Arbitration Award Summary

07-G--00516 – Group Grievance – Relief Employees - Multiple Positions

Case Outline:

This grievance falls under the Collective Agreement expiring March 31, 2009.

The grievance was filed due to a difference of interpretation between the Union and the Employer of language that was introduced into the Collective Agreement during contract negotiations in 2005. Appendix A1 was added to the Collective Agreement as the creation of Relief employee as a new category of employee. Corresponding changes were also made to Article 2.01 (m) for the definition of employee as well as Articles 4.03 and 4.04 for the Application of the Collective Agreement.

The new category was implemented after the ratification of the Collective Agreement in November 2005. The Employer created a number of indeterminate Relief positions which were first filled by current casuals in internal competitions. The "roll-out" proceeded on the Employer's interpretation resulting in some Relief employees holding multiple positions within the same facility.

The Union's interpretation of the language allowed for multiple positions but not within the same facility (building). The exception to this rule applies only to nursing situations where there had to be a minimum of two steps between the positions (A1.02 (b)).

Discussions were held between the Union and the Employer until it became apparent that each was firm in their interpretation. This grievance was filed on November 28, 2007.

Employer's Argument:

The Employer argued that the contract language was ambiguous; unclear in whether an employee was excluded from working in the same job or the same facility. Further, it was not apparent as to what kind of employee was meant to be excluded from the same job or the same facility. The word "employee" was believed to mean one who was already holding Full Time Equivalent (FTE) rated indeterminate position. This interpretation allowed for Relief employees to hold multiple positions within the same facility. In support of their interpretation, the Employer argued that the Union did not take exception during the roll-out process.

In addition, Mr. Todd Parsons was quoted in one meeting as agreeing that multiple positions could be held as in a presented example of a cook in an offender facility also working as a corrections officer.

The Employer presented evidence from the bargaining process supporting their view on how the accepted language developed and the Employer's interpretation of the language from the beginning. A letter confirming this interpretation was sent to the Union on February 15, 2007.

In conclusion, the Employer held that they had made their position clear with a Q&A document that was released shortly after implementation in November 2005 and that the time elapsed before the Union filed this grievance was considerable (2 years). Finally, the Employer submitted that with the next set of negotiations commencing soon, that "the parties should be left to work it out".

Union's Argument:

The Union argued that the word "employee" as written in Appendix A1 was defined under Article 2.01(m) as including all employee categories. Further, the term "facility" referred to a building or structure and not one of multiple locations within the same structure.

A response was sent to the Employer's Q&A document which clearly outlined the difference of interpretations. The response was discussed at a Joint Consultation meeting on December 1, 2006. Mr. Parsons clarified his earlier mistake and reiterated the Union's position which had otherwise stayed the same throughout bargaining and the intervening time.

Council for the Union cited Article 37.22 which denies the arbitrator any authority to "alter or amend any of the provisions..." He also pointed out that in other parts of the Collective Agreement that are directed at one employee category, that the language is specific.

In conclusion, there was no clear evidence that there was ever an agreement on the interpretation; therefore it must be taken from the plain language of the Collective Agreement.

Arbitrator's Decision:

The arbitrator ruled that the grievance must succeed.

He concluded that though the Employer interpreted the final language as allowing the stacking of relief employees, that evidence from the negotiating table did not show that there was a mutual understanding to the meaning of Appendix A1.02. Therefore, the difference must be resolved based of the negotiated language as written within the Collective Agreement.

The definition of employee was clear in Article 2.01 (m), so the Appendix would not refer only to FTE rated employees. Interpretation in this manner supports the Union's view of the language. His final ruling was;

"that an "employee" in A1.02(a) and (b) includes the current employee category of "relief employee" as defined by article 2.01 (m)(v) of the collective agreement, and that the referenced restriction is with respect to performing a job in the same facility where the person is already positioned."

Note

If you are a government employee (regardless of category) you cannot hold a Relief position within the same facility (building) that you already work in. The only exception is for employees in nursing positions who can be employed in a Relief position within the same facility as long as their positions are 2 pay ranges apart (i.e. Full time at pay range 16 and Relief at pay range 18).

This does not stop you from holding a Relief position within the same department, only within the same facility.

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

GOVERNMENT OF THE NORTHWEST TERRITORIES
as represented by the Minister responsible
for the *Public Service Act*

Employer

- and -

THE UNION OF NORTHERN WORKERS

Union

Grievance re: Relief Workers

A W A R D

BEFORE:	Thomas Jolliffe, Q.C.
FOR THE EMPLOYER:	Erin Delaney
FOR THE UNION:	Michael Penner
HEARING LOCATION:	Yellowknife, Northwest Territories
HEARING DATES:	June 10, 2008 (preliminary) October 24, 25, 26 and 27, 2008

Date Award Issued:
November 26, 2008

Our File: 52,086 TJ

07-G-00576.

In this matter, the Union has grieved that the Employer has violated the collective agreement, in particular Appendix A1, by wrongly hiring relief workers into multiple relief positions outside of those limited nursing situations permitted thereby, which is to say generally treating them as if they were capable of holding more than one position at the same time in the same facility. The Union sees there to be an impact with respect to their receiving proper wages, benefits and other entitlements including step increments, overtime, and severance. The relevant Appendix A language speaking to the issue at hand reads as follows:

Relief Employees

A1.01 The Employer shall hire relief employees into positions for which there are no established hours on a daily, weekly or monthly basis and may be required to report to work on an as-and-when required basis for facilities where services operate on a daily basis throughout the entire year.

A1.02 (a) An employee may not be appointed as a relief employee to perform a job in the same facility (which includes a hospital, health centre, correctional facility, young offenders facility, or college residence) as the employee performs in the employee's other position.

(b) An employee in a nursing position may be appointed as a relief employee in the same facility providing that the position is more than 2 pay ranges apart from the employee's other position.

From outset, the parties' respective counsel have indicated that the parties view the language of A1.02 quite differently. As matters have progressed through evidence to the point of final argument, it has become apparent that their crucial difference relates to the scope of "an employee" as referenced at the commencement of both subparagraphs (a) and (b). The Union asserts that the employee who cannot be appointed as a relief employee to perform a job in the same facility as the

employee performs in his other position would be anyone defined as an employee by the collective agreement. The Employer holds to the view that the proper interpretation would require encompassing only full-time indeterminate employees as normally indicated by one's full time equivalency (FTE) rating, which is to say it asserts that the language should not be taken as specifically disallowing a relief employee from working two positions in the same facility.

At outset the parties provided a joint statement facts which is available as follows:

The parties agree to the following facts regarding grievance #07-G-00516 respecting relief workers having multiple positions:

1. **At all material times the Employer is the Government of the Northwest Territories.**

2. **At all material times the Union is the Union of Northern Workers.**

3. **The Collective Agreement between the Union of Northern Workers and the Minister Responsible for the Public Service, expiring March 31, 2009 (hereinafter, the "Collective Agreement") created a new category of employee, namely a "Relief Employee".**

4. **Since the implementation of the Collective Agreement, the Employer has hired relief employees to work multiple relief positions in the same facility, or in the case of STHA, hiring nurses to work multiple relief positions with a difference of two or less pay ranges.**

5. **In an email dated November 28, 2007 and directed to Ms. Lynn Elkin, Deputy Minister of the Department of Human Resources, Government of the Northwest Territories (GNWT) from Ms. Kim Harding, Service Officer of the Union of Northern Workers (UNW), the Union grieved at the second level on behalf of relief workers working multiple positions in the same facility.**

6. **Attached as Exhibit "A" to this Joint Statement of Facts is a copy of the aforementioned letter and associated Grievance Form dated November 28, 2007 from Kim Harding to Lynn Elkin.**

7. **The Union extended the time for the Employer to respond to the grievance by January 8, 2008.**

8. **Attached as Exhibit "B" to this Joint Statement of Facts is a copy of an email dated December 28, 2008 from Kim Harding to Lynn Elkin stating that the Union had extended the Employer's period of response until January 8, 2008.**

9. **On February 7, 2008, the Union referred the grievance to arbitration.**

10. **Attached as Exhibit "C" to this Joint Statement of Facts is a copy of an email dated February 7, 2008 from Kim Harding to Lynn Elkin stating that the Union was referring the grievance to arbitration.**

At outset also, Employer counsel, Ms. Delaney submitted that the language was ambiguous either on the face of the wording itself, or in operation. For one thing, it was unclear on the face of the wording whether the modifying phrase, "as the employee performs in the employee's other position", was meant to modify "job", or "same facility" which would lead one to ponder whether or not an employee was eligible to perform another type of job in the same facility, or work in the same facility at all. There was also the issue of what kind of employee was meant to be excluded from the same job or the same facility, likewise said not to be clear. The Employer sought to present extrinsic evidence in the nature of past practice and bargaining history as an aid to interpretation.

