Crown Employees
Grievance Settlement Board

Suite 600
180 Dundas St. West
Toronto, Ontario M5G 1Z8
Tel. (416) 326-1388
Fax (416) 326-1396

Commission de règlement des griefs
des employés de la Couronne

Bureau 600
180, rue Dundas Ouest
Toronto (Ontario) M5G 1Z8
Tél. : (416) 326-1388
Téléc. : (416) 326-1396

Ontario

GSB#2001-0534, 2003-2944, 2008-3397
UNION#2001-0551-0001, 2003-0999-0023, 2008-0526-0018

IN THE MATTER OF AN ARBITRATION
Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Hunt et al) — Union

- and -

The Crown in Right of Ontario
(Ministry of Attorney General) — **Employer**

BEFORE	Randi H. Abramsky	**Vice-Chair**
FOR THE UNION	Tim Hannigan Ryder Wright Blair & Holmes, LLP Barristers and Solicitors	
FOR THE EMPLOYER	Len Hatzis Ministry of Government Services Counsel	
HEARING	June 23, 2010. .	

DECISION

[1] The Employer has moved to dismiss the grievances in this case because the particulars provided by the Union concerning the losses allegedly experienced by individual court reporters in regard to transcript production failed to comply with the Board's order for particulars dated March 11, 2010. The Union, although it acknowledges that the particulars do not meet the Board's order, strongly opposes the Employer's motion. This Decision addresses the Employer's motion.

Facts

[2] This case has a long history. It began with a group grievance filed by three Court Reporters in 2001, and was later joined by a policy grievance in 2003, alleging that the typing of transcripts was bargaining unit work to which the collective agreement applied. After a lengthy hearing, in July 2006, I issued a Decision upholding the grievances, concluding that "the preparation and certification of transcripts is bargaining unit work of the Court Reporters, and so declare." It further stated that "[a]ll issues regarding the implications of this finding are referred back to the parties and I will remain seized."

[3] For a substantial period of time, the parties attempted to resolve the issues but were unable to do so. In the Spring of 2009, the matter came back before me. A number of ancillary issues were addressed, and on March 11, 2010, I issued an order regarding particulars in relation to retrospective remedial issues.

[4] In pertinent part, the order for particulars - which was an agreed order – read as follows:

(a) The Union shall particularize the identity of each individual it is asserting a claim for retrospective relief;

(b) The Union shall particularize the dates and time associated with the work performed (transcript production) by the individuals noted in (a) that it asserts deserve retrospective relief;

(c) The Union shall particularize specifically how the Collective Agreement applies into the individuals noted in (a) including but not limited to setting out which Articles of the Collective Agreement apply in the circumstances and quantifying the claim for each individual.

[5] The particulars were to be provided to the Employer within 45 days of the Order. The Decision noted that "[g]iven the relatively brief timeline for compliance, in the event the Union is note able to meet the timelines … it shall schedule a teleconference or hearing to deal with the timelines or any other issues with respect to this Order."

[6] On April 22, 2010, a conference call was held at which time the Union requested an extension of time until May 17, 2010 to provide the particulars. That request was orally granted, and a Decision to that effect was issued on May 11, 2010. The Decision states that "[t]he Union is to make its best efforts to complete the required particulars by May 17, 2010."

[7] On May 17, 2010, counsel for the Union sent a letter to counsel for the Employer providing its particulars, along with twelve electronic spreadsheets containing information on individual court reporters. The letter informs the Employer that the Union had initial contact with "over 500 Court Reporters" and that it engaged its "best efforts to gather the particulars …" It stated that the Union had "received preliminary data from just over 300" court reporters, that it

continues to receive information and that it "expects that there will be additional information provided by Court Reporters in the coming weeks." It noted, however, that there were "dozens, perhaps hundreds of additional employees who are entitled to a remedy, and that the Union continues to seek a remedy on their behalf" and that the "Union expects to have information from at least 500 individuals…"

[8] The spreadsheets contain a separate tab within each spreadsheet for each individual Court Reporter. Within each tab, the Union has identified the individual, their start date as a Court Reporter, whether or not they continue to work as a Court Reporter, their classification, their employment status, their enrollment in the pension plan, their transcript earnings, the number of hours they spent preparing transcripts in each year, the number of hours they worked in the Court House, the total hours worked, and the work location.

[9] A review of the spreadsheets shows a significant variation in the information provided. For some individuals, almost no information is provided. For some individuals, a significant amount of information is provided – such as transcript earnings, transcript hours, in-court hours, expenses and costs, and their court houses, for each year.

