

IN THE MATTER OF AN ARBITRATION

BETWEEN

SUDBURY REGIONAL HOSPITAL

(The Hospital)

AND

CANADIAN UNION OF PUBLIC EMPLOYEES UNION,
LOCAL 1623

(The Union)

GRIEVANCE of R. Bossé

BEFORE: S.L. STEWART - ARBITRATOR
J. HERBERT - UNION NOMINEE
J. KUHNE - HOSPITAL NOMINEE

APPEARANCES:

FOR THE UNION: M. WRIGHT, COUNSEL
FOR THE HOSPITAL: S. EVES, COUNSEL

THE HEARING IN THIS MATTER WAS HELD IN TORONTO, ONTARIO ON
JUNE 9, 2008

AWARD

The grievance before the Board is dated April 4, 2007, and alleges that the Hospital has violated Article 9.08 of the Collective Agreement. There was no objection to the Board's jurisdiction to hear and determine the grievance. Counsel were able to expedite these proceedings by agreeing on the following facts:

1. The Union is the bargaining agent for a combined full-time/part-time bargaining unit of clerical employees whose terms and conditions of employment are determined by a collective agreement binding between the Union and the Hospital. Part of the collective agreement is negotiated centrally between The Participating Hospitals and the Canadian Union of Public Employees (Tabs 1 and 2). Part of the collective agreement is negotiated locally (Tabs 3 and 4). The current collective agreement expires on September 28, 2009.
2. A copy of the CUPE clerical salary scales for full-time, part-time and casual employees from the current collective agreement is attached at Tab 5.
3. The Grievor, Mr. Robert Bossé, is an employee of the Hospital and a member of the clerical bargaining unit. The terms and conditions of his employment are determined by the collective agreement.
4. On or about March 5, 2007, the Grievor received notice of layoff from his position as full-time Clerk Typist in the Facilities Management Department (Tab 6). However, by letter dated March 27, 2007, both the Union and the Grievor were advised that the Grievor's notice of layoff was being rescinded and that he was being reassigned to a full-time position as Communication Clerk in the Regional Cancer Program, Outpatient Clinics, effective March 19, 2007 (Tab 7).
5. The Hospital asserted in the March 27, 2007 letter that the reassignment was consistent with all the requirements outlined in article 9.08(b) of the collective agreement because, amongst other reasons, the Hospital red-circled the Grievor's hourly rate:

"This position is classified at a lower rate than [sic] your current position and as such, your hourly rate will be red-circled at \$21.06 until such time as the Communication Clerk rate matches or exceeds this rate of pay. At that point you will progress on the Communications Clerk wage grid which is at Level 1."

6. At the time that the Grievor was reassigned, the hourly rate of pay for the Communication Clerk position was \$19.31.
7. Article 9.08(b) of the collective agreement reads as follows:

"A layoff shall not include a reassignment of an employee from her or his classification or area of assignment who would otherwise be entitled to notice of layoff provided:

- i) the reassignment of the employee is to an appropriate permanent position with the employer having regard to the employee's skills, abilities, qualifications and training or training requirements;
- ii) the reassignment of the employee does not result in a reduction of the employee's wage rate or hours of work;
- iii) the job to which the employee is reassigned is located at the employee's original work site or at a nearby site in terms of relative accessibility for the employee;
- iv) the job to which the employee is reassigned is on the same or substantially similar shift or shift rotation; and
- v) where more than one employee is to be reassigned in accordance with this provision, the reassigned employees shall be entitled to select from the available appropriate vacancies to which they are being reassigned in order of seniority provided no such selection causes or would cause a layoff or bumping.

The Hospital bears the onus of demonstrating that the foregoing conditions have been met in the event of a dispute. The Hospital shall also reasonably accommodate any reassigned employee who may experience a personal hardship arising from being reassigned in accordance with this provision."

8. On or about April 4, 2007, the Union filed a grievance on the Grievor's behalf alleging that red-circling the Grievor's wage rate did not comply with the conditions of the article 9.08 of the collective agreement (Tab 8).
9. The issue to be decided by this Board of Arbitration is whether red-circling the Grievor's pay rate complies with the conditions of article 9.08(b) of the collective agreement or whether it is a breach of those conditions.
10. By way of remedy the Union and the Grievor seek a declaration and ask that any remedial consequences flowing from the declaration be remitted back to the parties. The Union and the Grievor request the Board remain seized in the event that the parties cannot agree upon the remedial consequences of any declaration the Board makes.
11. The Hospital requests that the grievance be dismissed.