Ms. Delaney also indicated that by her instructions, the Employer was applying the language of A1.02 facility to facility, nursing positions aside under subparagraph (b), on the basis that a relief employee could work a second relief position in the same facility as long as they were not performing substantially the same duties. Some FTE rated nurses were performing in the same facility in relief positions as long as they were more than two pay ranges apart under subparagraph (b). In response, on behalf of the Union, Mr. Penner said that the language of A1.02 was capable of its usual construction both with respect to the meaning of "an employee" under the collective agreement and also the proper modifier interpretation and implications thereof. In short, there

should be no stacking in a facility of relief positions, or any positions, other than nurses whose situations were specifically governed by subparagraph (b) as to their taking multiple appointments in the same facility at least two pay ranges apart.

Subsequent to counsel making their respective arguments on legal principles associated with the discovery and resolution of patent or latent ambiguities, I ruled in preliminary fashion on a hearing day set aside for that purpose that I was satisfied the language at least arguably could have an ambiguous quality to it, given the physical structure of the provision, and that I should hear the evidence which might well assist me in concluding whether ultimately the language did disclose an ambiguity, and if so then to be used as an aid to interpretation. There were a number of decisions tabled on the issue of considering whether an ambiguity existed, and how to deal with it, starting with the seminal case decided by the Ontario Court of Appeal in *Leitch Gold Mines v. Texas Gulf Sulphur Co.* (1968), 3 D.L.R. (3d) 161, through a host of arbitration awards decided since that time having regard to the obvious significance of contract language interpretation in labour relations matters, and the breadth of the individual factual circumstances presented. Included in the materials tabled were arbitrator Hope's helpful discussion in *British Columbia Ambulance Service and Ambulance Paramedics of British Columbia*, C.U.P.E. Local 873 [2006] B.C.C.A.A.A. No. 120, likewise arbitrator Warren's analysis in *IPSCO Inc. v. International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers Local 805* (2004), 124 L.A.C. (4th) and that of arbitrator Hamilton in *DHL Express (Canada) Ltd. and C.A.W.- Canada, Locals 4215, 144, & 4278* (2004), 124 L.A.C. (4th) 613.

It is appropriate for me to now outline the evidence as to the supposed uncertainty said by the Employer to be gleaned from the language, or its operation in the circumstances at hand, and to

consider whether there is any realistic and *bona fide* doubt as to its meaning for the extrinsic evidence to be ultimately of assistance. Even then, one is left to consider where this evidence leaves the parties in terms of assisting one to understand the true meaning of the negotiated provision as a matter of disclosing mutual intent.

By way of setting out some background to this matter, one notes that the employee group or category referred to in the current collective agreement under Appendix A1, as relief employees, did not exist before the last round of bargaining undertaken in 2005. The Employer had commonly used "as and when casuals" over the years to work in various facility settings across its numerous departments on an on-call basis, or for varying assigned periods of time. They were assigned in such a way to bolster its manpower requirements as needs arose, whether filling in for absent FTE rated indeterminate employees or, as often was the case, simply being available for those extra hours that a government department might require in order to complete the job at hand. No doubt however, many casuals found themselves working for lengthy periods of time, holding an employment status which overall the Union considered provided them with too few workplace rights and benefits, including job security. Sometimes they worked in different casual employment situations within one department or another, sometimes at the same facility, at the same time. It was also not unusual for FTE rated indeterminate employees to accept casual hours in another working capacity at another facility. Certainly, by 2005 the numbers and usage of casual employees and casual hours' assignments had become a collective bargaining issue for the Union, while the Employer also recognized that some significant changes needed to be made.

At the bargaining session on June 13, 2005 the Employer presented its initial proposed amendments to the existing contract language dealing with creating a new category of employee to

be included in the definitions' article 2.01 as a "relief employee". The proposed definition language was accepted by the Union and was included in the current collective agreement as 2.01(m)(v):

> **a "relief employee" is an employee appointed to a position for which there are no established hours on a daily, weekly or monthly basis and may be required to report to work on an as-and-when required basis for operations where services operate on a daily basis throughout the entire year.**

It bears observing that the same article 2.01(m) dealing with interpretations and definitions relating to employee categories, defines "Employee" simply as "means a member of the Bargaining Unit" and in addition to the new "relief employee", including definitions thereunder for the "casual employee", "indeterminate employee", "part-time employee", "professional employee", "seasonal employee", and "term employee".

The Employer also proposed at negotiations that the following new language be added to article 4 dealing generally with application of the collective agreement, which was accepted into the current collective agreement as follows:

> **4.03 An employee may occupy more than one position.**
>
> **4.04 An employee appointed to a position may also be employed as a casual employee. An employee may occupy more than one casual assignment.**

The Employer also proposed new language dealing with paying a percentage of a base salary to relief employees as supplementary compensation instead of earned vacation, sick leave and special leave, which was included as the new article 17.08 after agreement was reached on the acceptable *in lieu* figure of 14%.

Further, the Employer proposed language with respect to the applicable overtime rate payable to relief employees, which is to say "for work performed in their relief position in excess of the standard or regular hours of work for full-time employees in similar positions, either on a daily or

weekly basis." It was included as the new article 23.08.

The Employer's proposed introductory language covering its hiring "relief employees into positions for which there are no established hours... and may be required to work on an as-and-when require basis...." was included as the new A1.01, again no changes to the proposal. Further, it tabled language meant to ensure "that a series of relief employees will not be employed in lieu of establishing a full-time position or filling a vacant position" which was included as the new A1.03; also the proposed language of A1.04 dealing with probationary periods, pay increases, and entitlement to removal assistance; also the proposed language of A1.05 setting out the clauses of the collective agreement which do not apply to relief employees; also the proposed language of A1.06 outlining the entitlement to biweekly payment; and the proposed language of A1.07 ensuring that "the Employer shall make every reasonable effort to allocate relief work on an equitable basis among readily available qualified relief employees".

In short, it can be observed that for purposes of my considering the issue at hand, all the Employer's initial June 13, 2005 proposed language covering the creation of the "relief employee" was accepted in due course by the Union, with the exception of A1.02. Its rejection led to negotiations at the table meant to resolve the language, now said to be meaningful as an aid to interpreting the eventual, possibly, ambiguous provision which resulted. It requires one to review these negotiations and also observe how the parties thereafter dealt with the new language.

The Employer's initial drafted language was tabled as AXX.02 on June 13, 2005. It reads as follows:

> **An employee will not be appointed as a relief employee to perform *a similar job in the same facility as the employee performs in the employee's other position.* (Employer's italics)**

During the time frame of the June 2005 negotiations, the Employer's first witness, Shaleen Woodward, was the Director of Employee Relations, having been a member of its negotiating team for the current and previous rounds of collective bargaining. She related her background knowledge in testifying about the various contentious issues arising between the parties over the years related to the use of casuals. The situation had eventually led to the Employer drafting what it took to be suitable language creating the new relief employee classification, seen to be "distinguishable" from casuals, and to be covered by a new appendix contained in the collective agreement. With the draft language having been presented to the Union on June 13, 2005 she reviewed her handwritten notes in detailing her recollection of the bargaining to follow, having been seated at the table during that time. She said she was aware coming into negotiations, that the Union held to the view that some managers on some occasions had been using casuals in order to avoid paying overtime to those persons who otherwise would have been performing the work. At the same time, she was aware that some FTE rated indeterminate and term employees were working additional hours in other government facilities, or departments, sometimes at outside organizations funded by the government with this other work being done on a casual hours basis.

On consulting her notes, Ms. Woodward recalled that at the afternoon session on June 13, after the Employer proposals were tabled, its spokesperson, Glenn Tait, explained its position that the various departments should be moving away from using casuals in favour of creating a new classification of specifically hired relief employees. The Employer was willing to utilize internal competitions amongst any existing casuals working in a facility in order to fill the available job assignments. By her recollection, briefly recorded in her handwritten notes, the Employer's initial proposed language was meant "to provide clarity" on when relief work could be performed,

specifically as it related to a person's other position. She said the Employer was attempting to deal with the known concern that managers were assigning their scheduled employees in a facility to also "take on casual work in the same kind of job in the same facility". In the past there had been health care workers in term positions, even some who were full-time indeterminate, who had taken on casual hours in the same facility, being non-overtime hours, with which she disagreed. In her view, they should at least be doing different kinds of work in the second job. She knew the Union was wanting to prevent the same kind of thing happening with the creation of the new relief employee category, which the Employer recognized to be a valid concern. At the same time, she was aware that the Employer still required some level of flexibility. It also did not want to disentitle some employees from taking assigned hours as relief employees at different nearby locations, nurses being the prime example. She also knew that there were correctional officers working in FTE rated positions at an adult facility who were taking casual hours as relief youth officers in another local facility. Her notes reflect that Mr. Tait explained the Employer proposal that an employee should not be able to perform a similar job in the same facility, which meant that a floor nurse could still work as a relief patient care coordinator in the same facility, or a correctional officer as a relief youth officer, which the Employer did not see as being similar jobs. Her notes disclose that the Union's negotiator, Mike McNamara, was still concerned over nurses possibly doing the same kind of work despite the Employer wanting to characterize their relief assignments as being substantially different.

