

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

DAUPHIN-OCBRE SCHOOL AREA NO. 1,
(hereinafter referred to as "*the Division*")

- and -

DAUPHIN-OCBRE DIVISION ASSOCIATION NO. 33
OF THE MANITOBA TEACHERS SOCIETY,
(hereinafter referred to as "*the Association*")

BOARD OF ARBITRATION:

P. S. Teskey, Chairperson
D. Sheldon, Nominee for the Division
D. M. Shrom, Nominee for the Association

DATE OF ARBITRATION:

April 28, 1998

LOCATION OF ARBITRATION:

Dauphin, Manitoba

APPEARANCES:

C. Wallis, Representative of the Division
C. Basarab, Representative of the Association

A W A R D

This matter concerned an interest arbitration under The Public Schools Act. Regrettably, it was considerably delayed in terms of the hearing itself but, commendably, the parties had agreed upon most matters by the time of the hearing and there were only a few issues left in dispute for this Board to determine.

The parties also agree that the Board was properly constituted and had jurisdiction to deal with the matters in question.

This matter was concerning resolution of the 1995/96 Collective Agreement and the issues in dispute were all essentially concerning lay-offs and seniority. The parties had provided us with wording that had been agreed upon concerning all other clauses and those are incorporated into this Award.

The parties also managed to resolve one further issue at the hearing itself.

A certain amount of the wording in dispute concerning the lay-off clause had also been agreed to and reads as follows:

"LAYOFF (MUTUAL AGREEMENT)

- (A) When it is determined by the School Board that a lay-off is necessary and where natural attrition, transfers, sabbaticals and leaves of absence do not affect the necessary reduction in staff, the School Board shall identify teachers to be laid off after taking into account the special subject, program and administrative needs of the School Area.
- (B) During the month of October each year, a seniority list will be prepared by the Board and posted in each school and provided to the Association. Each teacher shall be permitted a period of ten (10) working days after the posting of the seniority list to protest in writing to the Superintendent any alleged omission or incorrect listing, but such protest shall be confined to errors or changes occurring subsequent to the posting of any previous seniority list. In the event that a teacher does not file a written protest with the superintendent within the time stipulated, his or her placement on the seniority list shall be deemed correct.
- (C) Seniority for the purposes of this agreement is defined to mean the length of continuous teaching experience from the date of most recent hire by the School Area beginning with the first day of teaching within the School Area.

- (D) Where the teachers have the same length of continuous teaching experience, the order of the seniority list shall be determined on the basis of the total length of employment with the School Area.
- (E) Where teachers have the same seniority as defined in (C) and (D), the order of seniority shall be determined on the basis of total recognized teaching experience in Manitoba.
- (F) Where teachers have the same seniority as defined in (C), (D) and (E), the order of seniority shall be determined on the basis of total teaching experience recognized by the Province of Manitoba for classification purposes.
- (G) If the length of teaching experience as defined in (C), (D), (E), and (F), is equal, the teacher to be declared surplus shall be determined by the Board.
- (H) *In dispute*
- (I) In the event of a lay-off, the Board shall meet with the Executive of the Association to discuss the implications of the lay-off and shall provide the Association with a list of teachers to be laid off.
- (J) *In dispute*
- (K) *In dispute*
- (L) **Definitions**
 - i) Training: Instruction received as preparation for the profession of teaching, which instruction leads to the development of a particular skill or proficiency with respect to a particular subject or subjects.
 - ii) Academic Qualifications: Refers to the classification in which a teacher is placed by the Administration and Teacher' Certification Branch of Manitoba Education.
 - iii) Experience: The practical application of training over a period of time with respect to the particular subject or subjects.
- (M) It shall be the responsibility of the teacher to report an address to which a recall notice can be delivered. Recall notices will be delivered by registered mail to the last reported address given by the teacher and a teacher who is recalled from lay-off shall be required to indicate within six working days of registration of same his/her intent to return to work and shall be required to return to work on the date set out in the notice which date shall not be less than 14 calendar days following such notification unless by mutual agreement.
- (N) A teacher's accumulated sick leave credits shall not be affected if the teacher is recalled as provided in the Article M above.
- (O) If the Board terminated the contract of a teacher because that teacher is surplus, the Board shall, at the request of the teacher, provide him/her with a letter to this effect.

- (P) Notwithstanding any other provision of this article the foregoing lay-off provisions shall not apply to teachers continuously employed under one contract with the School Area for one year or less, or to teachers employed for a specific term where during that term the teacher is employed on the express written understanding that such teacher will not after the completion of such term be employed by the School Area.”

