplinary nature of the letters written to the employees in 2019. The Union's initial issue was with respect to safety.

The Division stated that at the hearing the Union argued out of "both sides of their mouth". While most of their evidence involved concerns about safety, a Workplace Safety and Health complaint was not pursued and they decided to proceed on the issue of management rights.

Tataryn's evidence was that the letter to employees was not disciplinary. The Division argued that the Union knew that the letter was not disciplinary because they didn't grieve.

The Division referred to the wording of the grievance. There isn't any reference to a disciplinary letter, to Article 26 (Just Cause), or to the failure to have a Union representative present. No individual grievances were filed. The Division noted that the Union requested removal of the letters from employees' personnel files in the grievance, but they didn't reference discipline or just cause.

The Division maintained that the letters were not intended to be disciplinary. The letter dated October 4, 2019 to Ms. Taylor is in relation to dangerous work and says the Division welcomes further discussion. Division counsel allowed that it was not until the Union tendered its authorities, did the Division realize that the Union was arguing the letter was disciplinary and that there was a failure to have Union representation.

The Division stressed that the key from their perspective is that EAs can't refuse to do work required by management to be done.

The Division turned to the issue of the job descriptions and postings. The Division denied that Tataryn was hiding things in her letter to the EAs. The Division stated that job descriptions cannot contain a list of all duties and there is a catch-all phrase of "further duties as may be assigned".

The Union has the right under Article 9.01(b) to take action if duties are significantly changed or when a new classification is established. There is no reference in the grievance to this.

The Division argued that every EA witness acknowledged that driving facilitated students receiving programming which is tailored for their needs. This demonstrates that the Division was acting in good faith, with a lack of arbitrariness or capriciousness.

As to the job postings, the Division submitted that many over time included some reference to driving. Grant testified that she asks every candidate about driving. The Division witnesses were clear that it is necessary to have EAs drive to meet the educational objectives for the students.

The EAs offered that there were alternatives including public transport, school buses and parents. The Division countered that they cannot make parents drive.

The Division stated that even if the Union could establish that driving was voluntary, their recourse was to seek a higher wage rate, not the remedy they were seeking. The Division maintained that was why the Union has not grieved on that basis.

The Division countered that Article 25 already addresses additional compensation by reimbursement for mileage. This is what the Union negotiated and if they want more, this can be negotiated.

The Division challenged the Union's assertion that driving by EAs is a significant change as many do it and have done it for years. The Division said that if the Union wanted to propose seniority-based driving, they are free to do so at any time.

The Division responded to the witness concerns about liability and insisted that insurance was not an issue.

The Division denied that Tataryn's email was an agreement not to assign driving duties. The email did not deal with driving students.

The Division relied upon the following authorities and cases:

1. *NGF Canada Ltd. v. Workers United Ontario Council* (2010), 194 L.A.C. (4th) 264 (Ont. Arb.);

2. *FFAW-Unifor and Molson Coors Canada (Plant Power Engineers)*, 2017 CarswellNfld 443;

3. *O.N.A., Joseph Brant Memorial Hospital v. Joseph Brant Memorial Hospital* (1972) 24 L.A.C. 104;

4. *United Way of Greater Victoria v. CUPE, Local 50*, 2019 CanLII 28152;

5. *Chronicle Journal (Horizon Operations (Canada) Ltd) v Communications, Energy and Paperworkers Union Of Canada, Local 191*, 2003 CanLII 68736;

6. Brown & Beatty 5:2230 – Job Description; and

7. *C.U.P.E., Local 87 v. Schreiber (Township)* 2003 CarswellOnt 8677.

The Division's comments on the authorities are as follows:

NGF Canada Ltd.

The Employer submitted that Arbitrator Surdykowski's decision sets out the clear statement that simply if employees regarded certain work as voluntary, this does not restrict management rights to assign these certain tasks to employees.

In *NGF* the issue was whether any article in the agreement fettered the company's freedom to assign lunchroom cleanup work to bargaining unit employees. Among other things, the Union asserted that any such assignments may be and some have been voluntary.

In rejecting the grievance, the Arbitrator stated the following at paragraphs 18, 20, 21 & 22:

18 In the absence of estoppel, and even if all of the facts asserted by the Union with respect to past analogous assignments of work were proved true, the mere passage of time does not have the effect of freezing a management right, or of transforming a unilaterally instituted management practice not mandated by the collective agreement into a collective agreement restriction on the exercise of that management right. (See, *Brewers' Warehousing Co. v. United Brewers' Warehousing Workers' Provincial Board* (1985), 21 L.A.C. (3d) 327 (Ont. Arb.) Brunner; *De Havilland Aircraft of Canada Ltd. v.*

C.A.W., Local 112 (1987), 27 L.A.C. (3d) 97 (Ont. Arb.) (Foisy); and *Re Bowater Pulp and Paper Canada Inc. and I.U.O.E., Loc. 865*, November 11, 2002, unreported (Surdykowski)).

20 First of all, slippery slope arguments are rarely persuasive. Grievances are determined on the basis of what is or necessarily must follow, not on the basis of what might happen.