The language of Article 9:08 of the Collective Agreement that is central to the dispute before the Board came into existence not as a result of collective bargaining, but rather as a result of an interest award. This award is dated June 28, 1999, and involves the Participating Hospitals and the Participating Locals of CUPE and SEIU, chaired by G. Adams. In that award, at p. 4, after rejecting the request of the Hospitals to amend the contracting out language that had been imposed in the prior round of bargaining, the Board states as follows:

This is not to deny that the language challenged is intuitively restrictive. One can also appreciate the hospitals' need for greater flexibility if they are to respond to the twin impacts of reduced funding and restructuring. But arbitral changes to existing language typically require a specific demonstrated need. The hospitals' concern for

greater flexibility also underlies other key demands such as a new definition for layoff and a modified bumping provision in CUPE agreements. Having regard to all of the evidence and the inherent nature of collective bargaining, change in this round should focus on providing the hospitals with greater flexibility to reassign employees within the bargaining unit without triggering the layoff provisions.

Accordingly, at p. 5, under the heading "Notice of Layoff", the

Board concluded:

In light of the above, Article 10.02 for SEIU and Article 9.08 for CUPE merit a balanced redrafting to grant greater flexibility to the hospitals to reassign an employee who would otherwise be entitled to notice of layoff, provided certain critical job interests of that employee receive protection. On the evidence adduced, the extent of notice of layoff and of the elimination of a position to employees and unions are, in relative terms, somewhat excessive and should also be modestly reduced. However, the hospitals' request to delete giving notice to the unions in the case of an elimination of a position is denied. The unions have important institutional interests in receiving such notice. Accordingly the Board awards:

Article 10.02 for SEIU and Article 9.08 for CUPE shall be amended to provide:

- (a) In the event of a proposed layoff at the Hospital of a permanent or long-term nature or the elimination of a position within the bargaining unit, the Hospital shall:
 - (i) provide the union with no less than five (5) months written notice of the proposed layoff or elimination of position; and
 - (ii) provide to the affected employee(s), if any, who will be laid off with no less than five (5) months' written notice of layoff, or pay in lieu thereof.

Note: Where a proposed layoff results in the subsequent displacement of any member(s) of the bargaining unit, the original notice to the union provided in

(i) above shall be considered notice to the union of subsequent layoff.

- (b) A layoff shall not include a reassignment of an employee from her or his classification or area of assignment who would otherwise be entitled to notice of layoff provided:
- (i) the reassignment of the employee is to an appropriate permanent job with the employer having regard to the employee's skills, abilities, qualifications and training or training requirements;
 - (ii) the reassignment of the employee does not result in a reduction of the employee's wage rate or hours of work;
 - (iii) the job to which the employee is reassigned is located at the employee's original work site or at a nearby site in terms of relative accessibility for the employee;
 - (iv) the job to which the employee is reassigned is on the same or substantially similar shift or shift rotation; and
 - (v) where more than one employee is to be reassigned in accordance with this provision, the reassigned employees shall be entitled to select from the available appropriate vacancies to which they are being reassigned in order of seniority provided no such selection causes or would cause a layoff or bumping.

The Hospital bears the onus of demonstrating that the foregoing conditions have been met in the event of a dispute. The Hospital shall also reasonably accommodate any reassigned employee who may experience a personal hardship arising from being reassigned in accordance with this provision.

- (c) Any vacancy to which an employee is reassigned pursuant to paragraph (b) need not be posted.

In the CUPE agreement, pre-existing 9.08 (b), entitled Redeployment Committee, will be relettered as 9.08 (d).

9.08 (d) provides for a Redeployment Committee, whose mandate is to identify and propose possible alternatives to layoff. Article 9.09 of the Collective Agreement provides for options available to an employee in receipt of a notice of layoff, including the option to receive a separation allowance, to retire if eligible, and to displace an employee with lesser seniority in certain classifications.