When bargaining continued the next day, June 14, by Ms. Woodward's description the focus was still on the issue of working similar jobs, also the meaning of "facility" which was contentious to some degree. By her notes, the Employer proposed that nurses be prevented from working within the same point range, and that they should consider there was a realistic difference between

department and facility. The Employer tabled its second draft for the proposed wording of AXX.02:

> (a) **An employee may not be appointed as a relief employee to perform *a similar job in the same facility (which includes a hospital, health centre, correctional facility, young offenders facility, or college residence) as the employee performs in the employee's other position.* (Employer's italics)**
>
> (b) ***An employee in a nursing position may be appointed as a relief employee in the same facility providing that the position is more than 2 pay ranges apart from the employee's other position.* (Employer's italics)**

Ms. Woodward described it as a matter of the Employer wanting "to provide clarity" during the afternoon session of June 14, and deal with what the Employer took to be the Union's greatest concern in the past of term employees, even some FTE rated indeterminate employees, taking on casual work doing the same kind of job in the same facility. However, at the same time, she knew that it was important for the delivery of health services that nurses, who were in short supply, continued to work additional hours either outside the facility where they more usually worked, or even in different kinds of duties within the same facility, and hence the redrafted proposal. She recalled it being discussed at the table that day. By her recollection, Mr. Tait explained the Employer's position with respect to what might be considered a similar job in a facility as with reference to the correctional officers' situation. The above redrafted proposal which the Employer presented that day included examples of the kinds of facilities to be affected by the limiting language, and also provided a different limitation with respect to the nurses' situation which avoided having to debate case by case how varied the work was in a particular healthcare situation.

Ms. Woodward recorded in her handwritten notes that in response to the explanation from Mr. Tait on June 14, concerning the possible interpretive scope of the word "similar", the Union's spokesperson, Mr. McNamara, reacted negatively. He indicated that while he appreciated Mr. Tait

wanting to make the Employer's interpretation clearer, the Union was "... not sure it is where we want to go". She recalled the Employer also raising the issue of having internal competitions limited to existing casual employees currently employed at the facilities, and that "an employee could occupy more than one relief position", meaning from her perspective at that point that casuals committing themselves to transition into relief employee positions could hold more than one newly appointed position at a time. She was not sure whether there was any significant level of detail presented on the emerging transition issue. At the same time, with respect to "facility", the proposed language was explained to the Union negotiators as "can't do a job & relief position in same Authority in job normally performed in their other job", which she recorded in her handwritten notes as being Mr. McNamara's recapitulation of the Employer's position. By her recollection, it was a reference to full-time indeterminates, or term employees, not being able to take on relief jobs at the same location, except as permitted for nurses under the proposed subparagraph (b). By her recollection the discussion, for example purposes, again involved corrections officers with some wanting to take relief assignments in the same facility which they would not be able to do.

For purposes of the evening session on June 14, the Union tabled its rewritten AXX.02 which remained identical with respect to the Employer proposed subparagraph (a) except for the removal of the word "similar", which is to say as expressly worded the Union was contending at that juncture that "an employee may not be appointed as a relief employee to perform a job in the same facility [same facility examples included in parenthesis] as the employee performs in the employee's other position." With respect to the Employer's proposed subparagraph (b), the Union had sought some protection on nurses' pay range difference, having previously said that the relief position taken should be more than two pay ranges apart from the employee's other position. The parties accepted the

deletion of "similar" as the final wording change for the new A1.02(a). In addition there was one other change elsewhere respecting "an employee" on leave for greater than 14 calendar days being able to accept casual employment within the same Authority "provided the employee is not performing the tasks within the same facility as their substantial position". It was placed in Appendix A5.02. The discussion during the evening session, subsequent to the Union tabling its reworked version of the new A1.02 language, had centered on nurses taking on relief work in the same facility having to be more than two pay ranges apart, which the Union agreed would not present any barriers to their going from one distinct facility to another. The Employer's spokesperson, Mr. Tait, also inquired whether the use of the word "casual" was intended with respect to the provision eventually ending up in A5.02, and was told by the Union negotiator, Mr. McNamara, that it was.

In about late November 2005, subsequent to the Union membership ratifying the new collective agreement, the Employer circulated a document which it had created to explain the workings of the new collective agreement to employees from its point of view, entitled "Relief Worker Positions - Q & A for Employees" (Employer's Q & A document). By then casual employees were transitioning into relief positions. The two paragraphs dealing with employees holding more than one relief position are set out below:

> **25. <u>Can I be in more than one Relief Worker position at a time?</u>**
>
> **Yes you can. An employee can have several relief positions, even if they are in the same facility. For example, you can be a Cook Relief Worker and a Correctional Officer Relief Worker in the same facility.**
>
> **26. <u>Can I be in a relief position and in another indeterminate position?</u>**
>
> **You cannot be a Relief Worker in the same facility where you occupy an indeterminate position, unless you work in nursing.**

An indeterminate employee can be a Relief Worker if the Relief Worker position is not in the same facility as their indeterminate position. For example, an indeterminate Youth Officer at the North Slave Young Offender facility may work as a Relief Worker Corrections Officer at the North Slave Correctional Centre.

Nursing - An employee cannot be a Relief Worker in the same facility that they have an indeterminate position. The only exception is in the nursing area, where you can hold both an indeterminate and relief position if the two positions are three or more pay ranges apart.

The above explanations were eventually reviewed by the Union, resulting in it responding in writing as follows on April 9, 2006 (Union's Q & A response document):

25. Can I be in more than one Relief Employee position at a time?

The UNW does not take issue with this, except the comments should be clarified to show that you can hold more than one Relief position as long as it is not performing the same substantive duties, and/or it is not in the same facility as your other Relief position.

26. Can I be in a relief position and in another indeterminate position?

The UNW is generally in agreement with the section.

The determination of whether you can hold an indeterminate position and a Relief position boils down to a definition of "facility". The UNW took the position at the bargaining table that "facility" was defined as building. You may have the same department (Justice - Corrections), or Health Authority that provides the service in many different "facilities". This means by the UNW's interpretation, employees can hold another indeterminate (Relief or full-time) position in one facility of that Authority or Department and work as a Relief in another facility under the same Authority of Department.

The UNW understands that some employees have been receiving these shifts on an overtime basis, and the UNW interpretation could mean that they would no longer be paid overtime, but rather would be offered positions as Relief employees.

> **The decisions made at the bargaining table were made for the better of the membership as a whole, and not every circumstance was, or in fact, could be considered at the bargaining table. The Bargaining team agreed that the better part the changes agreed to under Relief Employee were a great improvement over what was occurring.**
>
> **Some members benefitted by the way the Employer was using casual employees, but many were not. Many casuals had their employment ended with little notice and for no cause. There was nothing the UNW could do for these members, the ones that did come to us, did not want us to take action because they were afraid they would never be re-employed with the GNWT. Now the member has security in an indeterminate position, and have solid mechanism in which to challenge the employer if they step outside the Collective Agreement. The Employer must also follow progressive discipline and can not longer just stop calling the employee for shifts. Some casuals were receiving benefits whereas others were not.**

Plainly put, Ms. Woodward testified that the Union's supposed understanding of the language of A1.02 at that point was not something which she thought had been negotiated. She testified with respect to item 25 of the Employer's Q & A document that "our" understanding, meaning what the Employer had thought it had negotiated, was that the modifying phrase "as the employee performs in the employee's other position" was in relation to the employee's "job", and not the "facility" where a person worked. It meant, as she explained it, that there was no absolute prohibition against any employee having more than one job in the same facility, as long as it was a different job. But, that approach would seem to contradict the Employer's Q & A document, item 26, which referred to indeterminate position holders not being relief workers in the same facility. Nevertheless, from Ms. Woodward's point of view it had meant that the concept of denying one "similar" jobs had been contracted down to having to be the same job in order for one to be excluded. In particular, and in practice, it meant by her view that relief employees could hold multiple relief positions in the same

facility at the same time, performing different duties, as was the ongoing situation for some employees who had its transitioned in November 2005 from casual employment into relief positions. She also said that there was no intention on the Employer's part to "disenfranchise" any casuals, some of whom characteristically had worked in more than one assignment at the same time, by accepting an offer to transition into its newly created relief positions.