The Board’s proposal in terms of the few items still in dispute was as follows:

“Lay-Off School Board Proposal - Sections H, J, K

- (H) A teacher will retain and accrue seniority if absent from work because of:
- i) Illness or accident up to the maximum days accumulated under the provisions of the collective agreement.
 - ii) A leave of absence up to 30 calendar days.
 - iii) Sabbatical Leave.
 - iv) Maternity Leave under the provisions of the Employment Standards Act.
- (J) Notice of lay-off shall be given to the teacher no later than one month prior to the 31st of December or the 30th of June. The teacher, within ten calendar days of receiving notice of lay-off, shall indicate, in writing, his/her wish to be placed on the re-employment list. Notwithstanding anything else in this collective agreement, failure to respond within the time limit specified in this clause shall relieve onus on the division for that teacher’s placement on the re-employment list.
- OR**
- (J) Notice of lay-off shall be given to the teacher by certified mail no later than the first day of May of the school year. The teacher, within ten (10) calendar days of receiving notice of lay-off, shall indicate, in writing, his/her wish to be placed on re-employment list. Notwithstanding any other provision of the collective agreement, failure to respond within the time limit specified in this clause shall relieve onus of the Division for that teacher’s placement on the re-employment list.
- (K) If after lay-offs have occurred and for a period of one calendar year after the date of lay-off, teachers who have been laid off and have given written notice that they wish to be recalled shall be offered the position first when positions become available, provided such teachers have the necessary training, academic qualifications and experience for the positions available.”

It was agreed at the hearing that as to section (H)(iv), the words “under the provisions of the Employment Standards Act” would not need to appear in the Collective Agreement and that section could simply read “Maternity Leave”.

The first dispute between the parties was whether or not there should be two definite dates for notice of lay-off (those being prior to December 31 or June 30 of any year - which was the Division's position) or whether, as preferred by the Association, that there should be only one date, that being as at the conclusion of any school year and that there would be only one potential notice of lay-off provided within the Collective Agreement.

The second issue was when recall rights would expire or lapse - the position of the Association being that it would be appropriate, given the particular circumstances of hiring of teachers, to allow for recall rights to continue until the second September following any lay-off notice in order for any laid-off teacher to have several opportunities for recall at a meaningful time.

The last issue in dispute was concerning whether seniority should accumulate or be retained while on long term disability.

While two of the issues appear to us to have been matters of some dispute, those being the allowable dates for notice of lay-off and whether or not time on LTD should be included for seniority, it does not appear to us that the recall rights for two successive commencement of school years subsequent to notice of lay-off was very much in dispute. This Board is prepared to allow that and finds logic in the proposal of the Association with respect to same. Of course, this ruling must be considered in light of the following portion of the Award but it does not appear to us that such a length of time would significantly impair the ability of the teacher to return to the classroom subject to the usual caveats as to the ability and qualifications concerning teaching the courses involved.

The other two issues are more problematic.

Essentially, the position of the Association was that the potential for notice of lay-off ought properly to only be allowed once at the end of each school year, particularly in the rural setting wherein it was more difficult for teachers to find other employment in reasonably surrounding areas as opposed to, for example, other opportunities being available within the City of Winnipeg or more major metropolitan centres.

It is fair to say that no teacher has yet ever been laid-off although lay-off notices have been given albeit positions became available before those notices became effective. Part of the evidence of the Division was that, as with the rest of us, the teacher population was aging as per the “baby boom” and this was not likely to be a great issue in the future. However, the Division wished to maintain the flexibility to provide notice of lay-off twice yearly in the event that the need rose.

There is some legitimacy to both positions.

It was also generally conceded that the normal practice within the area of the other Divisions geographically close to Dauphin-Ochre was that lay-off notices would normally be provided as at the end of the school year but that the contract wording concerning same was more vague in the sense of such notice of lay-off having to be provided “no later” than the beginning of May of any year. Such wording was the subject matter of a grievance arbitration in 1993 within the Kelsey School Division No. 45 and which resulted in an Award dated January 7, 1993 from arbitrator Chapman (with Mr. Parkinson and Mr. McGregor being the Nominees) in which the finding was that lay-offs were not restricted to being effective only as at June 30th in any particular school year upon such wording.

Interestingly enough, neither the Division nor the Association in this instance, wished such open-ended wording and, as was noted by the Division, the wording proposed in terms of the two possible dates of notice of lay-off was, in fact, more restrictive upon the Division than the predominantly common version of the clause in other agreements. That is a fair statement albeit, given the practice, it is more precautionary than necessary. That same statement could apply to the reasoning of the Association in terms of its own request.

Neither party has shown much necessity for change but both parties have indicated that they wish more specific wording than as is found in the neighbouring collective agreements. If this Board, as suggested by Mr. Wallis, is to attempt to replicate what would be agreed to between the parties through collective bargaining (and that may be somewhat of a fiction or, at least, it is not always easy to ascertain), it would appear that the parties are seeking more specificity.

The arguments of both sides have merit. We also find the practice (keeping in mind that there has never been a lay-off within this particular Division) is more likely to result in lay-offs as at the end of the school year and, as indicated above, we have already ordered greater protection in terms of recall rights than previously existed.