Reference was also made to Article 20.04, which provides as follows:

Wages and Classification Premiums

Provisions under these headings shall remain unchanged and are repeated as 20.04, except to the extent that the Wage Schedule referred to in the hospital's expiring collective agreement shall be adjusted and retroactivity shall be paid in accordance with the Implementation Agreement signed. ...

The wage schedule for all classifications shall be in accordance with the weekly and hourly rates.

There were two principal arguments that were advanced by the Union, the first being that the Hospital has unilaterally red circled a wage rate, which it is not entitled to do. The second argument is that red circling is in effect a reduction of the wage rate contemplated by 9.08 (b) (ii) because the benefit of increases to the former rate is precluded. The Hospital's position is that red circling is clearly contemplated by Article

9.08 (b) (ii) and that their actions in reassigning the grievor are in accordance with their obligations under the Collective Agreement.

There are two arbitration awards that have interpreted the language directly in issue, albeit in the context of SEIU Collective Agreements, as the Union emphasized. As would be expected, there was extensive reference to these awards on the part of both counsel.

The first of these awards is Sunnybrook and Women's College Health Science Centre & Service Employees International Union, Local 777 (unreported award of Louisa Davie dated September 16, 2004). That case involved reassignment to a lower rated classification and a red circling of wages, with the result that the rate did not increase in accordance with the rate of the former classification. That Collective Agreement contained a provision establishing a "scale of wages". It was the arbitrator's conclusion in that case that because of the red circling of the wage rate, the reassignment to a lower rated permanent job did not result in a reduction of the employee's wage rate and thus did not fall within the prohibition of what was there Article 10.02 (b) (ii). Given the significance of an interpretation of identical language, I will refer to this award at length. At pp. 20-23 the decision states as follows:

I commence with my concurrence of the undisputed fact that article 10.02 (b) was inserted into the collective agreement to

give the Hospital greater flexibility to deal with under funding and restructuring. The Adams award specifically speaks of greater flexibility to reassign "without triggering the layoff provisions." I agree that this flexibility must be understood in the context of the contracting out language of the collective agreement which prohibits contracting out if "as a result of such contracting out, a layoff of any employees other than casual part-time employees results..." (article 12.01). The flexibility created and recognized by the Adams award is that if Hospitals can reassign employees and meet the five conditions necessary for such reassignment not to constitute a layoff, their access to contracting out "in particular circumstances" may be increased.

As a result, for the purposes of this award I am prepared to accept Union counsel's submissions that the five conditions set out in article 10.02(b) must be strictly construed. Certainly a determination that there has not been a layoff does impact on an employee's seniority in so far as the employee is unable to use greater seniority to bump into a job of his/her choice. It may be for that reason that arbitrator Mitchnick refers to the five conditions as "Mr. Adams' stringent test." Article 10.02 (b) was inserted by the Adams award to relieve Employers from the normal layoff procedures if the Employer can provide comparable work. The reference to critical job interests of employees receiving protection is reflected in the conditions found in article 10.02 (b) which refer to the fact that the job has to be permanent, not result in wage reduction or hours of work reduction, be on the same or substantially the same shift, meet relative accessibility requirements, and the condition which imposes considerations of seniority where reassignments are made.

Even strictly construed however I am unable to accept the Union's position in this case that red circling results in a reduction of the employee's wage rate. The condition that the reassignment not result "in a reduction of the employees wage rate" must be read in context of the purpose underlying the article which was to grant greater flexibility to employers who can offer work which protect[s] the critical job interests of the employees. An employee reassigned to a comparable job, without loss of pay or loss of hours, without a change in shift or location has had the critical job interests protected and can't be said to have been laid off.

The words "not result in a reduction" suggest that the employee's wage rate can't be decreased, lowered or cut back. The term

"not result in a reduction" simply can not be equated with the notion of entitlement to future increases as the Union's position suggests. "Not result in a reduction" means that what you have or are then entitled to is protected and can't be reduced or decreased. The grievor was not yet entitled to the \$18.845 which the Union claims for him. He was entitled to that only if he was in the Cook/Baker OC-17 classification on October 11, 2002. At the time of his reassignment the grievor was entitled to \$18.296. That is the wage rate which was protected and can't be reduced by the reassignment if the Employer does not wish to run afoul of the conditions set out in article 10.02 (b).