Ms. Woodward acknowledged that it had been the Union's bargaining team on its review of the Employer's proposal for AXX.02(a), which argued for the modifier "similar" be taken away from "job", leaving the rest of the language alone, which she thought at the time provided greater clarity in that it eliminated the need to distinguish between jobs which were or were not similar. At the same time she recognized that subparagraph (b) was specific to nurses and allowed them to work in the same facility in the event the relief job was more than two pay ranges apart from the employee's other position. In response to Mr. Penner's specific question as to whether the Union during the bargaining sessions ever indicated that any relief employees could have another job in the same facility, she indicated that there was nothing in her notes covering whether the Union understood the language to limit their being able to hold more than one position, although she went on to point to the notation she made with respect to Mr. Tait's explanation presented at the table during the June 14 afternoon bargaining session, presumably with reference to the language which had been proposed, and not yet rejected, that "an employee could occupy more than one relief position". Indeed, the agreeable general language of the new article 4.03 indicated as much, albeit without specifically mentioning any specific employee category. At the same time, she again acknowledged that it was the Union spokesperson, Mr. McNamara, who then "went through the model" as she recorded in her notes, in dealing specifically with the Employer proposed AXX.02 language, and had indicated with respect

to "facility" that "can't do a job & relief position in same Authority in job normally performed in their other job". She agreed that the parties at that point did not embark on any further clarification, although she took it to be a common understanding that a person could have more than one position in the same facility, even with "similar" removed. Nor did she interpret paragraphs 25 and 26 from the Employer's Q & A document to be contradictory.

Ms. Woodward remarked in cross-examination that she had also understood all along that the new A1.02 language did not contemplate a full-time indeterminate employee working in a relief position in the same facility, albeit, she saw a relief employee as a type of indeterminate, just not FTE rated. Indeed, the Employer's Q & A document at paragraph 6 in describing the benefits available to a relief worker, indicated by way of introductory remarks, "you will become an indeterminate employee with job security". Certainly the collective agreement does not exclude relief employees from being considered a type of "indeterminate employee" which it defines in article 2.01(m)(ii) simply as "who is a person employed for an indeterminate period", which is to say the definition language admittedly, on its face, does not distinguish a full-time FTE rated employee from a relief employee on the basis of indeterminate employment. Nevertheless, Ms. Woodward had always seen the A1.02 language as distinguishing between indeterminate FTE type employment, even that of a defined part-time employee or term employee, and the new relief employee category. In response to counsel providing some documentary employment scheduling information from the Stanton Yellowknife Hospital indicating that following ratification of the new collective agreement there was at least one relief employee, a nurse, working in four different relief positions at the same time, none of which were more than two pay ranges apart, she agreed that would not be in accordance with her understanding of A1.02(b).

The Employer's next witness, Tara Hunter was not at the bargaining table. In 2005 she was a Human Resources Officer, and in that capacity provided assistance with the "roll-out" of the relief worker transition plan, meeting with senior managers, in helping to create positions, job descriptions, and work information materials. By her information, the transition affected some 330 existing employees in their moving from casual employment into relief positions, in addition to the Employer creating another approximate 70 positions which went unfilled. In coming to terms with the new "relief employee" language, in order to provide her expertise during the transition period following the Union's ratification, she met with Ms. Woodward in addition to the responsible Deputy Minister, Lynn Elkin. By Ms. Hunter's understanding from their discussions, the new article A1.02 allowed for persons to take multiple relief positions doing any kind of work as long as they did not at the same time hold an FTE rated indeterminate position in the same facility. The commencement words "an employee..." in subparagraphs (a) and (b) of A1.02 meant FTE rated indeterminate, or at least not a person already holding only another relief position. By example, a relief youth officer could take on another relief position in the same facility doing the same kind of work, or different work, but not an FTE rated indeterminate officer. The relief position which that person sought would have to be in a different facility. In her testimony she reviewed paragraphs 25 and 26 of the Employer's Q & A document and found the language to be consistent with her understanding, both when she worked on the draft language of that document prior to roll-out, and currently.

In her testimony, Ms. Hunter reviewed a number of known relief position placements where an employee might be holding one relief position in a facility, while correctly holding another relief position in a different area of the same facility, but not holding any FTE rated indeterminate position, which she understands would be currently the situation through 2008. She also indicated that there

had been occasional situations which were not handled correctly, which is to say an FTE rated nurse holding a relief position which was not more than two pay ranges apart. Inasmuch as the words "an employee" and "the employee" in A1.02 (b) were understood to mean one already holding an FTE rated position, then nurses who only held relief positions within a facility were thought to be able to hold multiple relief positions without contravening the provision, doing whatever assignment they were willing to accept.

Ms. Hunter was not part of the Employer's bargaining team during negotiations, having relied on "input" received from her superiors Ms. Woodward and Ms. Elkin, in addition to some other senior managers. At the same time, she thought it was clear enough on her reading that the parties were inferring that it was FTE rated employees who were being referenced, saying "that's the direction I was given... that's how we rolled it out", whether or not there were mistakes made in some specific instances, which she acknowledged there were on the scheduling materials presented in evidence.

The Employer's last witness, Collette Perry, between February 2005 and March 2006 was the Senior Labour Relations Advisor to the Financial Management Board Secretariat. She was not part of the Employer's bargaining team and only became familiar with the new provisions creating the category of relief employee following ratification when she was briefed on the changes from the Employer's perspective. In her testimony, Ms. Perry provided her understanding of the "roll-out" interpretation, which, as with Ms. Hunter, she took to mean under A1.02 that full-time indeterminate (FTE rated) employees could only be appointed to relief positions as a second job if they were not working in the same facility, or in the case of a nurse if she was working more than two pay ranges apart from the other job in the same facility. At the same time the provision was not understood by

her to be applicable at all to those holding only relief positions, meaning one could hold multiple relief positions in any facility, doing any kind of work, as long as he or she was not working at the same time as an FTE rated indeterminate employee.

On being referred to the Union's Q & A response document, paragraph 25, Ms. Perry said it was not her understanding of what had been agreed to by the parties, as reflected in the Employer's own earlier Q & A document, meaning that a relief worker in the same facility should be able to work in any other relief position, not just in differently described positions performing differently described substantive duties and/or in another facility. After having received the Union's Q & A response document she hand wrote in the margin her understanding that the Union had agreed that a person could hold a different position in the same facility, which was not exactly her understanding of the language either, inasmuch as she took relief employees to be able to work any other relief position, anywhere. She knew that transitioning from casual to relief employment had by that time occurred for numbers of employees. Some of them understandably had taken multiple relief positions, as offered, in the same facility, thought to be permissible as long as they did not also hold an FTE rated position. At the time of this transitioning of casuals into relief positions, starting in about November 2005, it was not her information that the Union took any steps to address whether the "roll-out" of the programme was being handled correctly. Unquestionably, it occurred that some transitioning casuals were positioned into multiple relief positions in the same facility.

As far as Ms. Perry is aware, the first time the issue of filling relief positions was raised by the Union, occurred at the joint union/management consultation held on December 1, 2006, which is to say there were no immediate discussions initiated by the Union after having sent to Ms. Woodward its Q & A response document in April 2006, and not over approximately the next eight

months. At that meeting attended by Ms. Perry accompanied by the Employer's Director of Corporate Human Resource Services, and Sharilyn Alexander, Labour Relations Advisor Roshan Begg, for the Employer, and the Union's President, Todd Parsons, accompanied by its Director of Membership Services, Roxanna Baisi, Ms. Perry recorded in her typewritten minutes a Union acknowledgment that it had initially agreed that corrections officers could work as relief cooks, "but quickly reconsidered upon reviewing language (same facility). Todd had explained this to Blair (Chapman) and intended to send a letter, though not certain if letter was sent". The understood admission made at some time earlier by Mr. Parsons was in reference to a discussion he had had with a senior labour relations manager where he indicated what was later remarked upon and recorded at the joint meeting as having occurred. At that December 2006 consultation meeting, Ms. Perry recalled, while Mr. Parsons admitted what he had said to Mr. Chapman, he also indicated that he had "reconsidered" the remark and had intended on sending a letter to that effect, which by all accounts was never received.

With the parties coming to the realization that, apparently, they were viewing the interpretation of A1.02 differently, on February 15, 2007 the Deputy Minister of Human Resources, Lynn Elkin, wrote to Mr. Parsons on the subject of "Employees Appointed to Two Relief Positions Within One Facility". This letter, drafted by Ms. Perry, which she took as describing the Employer's position throughout, reads as follows:

> **With the quarterly meeting regarding the use of relief employees approaching March 1, 2007, I want to confirm the Employer's position regarding employees appointed to two or more relief positions within the same facility.**
>
> **It has been the Employer's understanding from the implementation of relief positions that an employee may accept a second relief position within the same facility. At our last quarterly meeting December 1, 2006, you had indicated the**

Union had initially shared this view, but subsequently reconsidered its position. A letter was to follow, registering the Union's view that relief employees could not be appointed toa second relief position if that position was in the same facility.