21 Second, I am satisfied that the Company has not acted in an arbitrary manner or in bad faith. An employer acts arbitrarily when it makes and implements decisions that affect employees capriciously, without regard to necessity, reason, or principle. An employer acts in bad faith when its actions are motivated by "ill will", hostility, dishonesty, malice, personal animosity, or other improper considerations. (See: Adams, George, *Canadian Labour Law* 2nd edition; and see also *Complex Services Inc. v. O.P.S.E.U., Local 278* [(February 21, 2005), Clay Appleton Member, Edward E. Seymour Member, Owen V. Gray Chair (Ont. Arb.)] (2005) CanLII 40169 (Gray, Chair), and *Alcan Wire & Cable v. U.S.W.A.* (1992), 26 L.A.C. (4th) 93 (Ont. Arb.) (Tacon).) There is no dispute that there was a cleanup issue, that whether or not it was the right place to raise it the issue was brought to the JHSC, that whether or not the Union representatives on the JHSC agreed to how the assignment would be made they agreed that there was a problem and that employees would be assigned to deal with it, that the Company gave some thought to the manner in which employees would be assigned the cleanup work, and that whether or not it was the best approach decided that since most if not all employees use the kitchen (and must have ready access to the subsequently added eyewash stations) it would be fairest and least burdensome to assign the work to all bargaining unit employees on a rotating basis so that no employee would have to perform the task more than twice each year. Whatever one may think of the Company's approach I am satisfied that it is not arbitrary and that the Company has not acted in bad faith. Nor do I see anything unfair about the manner in which the Company has chosen to deal with the issue.

22 Third, the residual management rights theory underlies the collective bargaining regime in this jurisdiction. This means that a unionized employer must act in a manner that is not arbitrary, discriminatory or in bad faith, but retains all of an employer's usual management rights except to the extent that the collective agreement fetters any such right expressly or by necessary implication. There is no management right that is more fundamental than the right to organize and direct the workforce, and more specifically to assign work to the employees. Indeed, unions generally spend much collective bargaining time and effort trying to negotiate collective agreement provisions which do just that. Clear collective agreement language is required to fetter an employer's right to assign work. There is no such clear collective agreement language that operates to fetter the Company's general management right to assign the cleanup work in issue in this case. On the contrary, the Company's management right to operate and manage its business in a manner consistent with the collective agreement includes the right to assign work as it sees fit subject only to the express provisions of the agreement (and any applicable legislation).

In sum, the Division said the same principles apply to the instant case. There is nothing in the agreement to fetter the management rights article to assign work. Further there is no evidence of bad faith, or evidence of the Division acting arbitrarily and in a capricious manner. Everyone agreed that driving students was an important function.

The Division stressed that it was not relying solely on Article 25, but was relying on Article 5, dealing with management rights.

FFAW-Unifor

This case involved a grievance that workers were forced to work outside their classification and without compensation. The Union requested that the parties be directed to negotiate a new wage rate. The Employer argued that the agreement does not restrict them from adding duties which are ancillary and were not arbitrary or done in bad faith.

It was decided that the assignment of shifts did not violate the agreement and was a legitimate exercise of management rights.

O.N.A., Joseph Brant Memorial Hospital

Here, the Union grieved that the hospital created a new occupational classification, Team Leader. The Hospital said the reorganization was open to it under its management rights article. The Board stated it was a change of duties within a job classification and not the creation of a job.

To create a new classification there must be a substantial qualitative change.

Brown & Beatty

The authors state that the presence of a job description *per se* does not restrict management from reorganizing or altering the content of jobs.

The Division argued that having a job description doesn't freeze those terms for the life of the contract.

C.U.P.E., Local 87

In this case the Union grieved the Employer's decision to change job descriptions by requiring a higher level of educational qualification.

The Board stated that absent limitations in the agreement, the Employer can unilaterally change job qualifications as long as the change is reasonable and done in good faith for valid business reasons related to the work being done. The Division highlighted that the Board stated that these principles have been recognized for a long time in many decisions through the years.

The Division argued that in the case at hand, the qualifications had been in place for years.

The Division referenced paragraph 24 of the decision where Arbitrator Dissanayake confirmed that it is management's prerogative to determine proper qualifications unless the agreement says otherwise.

United Way of Greater Victoria

In this case the Grievor was dismissed during her probation because she didn't have a valid driver's license. The Employer maintained it was exercising its management rights in carrying out the termination.

The Grievor was dismissed. At paragraphs 104 and 105, Arbitrator Saunders set out the rationale for the decision and due to its applicability here, it is reproduced below:

104 The general framework for analysis begins with the proposition that the Employer has the management right to set qualifications reasonably related to a job, subject to express restrictions under the Collective Agreement. The Employer must act reasonably in its response to loss of a required qualification, regardless of whether the employee is a probationer or holds regular status. This framework is described in Andres Wines at paragraph 43 as follows:

> 43 It is settled that the power to establish qualifications for jobs is a natural incident of management even where there is no express provision in a collective agreement to that effect: *Re United Brewery Workers, Local 173 and Carling Breweries Ltd.* (1968), 19 L.A.C. 110 (Christie). It being a discretion of management, the jurisdiction of an arbitration board to review a qualification this established is limited: *Re Bank of British Columbia and Union of Bank Employees, Local 2100* (1982), 133 D.L.R. (3d) 227, [1982] 3 W.W.R. 722, 35 BCL.R. 334; see also *Simon Fraser University and Assoc. of University & College Employees, Local 6, Teaching Support Staff Union*, BCL.R.B. 169/83 [2 C.L.R.B.R. (N.S.) 329 (Black)]. In all events we consider that the *Bank of British Columbia* case is not authority for the proposition that a board cannot review the manner in which qualifications are established to assure that they are not set arbitrarily, discriminatorily or in bad faith. In *Re Reynolds Aluminum Co. Canada Ltd. and Int'l Molders & Allied Workers Union, Local 28* (1974), 5 L.A.C. (2d) 251 (Schiff), the board defined its jurisdiction in a concise and oft-quoted manner, at pp. 254-5:
>
> > In the ordinary exercise of management functions employers may determine in the first instance what specific qualifications are necessary for a particular job and what relative weight should be given to each of the chosen qualifications. After the employer has made the determination, arbitrators should honour the managerial decisions except in one or both of two circumstances: first, the employer in bad faith manipulated the purported job qualifications in order to subvert the just claims of employees for job advancement under the terms of the collective agreement. See *Re United Brewery Workers Local 173, and*

> *Carling Breweries Ltd.* (1968), 19 L.A.C. 110 (Christie); *Re Textile Workers Union and Lady Gault Towels Ltd.* (1969), 20 LA.C. 382 (Christie); *Re Canadian Trailmobile Ltd. and U.A.W., Local 397* (1973), 2 L.A.C., (2d) 13 (Brown). Secondly, whether or not the employer had acted in good faith, the chosen qualifications bear no reasonable relation to the work to be done. See *Re U.A.W., Local 707, and Ford Motor Co. of Canada Ltd.* (1970), 21 L.A.C. 61 (Weatherill); *Re Oil, Chemical & Atomic Workers, Local 9-14, and Polymer Corp. Ltd.* (1972), 24 L.A.C. 277 (O'Shea).

105 The evidence shows the licence requirement is reasonably related to the RDO job. I also find that driving to workplace accounts has always been a key part of this job. Burrows did not deny that driving was factored into the initial evaluation of the RDO job. His point was that driving one's car for work is optional under this Collective Agreement.

Chronicle Journal

In this case the Union grieved that the posting requiring a vehicle as a condition of employment was contrary to the agreement. The grievance was dismissed because nothing in the agreement precluded the Company from issuing such a posting.

The Division argued that nothing in this agreement fetters the right to assign duties. Management rights should govern.

The Division distinguished the authorities relied upon by the Union. Nothing in this agreement fettered management rights to assign duties.

The decision in *IWK Health Centre* involved a reclassification when new duties were added. The duties in the instant case were always present.

In *City of Winnipeg*, Arbitrator Peltz was dealing with the removal of a vehicle allowance. The matter was tied to a specific provision in the agreement. Such clauses do not exist here.

In the *Thunder Bay* decision, there was a failure to consult, which was not the issue in this case.

In sum, the Division argued that there was nothing in the agreement which fettered management's rights to assign duties. Other residual restrictions were not proven. The grievances therefore should be dismissed.

ANALYSIS AND DECISION

The Union's three policy grievances relate to the Division's requirements that EAs have a valid driver's license and access to a vehicle in order to drive students in the course of their employment.

We note that the Union's grievances make no mention of the Division wrongfully disciplining the EAs without just cause or in failing to have Union involvement at the time of the alleged discipline.

The Union made no mention of discipline in their opening statement at the arbitration. Yet they brought forward evidence regarding this issue and placed weight on this aspect of the case.

The main legal issue and the essence of the grievances in our view is whether the Division can require EAs to have a driver's license and have access to a motor vehicle in order to drive students in the course of employment. Linked into this main issue is whether the content of job descriptions and/or job postings in any way restricts management rights to assign duties.

The parties were at odds on a number of factual issues, particularly pertaining to the timing of instituting the requirement to drive. These factual issues warrant comment prior to proceeding to the legal analysis.

The Union maintained that the Division changed its practise in 2019 for EAs driving students and that it was always voluntary until then.

The Division vigorously disputed the Union's assertion and maintained that the driving requirement dated back at least nineteen years.

We received certain documentation on this issue including job postings and job descriptions. We also received details of a Union survey of the EAs as to their driving history in the course of employment. 137 out of 178 responded. 77% of EAs had driven some time during their employment, and 37% in 2019. The survey did not ask the question as to whether EAs were required to drive or volunteered.

There clearly was inconsistency in the content of the job postings. However, the documentation in evidence before us demonstrates that as far back as 2010, EAs were required to drive and have a driver's license and access to a vehicle.

For example, a 2010 job posting stated that job duties included "transport a student to Winnipeg on a regular basis . . . skills and abilities required . . . valid Manitoba driver's license and use of personal vehicle during the workday."

This requirement to drive is reflected in Article 25 of the agreement.

We also heard inconsistent evidence as to whether EAs were told at job interviews that they were required to drive. Grant's evidence on this point was clear that she stipulated this requirement in the interviews she conducted.