I also do not accept that article 25.05 (b) in effect defines "the employee's wage rate" for the purposes of article 10.02 (b) (ii) and imports into that definition the entirety of Schedule "A" applicable to the grievor in his Cook/Baker classification. Article 25.05 (b) must be read in conjunction with article 25.05 (a) which speaks of a "scale of wages" not an employee's "wage rate". Article 25.05 (b) is not a definition article, it is a calculation or computation article as evidenced by its opening words "for the purposes of calculating ..." At most, article 25.05 (b) may define the "regular straight time rate of pay" but even then the article does not say that the regular straight time rate of pay is all of Schedule "A". In any event, "regular straight time rate of pay" is not the term used in article 10.02 (b) (ii). (I note by way of contrast that is the term used in article 10.05 (b) (ii) in defining the classifications into which an employee may bump):

The term "employee's wage rate" is not in fact defined in the collective agreement. Applying an ordinary meaning to the words I would define an "employee's wage rate" as the rate of pay the employee receives when he performs work in his job classification. It is not a rate to which he is entitled if he performs work in the job classification in the future. It is the rate the employee presently receives or to which he is then entitled. Under article 10.02 (b) (ii) what can't be reduced by the reassignment is the rate of pay to which the employee is currently entitled for performing work in his classification.

The arbitrator went on to observe at p. 24 that:

Practically speaking acceptance of the Union's position also

means that the vacancies available under article 10.02 (b) are limited to vacancies which are at the equivalent rate of pay of the reassigned employees. Intuitively such a narrowing of the available positions to which employees can be deployed makes little sense for bargaining unit members and is inconsistent with the need for greater flexibility which the Adams award sought to address when it imposed the language of article 10.02 (b).

The provision directly in issue was also interpreted in Quinte Health Care Corp. and SEIU, Local 204 [2005] O.L.A.A. No. 402 (Simmons), where, as in this case, the Union argued that in reassigning an employee to a lower paid classification and red circling an employee's rate of pay, the Employer had unilaterally adjusted a prescribed wage without the consent of the Union. The Union here provided us with the authorities on that point that were provided to Mr. Simmons. These authorities express the general principle that an employer cannot unilaterally pay an employee more than the amount stipulated in the collective agreement for work performed in a classification. Mr. Simmons accepted the principle as "settled jurisprudence" and at pp. 5-6 of his award, deals with the argument as follows:

Does what happened in the instant situation violate that well-established principle? We know the parties went before the Adams board because they had been unable to conclude a renewed collective agreement. The issues involved an unsuccessful demand by the employer for broader contracting out language but in return was granted more flexibility in reassigning its employees thereby avoiding the necessity of invoking costly layoff procedures. Thus, while protecting employers' rights there were employee interests that had also to be protected. As explained in the Davie award, one of the most critical job interests to an employee is the maintenance of the employee's wage rate. Reassignments

to avoid layoffs must have contemplated employees moving to lower paying positions. Otherwise layoffs would inevitably result any time an employee was assigned from one position to another that carried a lesser wage rate. This would have defeated the purpose of providing greater flexibility to the employer and thereby frustrate the intent of the Adams board in enabling the employer the opportunity to protect its interest. Similarly, the employee's interest is protected in that the reassignment does not result in a reduction of the employee's wage rate. The intent must have been to protect the employee's wage rate upon reassignment. It is directed at the employee's wage rate. In this regard, I adopt, with respect, the reasoning of Arbitrator Davie at pp. 21 and 22

The purpose of art. 13.05 b) ii) is to protect the employee's wage rate through reassignment. One way of accomplishing that is by red circling. The union is one of the parties to the collective agreement. That collective agreement was imposed on both parties. The union must be deemed to have accepted and therefore agreed to the inclusion in the collective agreement that in order to avoid layoff through reassignment there would be instances of red circling in order to comply with the requirement set out in 13.05 b) ii) that "the reassignment of the employee does not result in the reduction of the employee's wage rate. Accordingly, by red circling the grievor's wage rate at that which she had been receiving as a Diagnostic Clerk/Radiology the employer had not violated art. 13.05 b) ii) of the collective agreement.