However, in August and September of 2005, the Employer proceeded to staff relief positions on the basis of initial agreement. Some employees were offered two relief positions on the basis of initial agreement. Some employees were offered two relief positions within the same facility. It is the Employer's view, then and now, that this approach is consistent with the language of the Collective Agreement respecting relief employees and respecting multiple positions.

Thereafter, at the follow-up joint union/management consultation meeting held in March 2007 as a quarterly review of numbers of issues arising between the parties involving relief employees, it was observed by Ms. Perry that Mr. Parsons had again acknowledged that on one occasion previously he had mentioned to Mr. Chapman that he agreed it was okay for a cook in an offender facility to also work as a corrections officer, but that later he had reconsidered his remark, and had intended to send a letter but did not do so. Her handwritten note of March 6, 2007 also indicated that at the request of Mr. Parsons, the Employer through Ms. Alexander confirmed its position that a person could hold more than one relief position in the same facility, for example someone working as a relief cook and relief corrections officer at the same location. With the Union asking why it would not be possible to set up a full-time relief position, presumably one having a range of described duties within the same facility, Ms. Alexander had indicated it would not be possible as it involved different budgets, different skill sets, different levels of pay, and basically having to work within different capacities. However, in order for the Union to better understand what was occurring, the Employer would provide a list of employees working more than one relief position.

In cross-examination, Ms. Perry again confirmed her understanding, of what she took to be the Employer's position throughout, that the reference in A1.02 to "an employee" and to "an

employee's other position" was meaning an FTE rated employee as distinguishable from one holding only a relief position. Simply put, it meant that the Employer was reserving on its management authority to stack different relief positions in the same facility much as it had done with "as and when" casuals, capable of being performed by the same person doing the same, similar or different work, but not a person already appointed into full-time indeterminate employment as an FTE rated employee. At the same time, she did not see that the language in A1.02 even dealt with the issue of a relief employee performing the same substantial duties there or somewhere else. The Union's April 9, 2006 circulated Q & A response document was put to her. She admitted to being "surprised" at the information contained therein, as described in item 10, namely that the Union had supposedly gone to the bargaining table "with the statement that an employee of the GNWT was "ONE employee (and that) during the bargaining process the UNW moved off its position to allow that in certain instances and employee could hold more than one position within the GNWT. Multiple contracts in one facility is not one of those instances". She indicated having always understood that at time of "roll-out" it was "appropriate" to distinguish between FTE rated employees and those transitioning into relief positions from their previous casual employment situations, which would allow for multiple relief contracts. Lest there be any doubt as to the Employer's position, Ms. Perry had drafted the February 15, 2007 letter for Ms. Elkin setting it out, as sent to the Union. Thereafter, to the time of hearing she had not seen Mr. Parsons' reply correspondence to Ms. Elkin dated January 8, 2008. This response, sent almost nine months later, six weeks after the grievance itself was filed, reads as follows:

> **Thank you for your letter received in this office February 19, 2007. I apologize for the late reply, the letter was misplaced and just recently surfaced again. I have reviewed the contents of your letter and have the following response.**

I find that I have to correct your statement that the Union had agreed that a relief employee could hold more than one position in a facility. During a meeting with a representative of Labour Relations shortly after the current agreement was signed, I misspoke regarding this issue. Once I had the opportunity to reconsider my comments, I made the Union's position clear. Our position since that time and what continues to be our position, is that no employee can hold more than one position with the GNWT. The exceptions to this rule is if an individual is a relief employee and then, they can only hold more than one position as long as they are not in the same facility. Nurses have a further exception in that they can hold two positions in the same facility if the pay range difference between the positions is at least 3 steps.

I will go one step further, and state that in fact employees can hold more than one position in a facility, but they must be treated as though they are one employee. This would include entitlement to overtime if when the multiple positions are combined they work more than the daily or weekly hours.

At the December 2006 Senior Joint Consultation, it was my understanding that you had in fact agreed with our position.

There seems to be some confusion on both our parts as to the others interpretation of the Collective Agreement. Regardless of our late reply, I would like to state again, and for the record, that the UNW's position has been and remains to be, relief employees cannot hold multiple positions within the same facility, and this position has been clearly relayed to the employer previous to this letter.

The Union's first witness, bargaining union member Kim Harding, in her testimony confirmed that her review of scheduling documentation within the Employer's healthcare operations showed some nurses to be holding multiple relief positions within the same facility, at less than three pay ranges apart. In her review of the documentation she pointed to some specific examples within the December 2007/January 2008 timeline of her research, albeit with no start date suggested. In her cross-examination the Corporation did not take issue with what she had learned, its view being that stacking relief nurse positions within the same healthcare facility, within the same pay range, was permitted under the wording of A1.02 (b).

The Union's second witness Roxanna Baisi, a bargaining unit member for the last 24 years, was its Director of Membership Services during the last round of collective-bargaining, and in previous rounds, which position she continues to hold. She testified that going into bargaining in 2005 the Union understood there to be various problems associated with the Employer's use of casuals, which had been under review for some time by a joint committee established for that purpose. The Union had long opposed having casuals hold "multiple contracts" at the same time, which it saw as impacting a number of workplace related issues including overtime denial, proper benefits' accrual for persons essentially working full-time hours, and job security. She recalled that the dialogue began prior to bargaining with the Union seeing a definite attraction to creating a new classification of relief workers having indeterminate employment, albeit without definite set hours. At the same time, the Union was opposed to any new classification of relief employees being able to hold multiple contracts which it saw as placing them back in the same disadvantageous position associated with casual employment. In their early talks, she said, the Union was accepting of the possibility of relief positioned individuals holding jobs in another facility or location, but not within the same facility, which would be with respect to "any position".

Ms. Baisi recalled in her testimony that the Employer's first draft of language tabled on June 13, 2005, she being present throughout bargaining, contained numerous provisions dealing with the creation of the new relief employee category, including definition language, overtime, and job security language. She also recalled that the Employer's first draft of AXX.02, made no specific reference to the nurses' situation in healthcare facilities, stipulating only that "an employee will not be appointed as a relief employee to perform a similar job in the same facility as the employee performs in the employee's other position". By Ms. Baisi's's description the Union was insistent

that the descriptive term "similar" should be struck out as its bargaining team did not accept that an employee should be able to work any other job in the same facility, at the same time, whether similar or not. It saw difficulties ahead in determining what might constitute one performing a similar enough job in order not to be placed in the position. If only "similar" work situations were disallowed, the Union negotiators saw the possibility of the new relief employees facing the same difficulty as casuals had encountered, facility to facility, namely relief employees being placed in numbers of working situations where their duties were arguably somewhat different, to avoid paying overtime, or having properly scheduled full-time employment. By her description, the Union simply "wanted boundaries around relief employee use, wanted a box around language of 'facility', tied to the actual work site." Consequently, she said, the Union's bargaining team sent the provision back to the Employer with the term "similar" removed from the language. It did not seem to her that the employer-side negotiators doubted the implications. By her recollection, there were then discussions initiated by the Employer over the need to recognize the unique situation facing nurses where manpower availability difficulties suggested that some of them might have to make themselves available to work in other capacities within the same healthcare facility in order for it to properly operate. Consequently, the Employer's next proposal contained subparagraph (b) dealing specifically with the nurses' situation.

Counsel asked Ms. Baisi in her examination-in-chief the specific question of whether the Employer-side bargaining team ever represented that the words in both its drafted subparagraphs (a) and (b) that "an employee may not be appointed..." or "an employee in a nursing position may be appointed..." were to be restricted to covering only the FTE rated indeterminate employees, which is to say without any reference to relief employees freshly appointed under the terms of the new

collective agreement as likewise being restricted. She responded, repeatedly, "no". Further, on her review of her handwritten notes recapitulating the negotiations ongoing at the bargaining table between June 13 and 15, although noting the changes in the Employer's proposed language of AXX.02 which final draft became ratified as A1.02 (a) and (b), there were no instances recorded by her where the Employer-side spokesperson, Mr. Tait, had mentioned that the above words were meant to reference only FTE rated indeterminate employees. In the event it had been said, she missed the reference. Some other aspects of the language were discussed, she said, and changed, such as including some specific examples of the term "facility" within the wording of subparagraph (a).

Ms. Baisi also testified that the first formal joint meeting following the November 2005 roll-out was held in December 2006, which she saw as a matter of the parties working out any unresolved details of implementation as reports were submitted from managers indicating the success of the new programme. There had already been informal discussions, in the spirit of open dialogue. By that time the Employer had already circulated its Q & A document in December 2005 followed four months later by the Union's Q & A response document sent to Ms. Woodward in April 2006. At this joint meeting held in December 2006, in their dealing with A1.02, by Ms. Baisi's recollection, the parties discussed the term "facility" as the Union was having some difficulty understanding what was being included, outside of the specific example language used in the provision. There was still some issue over whether multiple locations within the same structural setting necessarily meant additional facilities. The Union also raised what had started coming to its attention that there were at least some multiple contracts involving relief employees, it being the Union's position that the Employer should not have been assigning relief employees to work multiple positions in the same facility.