[10] None of the spreadsheets contain dates and times associated with the transcript work, nor do they specifically identify articles of the collective agreement which are alleged to apply in the circumstances. There is no quantification of the claim for each individual.

[11] In terms of the alleged applicable collective agreement provisions, the Union asserted in its May 17, 2010 letter that "[i]n general, based upon the employment status of each individual, the Collective Agreement would apply as outlined" in the letter. It then cited various sections of the Collective Agreement for full-time Court Reporters, Regular Part-Time Court Reporters, Part-Time Court Reporters, Flexible Part-Time Court Reporters, and Unclassified Court Reporters.

[12] The Union, in its letter and at the hearing, noted a number of difficulties that it encountered in trying to gather the required information. It stated that it was a "massive undertaking" given the number of employees involved who are spread across the province and the substantial period of time involved (2003 to 2010). It noted that many of the Court Reporters are still working and did not have the time to examine older records. In addition, it noted that because transcript work is paid for "by the page", not by time, records concerning dates and time were not kept. The Union acknowledges that dates and times are "a necessary consideration when determining premium payments, etc." It suggests, however, that "with additional time, it can provide accurate estimates based upon the individual recollections of each member."

[13] In a letter dated June 15, 2010, the Employer wrote to OPSEU that, in its view, "the Union has not in any respect complied with the Order." Specifically, it asserted that the Union failed to identify exactly which individuals for whom it was asserting a claim for relief, that it failed to particularize the dates and times associated with the work performed, or how the collective agreement applied to each individual, or a quantification of the claim for each individual.

Positions of the Parties

Employer

[14] The Employer asserts that the Union's particulars constitute a "flagrant flouting" of the Board's March 11, 2010 order. It contends that the order required the Union to provide "full" particulars and then specified what the particulars had to include. As a result, it submits that there could be no confusion or misunderstanding regarding the nature of the information to be provided. It submits that the Union's particulars, and the spreadsheets, not only fail to provide the required particulars but makes a mockery of the Board's order. It referred to four examples from the spreadsheets and noted that there were no dates or times regarding transcript work, no collective agreement provisions cited and no quantification of the proposed losses. In its submission, there has been a complete failure to comply by the Union.

[15] As a result, the Employer asserts that the Board should dismiss the grievances. It submits that the Board's case law clearly establishes that where a party has flouted an order of the Board regarding particulars, the Board has dismissed the grievance. In support, it cites to *Re OPSEU (Giannou) and Management Board Secretariat* (1996), GSB No. 570/96 (Leighton); *Re OPSEU (Gates) and Ministry of Health and Long-Term Care* (2007), GSB No. 2005-3003 et al., [2007] O.G.S.B.A. No. 20 (Dissanayake); *OPSEU (Klonowski) and Ministry of Finance* (2002), GSB No. 1799/99 (Fisher); *OPSEU(Singh) and Ministry of Community Safety and Correctional Services* (2005), GSB No. 2001-1070 (Abramsky); *Gardiner and Ministry of Community Safety and Correctional Services* [2004] O.P.S.G.A. No. 2 (Carter); *OPSEU (Morsi) and Ministry of Finance* [2008] O.G.S.B.A. No. 205 (Devins); *Re Credit Valley Hospital and Canadian Union of Public Employees, Local 3252* (Kumar) [2000] O.L.A.A. No. 782 (Davie). In addition, the

Employer also relies on *OPSEU (Disclosure Grievance) and Ministry of Community Safety and Correctional Services* [2006]O.G.S.B.A. No. 111 (Briggs)

[16] In the alternative, the Employer suggests that, even though the Union has not asked for additional time, additional time be given to the Union to complete its particulars, and then the Union must stand or fall on the information provided. In support, it cites to *Re OPSEU (Barillari) and Ministry of Community and Social Services* [2009] O.G.B.A. No. 101(Carrier)

The Union

[17] The Union asserts that it has made its "best efforts" to comply with the order for particulars under the time frame established in the two orders. It acknowledges that, in some respects, the particulars are lacking, but asserts that this is not a basis to dismiss the grievances.

[18] The Union first notes that the Board has already determined that the grievances have merit – that the preparation of transcripts is bargaining unit work to which the collective agreement applies. This fact, in its submission, distinguishes the cases cited by the Employer. It submits that the Board should not dismiss a grievance already found to be meritorious because of an insufficiency in the particulars regarding remedy.