Mr. Wright noted that CUPE was not a party to these arbitrations and thus ought not to be bound by the results in the same manner as if it were a party. Mr. Wright also argued that these awards are wrongly decided. Mr. Wright is particularly critical of one of the premises of Mr. Simmons' reasoning, specifically his reference to the inevitability "that there would be instances of red circling" supra, if there were to be no reduction in the wage rate, pointing out that there are many classifications paid at the same rate. Accordingly, in his submission, red

circling is not inevitable in order to provide meaning to the language of the Collective Agreement and such a conclusion is in violation of the prohibition against the amendment of the provisions of the Collective Agreement by an arbitrator, as set out in Article 7.12. Mr. Wright further argued that where the onus is on the Employer to establish compliance and there is an impact on seniority rights as well as other potential negative consequences for the reassigned employee, such a result ought only to be established by clear language. Indeed, in his submission, the language of the Collective Agreement suggests otherwise, with the language of Article 20.04 of the Collective Agreement clearly prescribing wage rates. Mr. Wright argued that this interpretation is reinforced by the existence of Article 20.01 which provides for the establishment of a rate in connection with a new classification and provisions for the protection of the rate in certain circumstances in Article 20.02. The essence of his argument in this regard is that there is express language which prescribes the rate of pay of any job, that where the parties have agreed to an exception they have expressed the exception specifically and that in this context, Article 9.08 (b) (ii) should not be interpreted as allowing the Employer to red circle a wage rate, which, it is submitted, allows the Employer to unilaterally determine a wage rate contrary to the provisions of Article 20.04.

Ms. Eves, in her submission, noted that the reference in Article 9:08 (b) to a reassignment of an employee from his or her classification in the first sentence of the provision is without qualification as to where the employee may be assigned to and submitted that the effect of this language, in the context of (ii), imposing the requirement that a reassignment does not result in a reduction of the wage rate, in the context of a provision designed to provide flexibility to the Hospitals, compels the conclusion that it is a red circling provision, a conclusion that was reached by two other arbitrators who considered this matter. Ms. Eves rejected the notion that an acceptance of this analysis would constitute a violation of the provision of the Collective Agreement establishing the wage grid, arguing that the wage grid is applied in the context of a provision which contemplates red circling. Ms. Eves referred to other provisions of the Collective Agreement where wage rates are protected, in support of the proposition that such a concept is not foreign to this contractual relationship. Ms. Eves referred to and relied on the analysis in the Sunnybrook and Quinte awards, supra, in support of the Hospital's position. Ms. Eves also submitted that the grievance ought to be dismissed on the basis of an application of the principles of res judicata and stare decisis, arguing that as a party to central language the Union in this instance ought to be bound to the result in the two awards that have interpreted the provision directly in issue before the Board

here. In this regard Ms. Eves provided the Board with a number of authorities

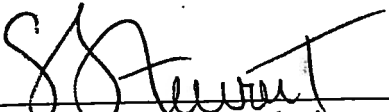
It is unnecessary for the Board to determine the matter of whether we are "bound" by the awards of Arbitrators Davies and Simmons, an issue on which the parties were in vehement opposition. Even accepting that Mr. Wright is correct in his submission in this regard, a decision of another arbitrator on the same language will inevitably be of persuasive power when the issue is put before another arbitrator or Board of Arbitration. In this instance, having reviewed the matter in issue before us and giving deference to the two awards only to the extent that we find their logic compelling, we have reached the same conclusion.

We will commence with the observation, also made by Ms. Davie and Mr. Simmons, that Article 9:01 was drafted with the express purpose of providing Hospitals with latitude in avoiding the invocation of the layoff process under the Collective Agreement by allowing it to reassign employees, subject to certain prescribed conditions. While there are specific limitations on the reassignments that have been prescribed, there is no specific requirement in that provision that reassignment be to a position at a level that is the same as the existing classification of the employee. Mr. Wright is correct in his observation that a reassignment outside the level of the existing classification is not inevitable. However,