Ms. Baisi said that at some time following that meeting during what she took to be an informal

discussion in Mr. Chapman's office, perhaps within the same month, when she accompanied Mr. Parsons, at one point during their conversation the Union President had indicated that he was not against a corrections officer also working as a cook in the same facility, and that there could be multiple positions. However, immediately upon leaving, as they were walking outside, by Ms. Baisi's recollection, he turned to her and said "what did I say there... I made a mistake....". He went on to indicate to her that he had misrepresented the Union's position and that he would have to "straighten it out". She thought thereafter that Mr. Parsons had taken steps to clear up any misunderstanding over the misstatement. As matters developed prior to the grievance being filed in late November 2007, however, she admitted, the Union never specifically referenced Mr. Parsons needing to clarify his mistaken remark in subsequent communications to Mr. Chapman. Nevertheless, she also said that at other times, in other meetings, and also in the context of its own Q & A response document already issued, the Union never acceded to any position that there could be multiple contracts under A1.02(a), in the same facility, whether it was an FTE rated indeterminate employee, a term employee, or someone holding a relief position. She understood the Union's position throughout to be any employee could work in a relief position in another facility, or a nurse in the same facility under subparagraph (b) as long as she was three pay ranges apart from her other position. To her, the position taken by the Union seemed clear enough on the contract language. Further, Ms. Baisi did not see that the Union's view of A1.02 was in conflict with either of the new articles 4.03 or 4.04 inasmuch as it was not asserting that there was any blanket prohibition against employees ever occupying more than one position, or that employees appointed to a position could not also hold casual employment, or that employees could not occupy more than one casual assignment. In addition, she saw no conflict with the Union's position stated in its April 2006 Q & A response

document which under item 25 indicated that an employee could hold more than one relief position "as long as it is not performing the same substantive duties, and/or it is not in the same facility as your other relief position".

Ms. Baisi testified that she was in attendance at all the joint committee meetings covering the relief worker issues, prior to the Union initiating its grievance, and never at any time heard anyone saying that the language of A1.02 should apply as a restriction only on FTE rated employees. As indicated in item 10 of the Union's Q & A response document, issued in April 2006, the Union had already taken issue with the multiple contracts given to relief positioned employees at the Stanton Yellowknife Hospital, indeed, any multiple contracts given out within the same facility which Stanton was an example. On her review, she did not see anything in that document which represented a departure from the Union's position taken throughout bargaining, including item 26 where it indicated that by its interpretation "the determination of whether you can hold an indeterminate position and a relief position boils down to a definition of 'facility'." By her understanding, the Union has always said that it was defined as being a building, and further as also indicated in its item 26, that "this means by the UNW's interpretation, employees can hold another indeterminate (Relief or full-time) position in one facility of that Authority or Department and work as a Relief in another facility under the same Authority or Department". In response to counsel's question why it would have taken the Union some two years from the time of the November 2005 "relief employee" roll-out to the point of filing the grievance, she remarked that by her recollection of the meeting she attended, whether formal or informal, whenever the Union indicated that an issue had developed over multiple contracts being given out to relief employees, the response received was that it should not be occurring and that they would "check it out". She said it was only "eventually" when the Union officers came to realize that

nothing was likely to change, that they filed the grievance in December 2007.

Ms. Baisi also testified that even prior to the round of 2005 collective bargaining which resulted in the creation of the "relief employee" as defined by article 2.01(m), the Union had made its position clear that the Employer should not be placing workers in more than one casual "as and when" assignment. At the same time, she did not understand the Union's bargaining team to ever be in disagreement with the Employer's view that the new relief positions amounted to indeterminate employment for those individuals, albeit not full-time in the sense of being an FTE rated employee. Plainly, she has never disagreed with the Employer's Q & A document, item 5, which advised of the Employer's position that "Relief Worker positions come into effect as soon as current casuals are appointed to the newly established relief positions", and item 6, which referred to one of the benefits of being a Relief Worker as "you will become an indeterminate employee with job security".

In cross-examination, Ms. Baisi reviewed her own handwritten notes made during the June 13 – 15, 2005 negotiations at the bargaining table, where she was present throughout. The initial discussions, she said, were with respect to the Employer's proposed wording centering on whether there was any agreeable meaning for the term "facility", and the Union's rejection of the term "similar" as an inappropriate modifier for one's "job" inasmuch as it did not want employees performing in any other job in the same facility, not just a similar job. She recorded in her notes the Union's proposal that the word be deleted, which was accepted. There was also some discussion on other issues related to establishing the new relief positions, such as considering whether there should be an exception for nurses as long as they were three pay ranges apart in the same facility, and running internal competitions for moving casuals into relief positions. She said there was nothing set out in her notes indicating any discussion over the actual "meaning of the language", other than to be

taken from the words they used. She could not recall any discussion between the parties during negotiations "on multiple positions in the same facility", then adding "outside of nurses" which was again a reference to the three pay range difference thought necessary by the Union for their multiple positions to be allowed.

By Ms. Baisi's recollection, throughout negotiations, the Union's stance which it held from outset was "one employee – one employer". It meant for the Union, she said, that there should be no multiple positions within the same facility, which was viewed as a means of limiting difficulties concerning overtime entitlement, benefits calculation, job security and other issues which came to the fore if employees were allowed to work more than one position at a time. She did not recall anyone from the Employer's side indicating at the table, despite what Ms. Woodward recorded in her notes, that it was intending on filling multiple positions in the same facility, except for nurses on specific agreed terms, with no discussion about distinguishing the new relief employees from FTE rated indeterminate employees for that purpose. She said that with the language of the restrictive provisions having been drafted by the Employer, she cannot say why it was worded and presented as it was, but as a union-side member of the bargaining team, she can say that she took the term "an employee" in both subparagraphs (a) and (b) of what ultimately became A1.02 of the new collective agreement as it was defined in the collective agreement under article 2.01(m), being bargaining unit members in those various listed categories including "relief employee".

Ms. Baisi also testified that, as far as she knew, the Union did not immediately respond to Ms. Elkin's February 15, 2007 letter inasmuch as she thought the parties were still having discussions over any misconceptions that may have arisen, with the next quarterly meeting scheduled for March 2007. Ms. Perry's notes were put to her in cross-examination where following Mr. Parsons acknowledging

that he understood the Employer's position to be that there could be more than one relief position in the same facility, Ms. Alexander for the Employer had responded that there could be and provided examples of a relief corrections officer working as a relief cook, and also a relief nurse working in another nursing position. Ms. Perry had also recorded that Ms. Baisi had pointed out that they presented the "same issues as Mahler grievances", being a nurse who was then and continuous holding more than two relief positions within the same pay range in the same hospital. The Union had filed a grievance over that matter following its coming to its attention. By then the Employer was known to be applying the A1.02(b) restriction to FTE rated indeterminate nurses wanting to also hold relief positions in the same facility, but at least on occasion not to relief employees holding multiple positions. She said that the Union had to "assume" at that point that the parties were "thinking differently" as to the meaning of the provision. She agreed that it was over eight months later before the Union filed the grievance, during which time the Employer managers in various facilities continued having some relief employees work in multiple positions.

The Union's last witness, its President, Todd Parsons, was a member of its bargaining team and was at the table throughout negotiations in June 2005. He was aware by then that the Employer wanted to move away from using "as and when" casuals to creating the new relief worker category of employee. Some months previously in January 2005, the Union had created its own initial bargaining proposals indicating that it wished to modify the contract with respect to Appendix A5, dealing with casuals, by providing recognition that indeterminate employees traditionally engaged as casuals in other work should receive overtime compensation for any duties performed outside the regular hours of their indeterminate position. He testified that going into negotiations, the Union also was against the kind of casual employee "job stacking" which it knew to be an ongoing situation and

which it saw as denying the affected employees proper overtime compensation. It was proposing that one's casual employment should be recognized across all the GNWT, regardless of department or unit, which is to say as he put it, "one employee – one employer". However, he acknowledged, it was the Employer negotiators who came up with a new employee category of "relief employee" to be defined by the collective agreement. He said the Union was agreeable to creating this new category which meant hiring a person into a form of indeterminate employment, without established hours, but with access to normal progressive discipline as opposed to simply being removed from the schedule when things went awry as had been occurring in some instances with casuals. At the same time, by his recollection, he thought the Union had made one of its primary concerns coming into the June negotiations clear enough that it wanted employees who were working relief duties in a particular facility not subjected to multiple contracts, which had been occurring in the past with casuals where the Union's concern had been with perceived overtime avoidance.