[19] The Union argues that it has not "flouted" the Board's order or disregarded it. On the contrary, it asserts that the Union has taken the Board's order very seriously. It had three employees working full-time on this matter for six weeks to provide the information in the spreadsheets. It contacted over 500 court reporters and attempted to obtain the required

information from them – information which spans almost 7 years. It submits that this was a huge task and that it made a substantial effort to comply with the Board's order, which is demonstrated by the spreadsheets provided for 300 employees. It learned, however, through its efforts, that there were serious difficulties in gathering the required information – such as time constraints, lack of records, and finding older records. Counsel asserted that he had recently received a "stack" of information from one Court Reporter, who spent fifty hours gathering her information, and that with more time, additional information could be provided.

[20] The Union submits that the case law provided by the Employer is distinguishable – not only because this matter is at the remedial stage but on the merits as well. It asserts that, unlike the cases cited, there was no disregard of or disrespect to the Board's order, there was insufficient time given the scope and breath of the information sought, and there were valid reasons for the Union's inability to comply.

[21] In regard to the collective agreement violations, the Union submits that its recitation of the applicable provisions for each category of employee is sufficient. It submits that, at this point, it is not possible to quantify each court reporter's loss without the date and time of the work being available (which affects premium payments and other collective agreement benefits). It submits, however, that a reasonable estimation may be made with additional time.

[22] The Union, however, is not asking for additional time to complete the particulars. Instead, it submits that there has been enough delay in this matter, and that the case should proceed. It submits that it has sufficient detail on some employees, sufficient to provide more

complete particulars to the Employer and to start calling evidence at our next day of hearing, which would then shed light on other court reporter claims. It submits that a number of issues would apply generally, and that there is no valid reason to delay the hearing.

[23] In the alternative, the Union requests that the Board give the Union a date for all information that it can give to the Employer, and proceed in that manner.

Reasons for Decision

[24] After carefully considering the history of this case, particularly since the Board's decision on the merits in 2006, the facts regarding the provision of the May 17, 2010 particulars and the case law provided, I conclude that the Employer's motion to dismiss must be denied.

[25] Although the Board has the power to dismiss a grievance for failure to provide particulars, especially when the Board has ordered them, it is important to remember that dismissal is an extraordinary remedy. As stated by Arbitrator Davie in *Budget Car Rentals Toronto Ltd. and U.F.C.W., Local 175*, 87 L.A.C. (4th) 154, as quoted in *Re Credit Valley Hospital, supra* at par. 13:

> [A] grievance may be dismissed or held to be inarbitrable under the "abuse of process" rubric, where a party fails to produce documents or matters ordered to be produced by an arbitrator, or where a grievor refuses to participate in the grievance/arbitration process, or refuses to otherwise accept the authority of the arbitrator or arbitration process. [citations omitted].
>
> In my view, an arbitrator should not lightly dismiss a grievance by reason of any "abuse of process", and outright dismissal of a grievance by reason of an alleged abuse of process should only occur in the clearest of cases. …

This standard was adopted by the Board in *Re OPSEU (Singh), supra*, where a number of grievances were dismissed because there was a substantial period of non-cooperation by the grievor which led to the Board's order for particulars and the grievor was given an additional six months to comply and warned regarding the consequences of non-compliance. Similarly, in *Re OPSEU (Morsi), supra*, the grievance was dismissed where the grievor refused to provide names to the Employer though ordered to do so by the Board. In *Re OPSEU (Klonowski), supra*, the Board held that Union had "ample time to do the necessary legwork" yet failed to provide the particulars ordered.

[26] In this case, the facts do not reveal *any* abuse of process, or deliberate flouting of the Board's order or the arbitration process. On the contrary, the Union made substantial efforts to comply. The scope of what it was required to do – in sheer numbers of individuals and the information sought which covered almost seven years – was enormous. The original 45 days was a very tight time period to start with and the extension sought to May 17th, was quite brief. The Union learned, as it proceeded, that gathering the required information was very difficult because of the manner in which transcript work was compensated – by the page instead of by time. This resulted in a lack of time records, which in turn, created difficulties to comply with the Board's order for particulars.