We draw the following conclusions. There was evidence that in this large School Division some teachers were assigned to drive students and in certain instances volunteers were requested.

There was also evidence of job postings dating back many years which set out requirements for a license and a vehicle. There is no evidence of the Union filing grievances with respect to such postings.

Therefore we reject the Union's submission that there was a wholesale change in 2019. While certain EAs may have no longer wished to drive, there is ample evidence that the Employer had required EAs to drive for many years.

We now turn to the governing law concerning the issues at play in this case. These issues have been the subject of arbitration decisions dating back may years. Authorities relied upon by the Division, such as *NGF Canada Ltd.*, *United Way of Victoria*, *Brown & Beatty*, and the seminal awards cited in these decisions, provide a comprehensive overview of the principles that have been developed over time.

What flows from these decisions is that among other things, management has the right to organize and assign work to its employees and direct its workforce. The management rights articles which vary from agreement to agreement, can reinforce these rights.

These fundamental rights include the right to set qualifications and determine the content of job postings and assign the duties to be performed by employees.

There is no principle set out in the jurisprudence that employees have proprietary rights in certain duties or that any and all duties must be set out in a job posting or contained within a job description.

Management rights, however, can be restricted. Clear language in a collective agreement is required to fetter a management right such as the right to assign work.

Aside from specific language fettering management rights, management must act in a manner that is not arbitrary, discriminatory or in bad faith.

This, of course, is a requirement in this jurisdiction, as per Section 80 of *The Labour Relations Act*.

There are some other areas where arbitrators have put restrictions on management rights. For example, even if an employer acts in good faith, but imposes qualifications which bear no relationship to the work, then requirements can be struck down.

In addition, it is a well-established principle that an arbitrator cannot rewrite the terms of the agreement or read into an agreement certain implied restrictions.

Against this legal backdrop, we turn to our analysis of the agreement.

An examination of the agreement at hand shows a robust management rights article (Article 5) setting out in some detail the Division's unbridled rights to set qualifications and conditions for continued employment and that any source of Union rights must follow from the specific terms of the contract.

In addition Article 25 specifically sets out that employees <u>required</u> to drive (emphasis mine) will be paid mileage and covered by the Division's insurance policy.

Article 25 demonstrates that the parties specifically directed their minds to the requirement to drive by EAs.

Is there anything in the agreement restricting or fettering its management rights to assign driving duties or from setting requirements such as having a driver's license and a vehicle?

A thorough review of the agreement indicates that there are no such restrictions in the agreement. There is no language in the agreement prohibiting the Division assigning driving duties or setting requirements such as having a license or a vehicle.

There is no language requiring the agreement of the Union in setting job descriptions or requiring that job descriptions set out every duty and responsibility that can be assigned to EAs.

Therefore in the absence of some other factors such as bad faith, the Division's right remains unfettered and they are within their rights to set job requirements and assign duties.

On that note, the Union has not advanced an argument that the Division has acted in bad faith, in a discriminatory fashion or for invalid business reasons. Nor have they advanced any submission that the requirement to have a license and vehicle to drive was unreasonable in relation to the duties of the job.

In sum, we find that there is nothing in this agreement or any legal principle which precludes the Division from assigning work and setting requirements. Nor has the Union established that the Division acted arbitrarily, in bad faith or for invalid business reasons.

As well, nothing from the factual determinations of the history of dealings (set out above), demonstrates a restriction on the rights to assign duties. The fact that there was inconsistency in postings and the fact that in certain instances EAs were not required to drive, does not preclude the Division from exercising their unfettered rights. We note that estoppel is not relied upon by the Union.

In view of our findings we do not need to focus on the submission of the Union on whether Tataryn's letter was disciplinary. We have determined that the Division had the rights to advise EAs about the requirement to drive. We repeat our earlier comments that the Union, in any event, did not treat the matter as disciplinary until the arbitration hearing.

As well, in light of our findings, we see no need to focus on the issue of whether the Division's actions gave rise to a reclassification. The Union didn't pursue this avenue and there is no basis for finding that there was a substantive change in the EA duties.

Therefore, the grievances are dismissed for the reasons set out above.

In closing, we make the following observations. We heard a lot of evidence from EAs that they were concerned about safety, compensation, and insurance coverage. The Division, in closing argument, allowed that if the Union wished to address concerns about allocation of work, the role of seniority or other issues, these could be addressed at bargaining.

It strikes us that an open and informed dialogue could be beneficial to dispelling any misconceptions or misunderstandings on a range of issues. A consistent practice regarding posting and job descriptions would be beneficial. Concerns about safety and seniority issues could be addressed.

We wish to thank the parties for their submissions.

DATED at the City of Winnipeg, in Manitoba, this 8th day of February, 2022.

MICHAEL D. WERIER, Q.C.

I concur with the above Award.

KENNETH M. DOLINSKY
Nominee of the Division

I dissent from the above Award, with comments attached.

RICK WEIND
Nominee of the Union

DISSENT

I have read the Majority Decision and do not concur for the following reasons.