While we are not unsympathetic to the difficulties of any individual teacher who is faced with a lay-off notice in the middle of the year, it does appear to us that the Division has a legitimate interest in terms of maintaining the flexibility necessary in terms of staffing. As was noted by the Association, that flexibility must be tempered with proper planning, reasonableness, and fairness. As well, a significant amount of notice ought properly to be given to the teacher in the event of lay-off, particularly in the rural context. Accordingly, we award the following wording under subsection (J):

- “(J) It is acknowledged that, insofar as is possible, notice of lay-off shall be given to the teacher by certified mail no later than May 1st, such notice of lay-off to become effective as at June 30th of that school year. However, it is also acknowledged that in certain circumstances, the Division may find it necessary to provide notice of lay-off earlier in the school year and, in such cases, shall provide such notice by certified mail no later than November 1st, such notice to be effective as at December 31st of the school year. The teacher within ten calendar days of receiving notice of lay-off, shall indicate, in writing, his/her wish to be placed on the re-employment list. Notwithstanding anything else in this collective agreement, failure to respond within the time limit specified in this clause shall relieve the onus on the Division for that teacher’s placement on the re-employment list.”

As indicated earlier, we have already dealt with subsection (K) and awarded the request of the Association.

That brings us to the issue concerning subsection (H) as to whether or not periods of time while on long term disability should be counted for seniority purposes.

Again, interestingly, the Association has put forward this request which could adversely affect its more junior members but we were assured that the members of the Association all agreed that this was the proper approach.

Basically, the position of the Division was that no such wording as proposed by the Association appeared in any other collective agreements and it was not proper to break new ground in this area. The other concern expressed was that this might afford an opportunity to teachers who were not qualified to return to the workplace at the expense of replacing more qualified teachers or the fear that an unqualified teacher would be allowed to return to a position which they would be unable to adequately perform.

Conversely, the position of the Association was essentially that it was discriminatory to not allow seniority to accumulate during periods of proven disability and that the failure to allow seniority to flow and accumulate while on long term disability could place more senior teachers in peril of

losing their positions should lay-off occur since the junior teacher could have surpassed the more senior teacher in that event.

The Association also noted that there was some protection in terms of the proposed wording under (H)(ii) in that the teacher was required to be on unpaid medical leave and in receipt of benefits from the Manitoba Teachers' Society Long Term Disability Plan.

We were referred to the Human Rights Code and to certain comments concerning Ontario decisions under their roughly equivalent (but not exactly equivalent) legislation.

Part of the Division's concern was that, if seniority continued to accumulate on an absolutely unrestricted basis in these types of situations, the teacher could also lose the expertise for which they were being paid. That is, to a certain extent, a legitimate concern but could be dealt with by different wording or a time restriction.

With respect to the argument that such wording does not exist in other collective agreements, it is fair to say that this system of collective bargaining provides for mandatory interest arbitration as opposed to strike/lock-out. If one were to accept that there should never be any change that was not previously agreed, there might never be any change at all and that is not the intention of this system of problem resolution in our view. However, it is fair to say that a Board such as this should be cautious in terms of treading new ground. However, in this instance, we do feel that the Association has a legitimate point albeit some restrictions should be placed upon the changes to (H)(ii) in terms of wording to meet the equally legitimate concerns of the Division. We therefore order that the following wording be included in the Collective Agreement in the subsection:

“(H)(ii) Illness or disability while on unpaid medical leave and in receipt of benefits from the Manitoba Teachers’ Society Long Term Disability Plan to a maximum of 36 months. At the expiry of that 36 month period, the teacher shall retain but not accrue seniority.”

We realize that this is a new start in this area but it does appear to us to be a fair one. We have placed a time restriction to accommodate the concern of the Division but we do not feel that any competent teacher would likely become inordinately out of date within the time restriction we have ordered whereas the seniority of the teacher would be protected upon a reasonable basis. The other protection that exists to the Division is that, as always, the teacher must have the qualifications and ability to teach and, should that prove not to be the case, the normal processes would follow.

The Chairperson would note that Mr. Sheldon would prefer an abbreviated time limit on accrual of seniority and Mr. Shrom would prefer no cap at all or, at least, a lengthier cap. However, it is the view of the Chairperson that what has been awarded is reasonable and should the parties encounter difficulties (from either side) in terms of the three year period we have set, either side is, of course, open to bring forward such concerns as may exist at some future time.

The above addresses the three issues presented to us but, should the parties have any difficulties in terms of implementation, we will retain jurisdiction to deal with such difficulties.


We also wish to thank both Ms. Basarab and Mr. Wallis for their succinct and able presentations.

DATED this 1st day of June, 1998.



P. S. Teskey, Chairperson

I do/~~do not~~ concur and ~~am~~/am not providing separate reasons.



D. Sheldon, Nominee of the Division

I do/~~do not~~ concur and ~~am~~/am not providing separate reasons.



D. M. Shrom, Nominee of the Association