On Mr. Parsons' review in testimony, at the June 14, 2005 bargaining sessions, the Union held to the view that an employee should not be appointed as a relief employee to perform another job in the same facility, said to have initially included multiple facilities administered by the same Authority, not just a similar job. His handwritten negotiation notes compiled later the same day at the table indicate that there was some discussion over transitioning from casual to relief employee, but nothing about the Union's interpretation of the proposed new AXX.02 language, with "similar" being deleted, which was to become A1.02. He said he knew the language in its final form had been drafted by the Employer, but was not taken by the Union to contradict what it thought to be acceptable at that point, namely that employees could not perform jobs in the same facility, including not stacking relief positions to be performed by the same person in the same facility. He referred to it, from the Union's

perspective, as a facility "coral", which he saw as providing the Employer with at least some wanted flexibility, by allowing employees to work jobs elsewhere in the same Department or Authority. Mr. Parsons testified that by his recollection the employer-side negotiators did not say that the reference to employees not taking other jobs in the same facility was only with respect to full-time FTE rated indeterminate employees. Further, he said, if that were the case, they would have been back to the starting point in their negotiations as the Union was set against the Employer being able to hire people into multiple contracts at the same location, which is the problem it had had all along with the Employer's use of "as and when" casuals. He added that at the time he was "confident" they had a "shared understanding" on that issue.

According to Mr. Parsons, subsequent to the roll-out occurring in November 2005 he had discussions with Deputy Minister Elkin on two occasions where she acknowledged that there were some FTE rated employees holding relief positions in the same facility which he recollected her saying it should not have occurred, and that she would look into it. Thereafter, he acknowledged, at some point, perhaps a year or more later, in a discussion with Mr. Chapman he was told of a corrections officer at the North Slave facility also taking on cooks' duties, and indicated in response that it was his understanding he could do that, which he said seemed to cause some surprise on the part of Mr. Chapman. On leaving, by Mr. Parson's recollection, he "checked it out" with Ms. Baisi who had accompanied him to the meaning, and she advised that what he had said was not the Union's view of the new A1.02 language. He indicated in testimony having had it in mind to write a letter to correct his "hasty statement", which he acknowledges was never done. However, he also said that he thereafter spoke of his mistake both at a subsequent joint consultation meeting and also raised it informally with Ms. Elkin on at least one occasion. Eventually, on January 8, 2008 in response to the

letter received from his Elkin some 11 months earlier, he wrote to Ms. Elkin, indicating that the Union's position was that a relief employee could not hold more than one position in a facility, and also that it had never agreed that this could be done, which position it had communicated in discussions. They included a joint consultation meeting held in December 2006. He continues to the present time to view the language of A1.02 as open to construction as written, and keeping in mind the collectively bargained definition for "employee" as including "relief employee" under article 2.01(m).

In cross-examination, having been referred to the Woodward notation in her June 14, 2005 negotiation notes indicating that the Employer's spokesperson, Mr. Tait, had said that "an employee could occupy more than one relief position", Mr. Parsons responded that there was no such remark recorded in his own notes and that he had no recollection of that statement having been made. However, it may not in any event have to be taken as contradicting the Union's view that any employee could hold one or other available relief positions, but only in compliance with A1.02, meaning not in the same facility. He said it was the Union's ongoing "fundamental position" throughout negotiations that there should be no multiple positions held by anyone in the same facility, whether or not it was recorded anywhere in Ms. Woodward's notes. He was also directed to Ms. Woodward's notation of the same session covering Union spokesperson, Mr. McNamara's, observed comment at the table that the Employer's position with respect to "facility" was that a person "can't do a job and relief position in same Authority in job normally performed in their other job". He responded that he did not know why Mr. McNamara would have said it that way in recapitulating the Employer's position, if he did. He does not interpret it as a matter of Mr. McNamara necessarily "parroting" the Employer view, but that what the Union was trying to get across in its response to the

proposal overall was that the language covered the spectrum of "any job", which is why the Union proposed that the qualifying word "similar" be deleted, but the language of subparagraph (b) allow for the possibility of nurses being able to work in other jobs in the same facility as long as they were three pay ranges apart. The Union never viewed the language, or the discussions leading up to the final draft, as allowing the Employer to simply stack people in multiple relief positions at its discretion.

In cross-examination, Mr. Parsons stood by the Union's April 2006 Q & A response document to the Employer's December 2005 Q & A document, and saying that he thought it was plain enough when the parties had left the bargaining table that the Employer would not be using multiple relief positions in the same facility held by the same person in order to avoid overtime. He also agreed that the first clarifying letter thereafter was sent out by the Union in January 2008, subsequent to the grievance being filed, although the Employer had longsince been in possession of the April 2006 Q & A response document, with Ms. Woodward having made her notations in the margins of the document disputing the Union's interpretation of items 25 and 26. She had written thereon that "UNW had agreed 1 person could hold different positions (i.e. cook and co.) at the same facility". In response to the line of questioning focussing on why he would have later told Mr. Chapman in one of their meetings that he thought it was permissible for a relief corrections officer to also take on a cook's assignment, he said that he may have been nervous or confused at the moment, but that ultimately he had to rely on the proper positions being identified by his staff, and pointing out that on taking up the issue immediately upon leaving the meeting with Ms. Baisi, he quickly reconsidered. He mentioned his mistake in later joint meetings. In response to counsel's asking why the Union waited so long to file its grievance, two years following the November 2005 roll-out of the relief

worker transition programme, Mr. Parsons said that the parties had many conversations about what was thought to be occurring, and the Union was hoping the situation could be rectified within the ongoing consultation format. It seemed to him that the Employer had even recognized that mistakes were being made, and had indicated a willingness to take corrective action, which then did not occur. He said that one discussion with Ms. Elkin at some point, had centered on the Union discovering that there were one or other FTE rated employees taking relief positions in the same facility, which she acknowledged should not be occurring, but which Mr. Parsons did not take as communicating any admission on Union's part that it was permissible to have relief employs working in multiple positions. By his description, the Union never differentiated between types of defined employees taking on relief positions in a facility, in addition to their own existing positions, which by his view of the relevant contract language was not permitted.

In argument on behalf of the Employer, Ms. Delaney submitted that no doubt both the management and union-side negotiators bargained with the joint intention of creating a new type of indeterminate employee, relief worker, as distinct from casual employees. From the Employer's perspective it was a "back and forth" process between June 13 and 15, where its negotiators at the table must have felt that they were "all on the same page". On the evidence presented, she said, at this point the parties should be taken as having contemplated that the negotiated language allowed multiple relief positions being available in the same facility. Ms. Woodward in her testimony had recollected and recorded in her negotiation notes that the Employer's spokesperson, Mr. Tait, related as much to the union-side negotiators without their having taken issue with his statement. Some 330 new relief positions were rolled out on that basis commencing by November 2005, with the Employer's Q & A document to follow a month later. Therein, the Employer made its position clear covering the

language of A1.02 she said, namely that a person working in the new relief worker category could hold more than one position at a time, with the example of a person working as a relief cook into relief corrections work at the same time in the same facility. This is not to say that there was anything preventing the location manager from having a relief corrections officer also work in another relief corrections officer position. At the same time, she said, there is no suggestion that the responsible managers were scheduling relief workers into exactly the same duties as they were performing in their first job.

Ms. Delaney submitted that it was significant for interpretation purposes that the Union President, Mr. Parsons, indicated in a meeting at some point with a senior labour relations manager, Mr. Chapman, that he saw no difficulty with assigning a relief cook into relief corrections work at the same time, as that should also be taken as the Union's position, and the parties' mutual understanding of the language. They should be taken as having mutually inferred that the term "an employee" in both subparagraphs (a) and (b) of A1.02 meant other than a person already holding a relief position, which is to say an FTE rated indeterminate employee, or possibly a term employee. Thereafter the Deputy Minister, Ms. Elkin, confirmed as much in her correspondence of February 15, 2007 which was not responded to until January of the following year, even subsequent to the Union having filed its grievance. The interaction between the parties, and correspondence which was exchanged, in the Employer's view, showed clarity of understanding throughout from the employer-side negotiators and managers, having taken action in accordance with the agreed terms of the new collective agreement, whether or not the Union could have lacked that same kind of clarity after the fact of ratification.

Further, Ms. Delaney submitted, the Employer should be taken as having consistently applied the negotiated language, with the meaning evident throughout that an FTE rated indeterminate

employee could not perform a relief job in the same facility, but that those holding only relief positions could be "stacked" in the same facility were that decision deemed necessary for operational requirements. In short, she said, the A1.02 language should be seen as "having nothing to do with relief employees' rights as such". Any issue of ambiguity, were that found to be the case, should be resolved in the Employer's favour, she submitted, with there being no argument made with respect to the possibility of an estoppel having arisen based on conduct subsequent to negotiations. The Employer sees it as a pure interpretation issue, with the proper inference to be drawn on the negotiated language presented that the mutual intention was not to limit the use of relief employees in the manner subsequently sought by the Union. She concluded her argument by remarking that, in any event, with the next set of negotiations commencing in the new year with the current collective agreement expiring on March 31, 2009 "the parties should be left to work it out".