The grievances should be granted for two reasons:

a) A valid driver's license and transporting students using the employee's reliable vehicle are not *bona fide* requirements of the position;
b) When transporting students, as construed by the Division, EAs are not assisting with the process; they are responsible for the process

ARTICLE 7 GRIEVANCE PROCEDURES

7.01 DEFINITION OF A GRIEVANCE

A grievance shall be defined as any difference arising out of interpretation, application, administration, or alleged violation of the collective agreement. No matter shall be subject to arbitration which involves:

A) any matter not covered by this agreement;

B) any matter which by terms of this agreement is exclusively vested in the board

The Division never argued that the issues regarding job duties were excluded from the grievance /arbitration procedure as set out in points A or B. A reasonable inference is that Management's rights are fettered in the case and subject to the Collective Agreement (CA).

Management has the right to organize and assign work to employees and direct their workforce in accordance with the Collective Agreement (CA).

The Union has the right and obligation to grieve when there is a violation of the CA .

PAST PRACTICE

The union's position, supported by testimony from three EA's (Karen Sinnock, Darlene Hacking, Sabrina Taylor), was that throughout their careers driving had been voluntary /optional. Sometimes they drove but always at their discretion. The Union had, since 2017 at least, believed the Division was aware of their

position that a license was not a job requirement.
Mr. Simpson described the Division's position as a willingness to be reasonable.

The system seems to have worked. No one was forced to drive and the Division had enough drivers.

Just because EA's drove students in the past does not mean EAs were required to drive students as part of their job duties.

There was some ambiguity whether two witnesses (Ms. Hacking and Ms. Taylor) had applied for positions requiring a driver's license or vehicle. The Division did not provide any evidence regarding the hiring process for these individuals (e.g. requirement for license or a vehicle to transport students).

Ex 6 In a 2017 e-mail exchange with CUPE 1522 President Karen Sinnock , HR Manager Shelley Tataryn clearly stated she was aware that a driver's license was not a requirement for the EA position. At the hearing, the Division claimed that was a comment about getting to work and that she had only been in the position for four months at the time.

In any case the Union believed the statement credible and relied on it. At the least it put Ms. Tataryn and the Division on notice that the driver's license was an issue**.** Until the hearing there is no evidence Ms. Tataryn ever rescinded or clarified this point. Accidental truth is truth nonetheless.

BLOCK FUNDING

There was a substantive change with the implementation/imposition of Block Funding in 2019. The Division now required a consistent pool of drivers with vehicles. The requirements (transport students, license, vehicle) are now mandatory in order to carry out the Division's mandate. The importance of drivers/vehicles on a scale of 1 to 10 would be a 10 from Division testimony. The testimony from the Division and in argument was that Block Funding mandated a major change in the Division's work processes. Management was no longer willing to be reasonable. Leeway might be granted in some exceptional circumstances. Management unilaterally made transporting students, a license and reliable vehicle a requirement.

<u>ART 9.01 A) T</u>he employer agrees to maintain the job descriptions and prepare a job description when a new job is created for all positions for which the union is the bargaining agent. These job descriptions shall be presented to the union for discussion.

B) When the duties of any job are significantly changed, or when a new classification(s) is established by the employer, which come within the scope of this agreement, the wage rate will be subject to negotiations. The employer shall have the right to temporarily establish a rate of pay until the regular rate of pay for the new classification(s) has been agreed upon. If the parties are unable to agree on the reclassification and /or the rate of pay for the job in question, such dispute shall be submitted to grievance and arbitration for determination. The new rate shall be retroactive to the time the new position was first filled by the employee, or the date in change of duties

This change results in a significant change in job duties or new classification. Art 9.01 should have been activated. This represented a significant break with past practice.

Management rights set out in CA, in this case Article 9, give them the latitude to change requirements for a position.

In Article 9.01 A) The Division agrees to maintain job descriptions – with respect to this issue they were never maintained. Duties and qualifications should have been set out over 19 years. Management sets the job descriptions; the Union negotiates terms. It is Management's right and responsibility to change if required (Art. 5)

In the fall of 2019, three to five EA's declared they would no longer drive for various reasons (e. g.: driving was voluntary, health and safety concerns, insurance /liability issue).

EX 9 The LSSD/CUPE 1522 letter Sept 17, 2019 required that the EA's submit their reasons not to drive in writing. At least two did **(Ex 23, 25)**. This resulted in the Oct 4, 2019 letters **(Ex 24,26)** from Ms. Tataryn.

The Union responded by filing Grievance #2019 10-17 **(Ex 2).**

On January 8, 2020 the Union grieved the requirement for a valid driver's license. **(Grievance #2020 01-06 Ex 3)**

On Feb 12, 2020 the Union grieved the requirement to have access to a reliable vehicle. **(Grievance # 2020 02-11 Ex 4)**

The grievances were denied and the Union submitted the grievances to arbitration

In Exhibits 7 & 8 in both job descriptions for EA 1 or EA2, there is no requirement for a valid license, suitable vehicle or to transport students in the employee's personal vehicle.

Both parties agreed with the above regarding Ex 7 & 8.

ANALYSIS

There is no dispute that transporting students individually or in groups to various locations for specialised educational purposes is part of the LSSD mandate.

There is no dispute that EA's have used personal vehicles to transport students.