restricting a reassignment to jobs at the same level of the existing classification of the job held by the employee being reassigned is clearly more restrictive. In our view, such an intention would have been reflected in different language than the language that was imposed, had the interest Board intended such a result. The language of Article 9.01 (b) does not qualify reassignment in such a manner and thus we interpret it in accordance with its clear and apparent meaning, that being a reassignment of any kind, subject of course, to it meeting the criteria set out in (i) through (v) which follow and which represent the critical job interests that are to be protected. The particular critical job interest in issue here is 9.08 (b) (ii), that is, that the reassignment does not result in a reduction of the employee's wage rate. Upon careful consideration of the language of this provision and reflection on the arguments of counsel, we are compelled to the conclusion that this language provides for wage protection at the time of assignment, but does not provide protection in relation to future increases in the job held prior to reassignment. Preservation of existing wage entitlement is what a plain reading of the language of that provision suggests. We echo Ms. Davies' comment that the phrase "not result in a reduction" preserves what the employee has, but does not protect future entitlement. While we agree with Mr. Wright that the provisions of the Collective Agreement must be read as a cohesive whole, we are unable to accept his position that the effect of Article 20.04 setting out the wage schedule is dispositive of the

argument that a red circling can exist in connection with a reassignment under Article 9.01 (b). Article 20.04 exists to establish the wage scale which is applicable to all employees, and while exceptions are created in other language elsewhere, as Mr. Wright has pointed out, it is our view that the language of Article 9.01 (b) and in particular the exception created by 9.01 (b) (ii), creates an exception to the strict application of the wage scale contained in Article 20.04. We note that a similar argument was made about a similar provision in the Collective Agreement that was before Arbitrator Davie in the Sunnybrook case and that that argument was also found to be unpersuasive. We accept, as did Arbitrator Davie, that the critical job interests that are to be preserved in the event of a reassignment under Article 9.01(b) of the Collective Agreement are to be strictly construed. However, on a plain reading of that provision of the Collective Agreement both in the context of its purpose and the provisions of the Collective Agreement read together as a whole we are unable to conclude that a violation has been established. Accordingly, the grievance is dismissed.

Dated at Toronto, this 1st day of December, 2008


 S.L. Stewart - Chair

I dissent

_____"J. Herbert"
 J. Herbert - Union Nominee

I concur

_____"J. Kuhne"
 J. Kuhne - Hospital Nominee

DISSENT

Regrettably I must dissent from the Chair's award. With respect, the decision provides an interpretation of article 9.08(b)ii which is entirely premised upon reading article 20.04 out of the collective agreement. In so doing, it creates undesirable consequences that are prohibited by the wording of the contract.

It is worth setting out again the two collective agreement provisions applicable to the case.

Article 9.08(b) reads as follows.

"A layoff shall not include a reassignment of an employee from her or his classification or area of assignment who would otherwise be entitled to notice of layoff provided:

- i) the reassignment of the employee is to an appropriate permanent position with the employer having regard to the employees skills, abilities, qualifications and training or training requirements;
- ii) the reassignment of the employee does not result in a reduction of the employees wage rate or hours of work;
- iii) the job to which the employee is reassigned is located at the employee's original work site or at a nearby site in terms of relative accessibility for the employee;
- iv) the job to which the employee is reassigned is on the same or substantially similar shift or shift rotation; and
- v) where more than one employee is to be reassigned in accordance with this provision, the reassigned employees shall be entitled to select from the available appropriate vacancies to which they are being reassigned in order of seniority provided no such selection causes or would cause a layoff or bumping.

Article 20.04 reads as follows:

Wages and Classification Premiums

Provisions under these headings shall remain unchanged and are repeated as 20.04, except to the extent that the Wage Schedule referred to in the hospital's expiring collective agreement shall be adjusted and retroactivity shall be paid in accordance with the Implementation Agreement signed. ...

The wage schedule for all classifications shall be in accordance with the weekly and hourly rates. (emphasis added)

Beginning with the latter provision, article 20.04 expresses one of the most important features of a collective bargaining regime. By application of that article the Hospital is prohibited from paying employees different rates for the same work in the identical classification and must instead pay rates agreed upon by the parties. Whereas an employer at common law may pay different employees varying rates for the performing the same work, collective agreements commonly prohibit that result.

Article 20.04 mandates that the rates of pay for all classifications shall be in accordance with the appended wage schedule. In other words, the Hospital may only pay rates of pay for work performed within a classification that have been agreed by the parties for that classification. The provision admits of no exceptions, and compliance is obviously made mandatory. The wording is clear and unambiguous and, with respect, the provision is not one lightly 'massaged out' of a collective agreement.