[27] There can be no question that the Union's May 17th letter, including the spreadsheets, does not comply with the Board's order for particulars of March 11, 2010. But there is a difference between a refusal to comply or an unjustified failure to comply and an inability to comply. In this case, there was an inability to comply. Certainly the Board expects compliance

with its Decisions and orders – including agreed orders. Once an order is issued, the integrity of the Board and the arbitration process is at stake. *Re OPSEU (Gates) and Ministry of Health and Long-Term Care, supra* at par. 8. But the Board cannot expect blind compliance – and must look at the specific facts of a situation to determine if the extraordinary remedy of dismissal is appropriate. In this case, although there has not been compliance with the Board's order, there has been no abuse of process and no basis upon which this Board should dismiss the grievances.

[28] In this regard, I do find it significant that we are at the remedial stage of the process – not the beginning of it. The situations are fundamentally different. In this case, the grievances have already been determined by the Board to have merit – and the issue is remedy. The issue of particulars at the remedial stage is not an issue that the Board has previously addressed. Although the requirement to provide particulars applies to all types of grievances – individual, group or policy grievances – the Board has not yet addressed the issue of particulars in regard to remedy. As stated by Arbitrator Briggs in *Re OPSEU (Disclosure Grievance), supra* at par. 34: "[t]he law continues to evolve as new and previously unidentified issues arise…"

[29] Although the obligation to provide particulars as to remedy exists, dismissal for non-compliance with a Board order in regard to particulars, when the Board has already found a grievance to have merit, should only be granted in a truly exceptional situation. Instead of dismissal of the entire claim, the issue may be dealt with on the basis of onus and natural justice. The onus is on the grievor and Union to establish their individual losses, if any. They will also have to establish how and when the collective agreement was violated in relation to the specific claim. The Employer must be provided enough information for it to be able to challenge the

claim. If the Employer is unable to challenge the claim or part of a claim because of lack of particulars, that matter may be dealt with at the hearing and may, if it impacts natural justice and the ability to have a fair hearing, lead to a conclusion that the remedy may not be granted. Likewise, if the grievor and Union are unable to establish their losses on a balance of probabilities standard, then they may not be awarded the remedy they seek. This approach, however, is fundamentally different than dismissing a remedial claim in its entirety for failure to comply with an order of the Board, at least where the failure arises from an inability to comply. This ruling is not to suggest that, in an appropriate case, dismissal of a grievance may not occur. The ruling is based on the specific facts and circumstances of this case. Accordingly, for all of the above reasons, the Employer's motion to dismiss is denied.

[30] In terms of how to proceed from here, I conclude that the following approach should apply.

[31] The information provided by the Union, to date, is not sufficient to enable the Employer to understand the individual remedial claims. The Union indicated, at the hearing, that it does have sufficient information from at least one Court Reporter to proceed to hearing, and expects more to follow. Accepting this representation, I conclude that the Union is to provide the information that it has in regard to its first Court Reporter witness to the Employer by July 9, 2010, and we will begin the hearing on the July 22, 2010 date previously scheduled. The evidence concerning this individual will not be on a "representative" basis because I agree with the Employer that neither it, nor the Board, has sufficient information to be able to ascertain if this individual is "representative" or not. Nevertheless, there may be issues that arise that have

broader applicability. In my view, there have been enough delays and the matter must be moved forward, and this will be a start.

[32] In addition, the Union will have six months from the date of this Decision to complete the provision of its particulars in regard to remedy. With reasonable diligence, that should be sufficient time for the individuals to review their records and provide the information to the extent that it exists. The particulars, however, need not be in the precise form outlined in the March 11, 2010 Order. But they must be sufficient for the Employer to be able to understand the specific claims that are being made and the collective agreement violations alleged, and have the ability to challenge them.

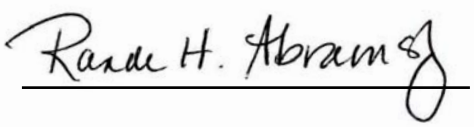
Conclusion

1. The motion to dismiss is denied.

2. The Union is to be given a period of six months from the date of this Decision to complete the provision of its particulars in regard to remedy. The particulars need not be in the exact form outlined in the March 11, 2010 Decision, but must be sufficient for the Employer to be able to understand the claims that are being made and the collective agreement violations alleged, and have the ability to challenge them.

3. In the interim, the hearing will continue as scheduled. The Union is to provide the particulars on its first witness to the Employer by July 9, 2010. The evidence concerning this individual is not as a "representative" of other Court Reporters, although there may be issues that have broader applicability.

Dated at Toronto this 30th day of June 2010.



Randi H. Abramsky, Vice-Chair