The Division contends that driving students (and therefore a valid driver's license) in their personal vehicles are and have been requirements of the EA1 &2 positions. The Union contends that these are not requirements of the position. The past practice between the parties is that employees driving and using their personal vehicles to transport students was voluntary and a personal choice. The Division contends in the past they were only being reasonable when enforcing the requirements.

Both Mr. Simpson in his opening statement, and Ms. Tataryn, in Ex's 24 & 26 rely on Art. 5 of the CA to determine that the Division has the right to require a license, use of suitable vehicle, and to transport students in that vehicle.

Article 9 of the CA mandates Management has the right to set out job descriptions. Typically, job descriptions will include core duties, responsibilities and bona fide qualifications necessary to perform those duties. Simply put the employer sets the parameters; the union negotiates price or wages. As Ms.

Chagnon put it, management owns the job descriptions.

Both Ms. Tataryn and Ms. Grant specified the importance of individual student programs and that EA's using their vehicles to transport students is essential to these programs, particularly after Block Funding was initiated.

The assertion that granting the grievances jeopardises the Division's unique needs and creates operational problems is a "red herring." The issue for purposes of this arbitration is that the Division did not codify for many years what they consider to be essential requirements of the position.

SHELLEY TATARYN MGR H R LSSD, LETTER TO STAFF - OCT 4, 2019 EX 24,26

In the letter Ms. Tataryn discusses points regarding health and safety issues raised by EA's and possible consequences for refusing to drive students.

She goes on to justify the Division's position that allows it to mandate the items under contention.

With respect to any ambiguity on the issue she states, "You should also understand being directed to transport students is not a matter of choice left to the employee. It is a reasonable direction which the employer can make."

She also makes specific reference to points in the job description under Duties and Responsibilities, Article 5 and 25 of the CA. She asserts these provisions allow the Division to direct employees as it sees fit.

Included in the letter are these partial quotes from the EA 1 and EA 2 job descriptions under duties and responsibilities;

"Assist with supervision of students...while students are being transported and in other locations as required"
FULL QUOTE:" Assist with supervision of students, during breaks, lunch, loading and/or unloading of buses, while students are being transported and in other locations as required" (9 wds)

"Assist with…… escorting specific students as needed"
FULL QUOTE: "Assist with team lifting, positioning, transferring and escorting specific students as needed" (5 wds)

Also included is the stipulation that the division may assign "…other duties relevant to the position".
FULL QUOTE: Other duties, relevant to the position, will be assigned as required". (5 wds)

She asserts that Article 5 of the CA "gives the Division broad authority to assign work to its employees".

She asserts that Article 25 "clearly contemplates employees using their vehicles for carrying out their duties for the division".

When Ms. Tataryn partially quotes requirements from the job description, she distorts their meaning and takes them out of context. The quotes in full more accurately depict the duties of the EA as part of a team while students are transported in buses or assisting specific students being lifted and positioned. The quotes as used cannot be construed to mandate the EAs to transport students in personal (reliable) vehicles and have a license. While there is latitude for the Division to assign other duties relevant to the position there is no corresponding point allowing them to add qualifications e. g. drivers licence and reliable vehicle.

At the hearing and in argument Ms.Chagnon did dispute the distorted quotes used by Ms Tataryn to justify the requirements in dispute. I do not concur with the majority that the Union failed to show the requirements for a licence and vehicle to drive were unreasonable in relation to the duties of the job.

The letter states, "Should you fail to comply with the Division's lawful instructions to transport students in the future, you will be subject to disciplinary action up to and including termination of employment."

Nowhere in the letter does she quote specific requirements for a license, suitable vehicle and the requirement to transport students because they do not exist. While there is some elasticity in the partial quotes relied on, they have been stretched beyond any reasonable limit to assume such specific requirements are

mandatory.

The elements in the duties and responsibilities must relate to the required qualifications. If, as she contends, “other duties relevant to the position” means driving students in a personal vehicle there must be qualifications that correspond to those duties. There are no qualifications requiring a license and suitable vehicle.

The reference to Art 25 in the Oct. 4, 2019 letter becomes irrelevant. If there is no requirement for a license or personal vehicle to transport students in the CA or the job description, there can be no requirement for the EAs to use their own vehicle to carry out their duties.

When Ms. Tataryn relies on the job descriptions which flow from the CA, she is tacitly acknowledging that management does not have an unfettered right to direct employees. Management has the right to set job descriptions, the obligation to maintain them and thereafter comply with them or change them. Ms.Tataryn fails to demonstrate that the job descriptions justify the requirements in dispute.

The EAs duties and responsibilities as set out in Ms. Tataryn’s letter and as described in testimony at the hearing are not commensurate with the job description.

Ex 19 The LSSD Safe Work Procedure -Transporting Students to Offsite Activities
Included under the heading Additional Requirements is the requirement for a communication device. It is clear from testimony that the Division did not provide a communication device. It is also clear that it was expected/taken for granted that EAs would carry a cell phone which would be paid for by the EA. The Division did not reimburse or compensate for the cost of the phone.

Ms. Grant was asked what the procedure was if there was a break down on the highway. Her response was that the EA should assess the situation and act in the best interests of themselves and others. There is no backup plan or protocol, no group CAA coverage or towing service contracted to call.
It is the EA’s responsibility to have a communication device and rely on their own resources if they have a problem on the road.