Article 9.08(b), on the other hand, is a 'notwithstanding provision', which permits a hospital to avoid issuing notice of layoff where that notice would otherwise be required (see *Scarborough Hospital and CUPE 1487*, (Burkett) (2006), 84 C.L.A.S. 99). It is apparent from the outset of the provision that its purpose is to eliminate in defined circumstances the requirement for layoff notice which would otherwise be required by article 9.08(a). In so doing, 9.08(b) provides the Hospital relief against that line of arbitral authority which had held that the reassignment of an employee to a different position within her classification would require the issuance of 9.08(a) layoff notice, which further resulted in the triggering of the extensive subsequent steps provided at article 9 (see e.g. *Riverdale Hospital and C.U.P.E., Loc. 79* (MacDowell) (1997), 47 C.L.A.S. 109 and; *Hamilton Civic, Hospitals and Canadian Union of Public Employees, Local 794* (Samuels) (1994) 36 C.L.A.S. 32)

In order to be in compliance with article 9.08(b), the employer is required to comply with the limitations at 9.08(b) i) to iv) on the characteristics of the position to which an employee may be reassigned. In order, these require that the position must be one compatible with the employee's skills and training; the rate of pay of the new position cannot cause a reduction in the employee's wage rate; the position is at a proximate location, and; the position is not one with a significantly different shift. The purpose of these limitations is to eliminate or minimize the prejudice to an employee who is reassigned and thus deprived of various contingent rights, including for example the right to displace a junior employee in the same or a different classification.

When both articles 9.08(b)ii and 20.04 are read together, as they must be in order to afford each any meaning, the application of the two provisions to the facts of this case is not a particularly difficult matter. Put simply, an employee may be reassigned without the requirement for layoff notice to a different position either in a different classification or the same one, and the rate of pay of the new position *shall be the rate of pay mandated for that classification by article 20.04 which shall not be a lesser rate of pay than the employee's present one*. With great respect, no other interpretation of the two provisions

is intellectually defensible. And while one may suppose that article 9.08(b)ii might have been expressed in the positive rather than the negative, and might have referred instead to 'the same or greater rate', such a distinction appears pale against the alternative of ignoring a mandatory wage schedule provision. A construction based upon 'future entitlements' versus 'present entitlements' is one entirely of the Chair's and of an earlier arbitrator's making and is not a construction indebted to the wording of the collective agreement. With respect, it is an artifice that substitutes for the plain meaning of the relevant collective agreement provisions.

On the Chair's interpretation, the Hospital is entitled to reassign a senior employee from her own classification to one receiving a significantly lesser rate of pay, while depriving the employee of the opportunity provided at article 9.09 to displace a less senior employee in her own or an identically paid classification, provided the Hospital freezes her rate of pay at the rate currently received in the original classification. In addition to ignoring article 20.04, this approach clearly runs contrary to the seniority structure of the collective agreement, and would circumscribe her future displacement rights in that these are determined at article 9.09 by the rate of pay of the lower classification. The other obvious prejudice to the employee is that she is deprived of any negotiated wage increase until the rate of pay of the lower-paid classification exceeds her individual rate of pay and further deprived of important future seniority rights. With respect, such an outcome is foreign to the clear wording and structure of the collective agreement.

Finally, although the Chair has found that the doctrine of *stare decisis* need not be invoked in this case, it is apparent that even to the limited extent the doctrine finds favour in labour arbitrations this could not be a case where it would have been applied. Not only is the wording of article 20.04 here different from the earlier decision but more importantly both of the parties are different. It strikes me as fundamental that a party has a right to instruct counsel on the interpretation of its contract and cannot be bound in by a finding in respect similar but different wording in a proceeding involving different parties where it was uninvolved. That is not to say of course, that a previous decision should not be carefully considered and followed where correct, but here the union was in my

respectful view obviously entitled to have its own collective agreement interpreted correctly and in a way which does not disregard key provisions of the agreement.

For all of these reasons I must dissent from the Chair's award.

Dated at Ottawa, this 29th day of November, 2008.

Joe Herbert
Union Nominee