Ex. 23 and 25 itemize concerns listed by Ms. Hacking and Ms. Taylor. These include, feeling unsafe, fear of false accusations, overwhelmed by the responsibility of transporting students, vehicle breakdowns, physical or verbal abuse, vandalism, concern re insurance/liability coverage.

In response to these concerns Ex 24,26 Ms. Tataryn contends that driving students is not dangerous work (a phrase never used by either Ms. Hacking or Ms. Taylor). She states their concerns are speculative and not concerns which extend beyond the inherent risk in working with students and /or operating a motor vehicle.

That is exactly their point. EAs are responsible for mitigating the risk (e.g. provide a cell phone). They are, according to Ms. Grant, to assess the situation and act in the best interest of themselves and others. EAs are responsible, the Division offers little if any assistance. The Job Title and Job Descriptions are clear and consistent in use of the term “assistant” and “assists in”. Neither uses the term “responsible for”. The Division has made the EAs responsible for transporting students.

Dismissing the concerns listed by Ms. Taylor and Ms. Hacking as speculative and inherent risks to the position is an abrogation of responsibility by the Division. The inherent risks belong to the Division. The concerns the Division defines as speculative should be part of a risk management strategy with tactics to deal with those concerns. The concerns are speculative only until they are not. The Division did not schedule a meeting to address the concerns prior to sending the “ non disciplinary” letters. When asked by Ms Chagnon if a meeting should have been held, Ms. Tataryn replied “hindsight is a beautiful thing, Morgan.”

The issue raised about insurance coverage is not clarified. There is no mention of coverage for Civil or Criminal Liability (including a Highway Traffic Act offence) for EA’s should such actions be brought against them.

Two witnesses for the Union credibly testified that they were told by Ms. Grant that your car is an extension of the classroom (Ms. Grant denied saying this). In Ms. Hacking ‘s testimony she was not allowed to work alone with a student while in the school yet mandated to work alone while transporting the student. The Division didn’t explain the logic in that position because they can’t.

“Assists in” does not mean “responsible for”. When “assists with” becomes “responsible for” (license, suitable/reliable vehicle to transport students, communication device, car as classroom) there was a significant change to the job description. The process outlined in Article 9 should have been triggered.

The onus is on the Division to provide clear and cogent terms of employment. It is grossly unreasonable to threaten discipline up to and including termination where no clear cogent terms exist.

For all those 19 years, with knowledge that these specific grieved items were essential to the mandate of the Division, Management chose not to amend, revise or make a new classification which would include those items. If it was resolved between the parties that these were bona fide requirements for the position, discussions regarding cost, if necessary, could have commenced.

Significantly, in the letter there is no reference to the specific jobs the recipients had applied for and occupy.

At the hearing when questioned, witnesses for the LSSD did not present any specific evidence regarding the postings successfully applied for by the witnesses for the Union.

There is no evidence presented regarding the posting applied for, qualifications required, their application/resume or interview notes, references or matrix. It is inconceivable that the Division does not have personnel files for employees.

One of two things can be inferred;
1) the Division had such information and did not present it for whatever reason or,
2) the Division has none of that relevant information.

Either they know and are not disclosing details of the hiring process or they have no idea who they hired for what position.

At the hearing counsel for the Division asked when would a posting require a driver’s license. For instance, would a posting for a bus driver require that qualification?

It stands to reason the position of bus driver requires a driver's license. that would be in the class specs, job description and the posting. It would be stated clearly the driver's license was a required qualification, unlike the EA position which has no such requirement.

POSTINGS

The Union grieved one posting in 2018, 1819-EA-055 (Ex 22) requiring a valid class 5 driver's license and access to a vehicle. That posting was withdrawn and the union withdrew the grievance.

The Division advertised another posting 1819 -EA- 055 (Ex 27); the only difference between the two postings was the hours of work. That position was filled. The union never grieved the second posting.

At the hearing, Ms. Sinnock testified that the Union was not aware of the second posting and that the position had been filled. She did not recognize the name of the person who filled the position.

There is some confusion with the posting and the employee hiring form (Ex.28). All three documents show different hours of work.

Ms. Sinnock's testimony was that she was unaware of the second posting and that it had been filled was credible. Hence there was no second grievance.

EXHIBITS 5 (Union: Tabs 34-43) AND 29 (Division: Tabs 70-75) POSTINGS

There are inconsistencies throughout the postings submitted by both parties.

Eg: in the job descriptions first aid/CPR certification is an asset. (While not directly related to the specific issues the examples are further evidence of the haphazard / inconsistent practices by the Division)

Of the sixteen samples, four do not mention first aid/CPR, five state "would be an asset", six state "required", one states "willing to obtain". Why the discrepancy?

Tabs 70,71, 75 require a license, no vehicle but only stipulate "may require travel with a student (e.g. field trips)". Travel with does not mean driving and there is certainly no requirement for a vehicle.

Only tab 72 requires a license, vehicle and the requirement to transport students.

Tab 73 has no requirement for a vehicle or license but does contain a requirement to drive students. How this is to be accomplished without the requirement of a vehicle or a license is not explained.

Tab 74 requires a license, no vehicle but a requirement to drive students. Again, how is left to be determined.

Are all these people subject to discipline up to and including termination if they refuse to drive or provide a reliable vehicle??

These postings confirm the haphazard piecemeal methods the Division used (uses?) to transport students. The postings in no way confirm that transporting students, a license or a vehicle was a requirement of the EA position, particularly when none of these requirements are included in the job descriptions. Given the level of inconsistencies in the postings, I do not concur with the majority that the EAs were required to drive for many years. Because they may have driven does not mean they were required to drive.

The Division's own evidence is that there is/was no rhyme or reason to how students were to be transported. It is unreasonable given the evidence that, because changes to the business processes (Block Funding), the EAs are now mandated to fill the gap created by the changes. There was now a need for the Division to provide sufficient transportation for students. The simplest solution was to download it to the EAs. That does not mean that decision was reasonable, complied with the CA or the past practice between the parties. These are not ancillary duties. They are distinct and discreet from the position of EA. I do not concur with majority that the implementation of Block Funding did not result in a wholesale change in the work process affecting the EAs.

Ms. Tataryn testified that the LSSD was planning on revising the Job Descriptions. She stated the Certificate in Educational Assistant currently listed as only an asset would likely become required. She also conceded the requirement to drive students should be in the job descriptions. In none of the samples provided is there an unconditional requirement for a Certificate in Education Assistant. Yet the Division mandates EAs drive students, have a license and a vehicle with no mention of same in the Job Descriptions.

It is fair to say that the 16 postings submitted by both parties are remarkably inconsistent, contradictory and disconnected from the Job Descriptions. Any assertion by Ms.Tataryn in the Oct. 4, 2019 letter, that the direction to drive students by the Division is reasonable, is incorrect. It is an unreasonable direction. While Management has the right to manage it must do so within the parameters set out in the Collective Agreement.

Until 2018 the Union had not filed a grievance regarding those requirements on postings. The Division did not enforce the requirements or displayed a "willingness to be reasonable". There was no reason to grieve – driving and supplying a vehicle were voluntary. The Divisions reasonableness amounted to condonation of the Union's position. The fact the Union did not grieve the 2010 Posting (Tab72) can be construed as reciprocal reasonableness on the part of the Union.

Because EAs drove students did not mean EAs were required to drive students.

Until Block Funding was introduced, the system as it existed worked to both parties' benefit.

ALTERNATE MODES OF TRANSPORTING STUDENTS

At the hearing and in EX 23 & 25 there were alternate methods of transporting students suggested. These included taxis, public transport, cycling, walking, some students have licenses and access to a vehicle, parents and students can arrange transport. It was also suggested having two EAs present when transporting students would alleviate safety concerns.

In Tab 8 (Dec.10,19 Union Grievance presentation) the Union contends that the Division has off loaded transporting students to EAs. Logically the Transportation Division should be responsible for transporting students.

At the hearing the LSSD presented testimony from David Campbell, Transportation Manager for the LSSD. Mr. Campbell's testimony focused on the increased cost that would accrue should the Division use the school busses to transport individual students. He also suggested staffing issues and using a bus to transport single students would not be practical.

It was the Division's position that the increased costs and impracticality ruled out use of the Transportation Division to transport students.

This is a "straw man" argument. This is not an either/ or question. Ms. Taylor provided examples of how to accomplish transporting students. There are a variety of suitable vehicles available to the LSSD besides 40-foot buses to transport individual students. Using smaller vehicles would allay Ms. Grant's concerns that bus transportation was impersonal and inhibited interaction with the driver/person accompanying.

It is called the Transportation Division and the method of transporting individual student can be accomplished by the Division having smaller vehicles to transport students.

During cross exam Mr. Campbell was referred to Tab 64 - the comprehensive regulation re School Bus Transportation. He was asked if there was a similar document for private vehicles and replied no.

Ms.Chagnon referenced Tabs 55/56 Regulation: Use of Private Vehicles on School Business. The Regulation consists of five sentences. The inference is the comprehensive School Bus policy makes it safer for students to be transported by the Transportation Department rather than in private vehicles.

CONCLUSION

The lack of a comprehensive policy regarding transporting students in private vehicles demonstrates the reality again that EAs are not assisting, they are being made responsible for transporting students.

The issue is not an attempt to fetter management rights. Management has the right to set duties and qualifications as long done accordance with the Collective Agreement. The issue is management has managed badly or failed to manage.

With the implementation of Block Funding the division unilaterally changed the job duties and requirements of the EA position which amounted to a violation of Article 9 which the Union grieved.

It is clear no matter how you twist the C A or the job descriptions driving students, a license or a reliable vehicle are not *bona fide* requirements for the EA position. The requirements in question cannot be conflated with the other myriad duties

performed by EAs. The duty to drive students, have a license and a reliable vehicle (whatever reliable means) are not ancillary to the existing duties and qualifications they are separate and distinct from those existing duties and qualifications.

The Job Descriptions were not maintained as set out in Art. 9.

From the evidence presented the Division expects these employees to be "Responsible for" as opposed to "Assists with".

The three grievances should be sustained and redress requested granted.

Rick Weind