Mr. Penner, in his opening remarks in final argument of behalf of the Union said that it seemed both sides wanted the same solution to be applied, which was to leave the language alone, except for the Employer looking for a inference to be drawn on the language as currently written, namely that a certain category of defined employee under the collective agreement should not be included in one's applying the A1.02 negotiated restriction. This would be the new category of "relief employee" concerning which Appendix A, wherein A1.02 is located, is all about. He said there is nothing on the face of subparagraphs (a) or (b) which suggests that the parties, on negotiating the language, and with their mutual intention to be taken from the words they used, had it in mind that only FTE rated indeterminate employees would be restricted in taking additional relief worker appointments. Certainly, the collectively bargained definition for "employee", under article 2.01(m), as earlier set out in this award, includes various classes of employee, including the newly created "relief employee",

he or she being just as much "an employee" as anyone else. Indeed they are accepted as having a type of indeterminate employment, for purposes of one applying the rights and obligations under A1.02, as are full-time FTE rated indeterminates. As with term employees, or part-time employees, they are all defined employees within the meaning of the collective agreement. Mr. Penner cited article 37.22, which, as with similar articles existing in most collective agreements, denies the arbitrator any authority "to alter or amend any of the provisions of this Agreement, or to substitute any new provisions in lieu thereof, or to render any decision contrary to the terms and provisions of this Agreement." He also pointed out that in parts of the collective agreement where the parties intended on a provision applying exclusively to one type of employee, or another, they said as much. By example, he cited A10.B8. dealing with special clinical preparation for healthcare workers, where the language specifically refers to "an indeterminate, term or part-time registered nurse..." as the types of employees entitled to receive payment thereunder. Here, the Employer evidently wants to write into A1.02(a) and (b) the non-existent descriptive passage: "An employee other than a relief employee...".

Further, Mr. Penner said, it appeared that the Employer would like to rely on the November 2005 roll-out as somehow indicating a mutual intention on the meaning of A1.02, but he points out, the transitioning of casual employees into relief positions was done without Union input as to who was being fitted into what positions, and whether the Employer was intent on stacking relief positions at some facilities. Certainly, the Employer's December 2005 Q & A document, once digested, some four months later led to the Union's own comprehensive April 2006 Q & A response document where the Union took issue with the Employer's view of the negotiated restrictions under subparagraphs (a) and (b). The Employer would also like to rely on Mr. Parsons' one-time verbal miscommunication in a

meeting with Mr. Chapman, probably in about December 2006, a full year after the Employer had committed itself to a roll-out of the relief worker transition in accordance with its view of the relevant language and without the Union in any formal sense, at any time, agreeing. It was a mistaken utterance on his part, did not reflect the Union's view, and should not provide any assistance in interpreting the language. Certainly, his comment to Mr. Chapman was many months subsequent to the Union's Q & A response document, where it had stated its own understanding in some detail covering many of the roll-out issues.

By Mr. Penner's description, the language should be taken as clear enough on its face to be applied without any extrinsic evidence, but if there was any ambiguity there should be no inference drawn as asserted by the Employer. The negotiations show that the Union all along was intent on limiting multiple positions being worked by relief employees, which is to say their other positions could only be in other facilities. The Union needed more protection than their not just holding "similar" positions in the same facility, which is why it insisted on that half-way modifier being removed.

Mr. Penner pointed out that for purposes of one considering extrinsic evidence in the nature of bargaining history which is what the evidence primarily addressed, it is not enough to show unilateral intent held by one of the parties. Their words and actions must be sufficient to show a mutual intention as to meaning where an ambiguity arises, which is not evident here. As he put it "it is not clear they were ever on the same page" which brings one back to providing an interpretation to be taken from the written words they used, as contained in the collective agreement. The interpretation sought by the Employer, Mr. Penner said, that "an employee" for purposes of A1.02 somehow does not include a transitioning relief employee taking other, multiple, relief positions, is

simply not apparent on a reasonable and usual reading of the words they used to describe their intention, and should not be written into the contract language.

Conclusion:

Having set out the extrinsic evidence in this matter at some length, it deals both with the parties' bargaining sessions held in June 2005 leading to their bringing the language of Appendix A into the new collective agreement, in particular dealing with the creation of A1.02(a) and (b), as ultimately drafted by the employer-side negotiators and signed off by the Union with some changes to the initial tabled language as remarked upon by the witnesses, and also the roll-out process which followed as debated by the parties in their respective Q & A documents, and periodically consulted on in their joint meetings. One can observe, overall, that the interpretation issue now under discussion ultimately presents a consideration of the parties' intentions with respect to the meaning of the term "an employee" as used in both of these critical subparagraphs, the new collective agreement having been ratified by the time the relief employees' integration by about November 2005. At the same time, it is necessary to understand that it has been long established that the parties to a collective agreement, unless an ambiguity is seen to exist leading to extrinsic evidence being considered as an aid to interpretation, will find the meaning of the various terms requiring application from the words they have written into the contract as a matter of one taking a normal and ordinary reading thereof. Certainly, the usual interpretive factors will ordinarily be in play such as reading the words in the context of the provision or section wherein they are found, and the negotiated contract as a whole, also considering any aspects of common or trade usage which might be apparent or applicable, and having regard to certain grammatical canons of construction where needed. Nor is it

unusual for arbitrators to consult a dictionary in their considering the meaning of a difficult word or phrase, possibly other arbitrators' awards too where the same words or phrases have been ruled on. However, where the assertion has been made that extrinsic evidence is required, namely, primarily in this matter being the negotiating history relative to the June 2005 round of negotiations, also practice subsequent to ratification, in order to properly assist one in understanding the real meaning, to resolve an alleged ambiguity, it is helpful to consult the *Brown and Beatty* topics taken as a synopsis of the developed caselaw over the decades. In particular I refer to topics *3:4420* and *3:4430* in their *Canadian Labour Arbitration* (4th ed.- looseleaf), which are set out below as follows:

3:4420 Negotiating history

A variety of forms of extrinsic evidence may be used as an aid to interpretation of agreements, or to establish an estoppel, or in support of a claim for rectification. The most significant of these in grievance arbitrations, apart from past practice, is the history of negotiations.

Both the history of a specific agreement through its sequence of prior agreements, and documentary evidence, including memoranda of agreement or minutes of settlement forming part of the negotiations of a particular collective agreement, may be introduced. Such documentary evidence may include a related agreement which was used as a point of reference, an interest arbitration award, as well as proposals made, discussions held, notes made, and agreements reached during negotiations, although reservations have been expressed to admitting evidence as to the give-and-take of negotiation. Of course, evidence of such negotiation history must not only be relevant, but most importantly, to be relied upon it ought to be unequivocal.

Settlements of grievances, unless made on a "without prejudice" basis, may also be used as an aid in construction. However, statements made in the course of the grievance discussions are generally regarded as privileged communications.

3:4430 Past practice

Every collective agreement is written against a background of understandings, practices, and unwritten procedures. Frequently, one party may seek to obtain a favourable decision on the basis of a practice rather than on the actual wording of the collective agreement. The use of evidence describing such

a practice as an aid to interpretation has been described as follows:

> **If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of ether one of the parties, as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties. Such a doctrine, while useful, should be quite carefully employed. Indiscriminate recourse to past practice has been said to rigidify industrial relations at the plant level, or in the lower reaches of the grievance process. (*John Bertam & Sons Co.* (1967), 18 L.A.C. 362 (Weiler)**

However, it has been held that illegal past practices cannot be resorted to as an aid to interpretation, nor can practices which conflict with the clear meaning of the agreement, unless they give rise to an estoppel. Nevertheless, evidence of past practice may be admitted to show the reasonableness of a party's conduct, even if the conduct is inconsistent with the terms of the collective agreement.

Generally, past practice under a prior agreement is not relevant in the interpretation of new collective agreement language. Similarly, evidence of settlement of similar previous grievances, even if admitted, will be accorded little weight. However, one arbitrator has held that in appropriate circumstances it may be reasonable to consider the past practice in the industry generally, and not merely the past practice of the employer involved in the grievance.

The leading award sets forth the requirements for reliance on past practice in the following terms:

> **Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some**

> **real responsibility for the meaning of the agreement have acquiesced in the practice. (*John Bertram & Sons Co.*)**

Accordingly, when a party is unaware of the practice, it cannot be relied upon. Indeed, for the reason that it does not represent a consensus, some arbitrators hae held that a pattern of inaction cannot utilized as such a practice. Moreover, one or tow occurrence will not normally constitute a sufficient practice to be reliable, nor will a practice that has been consistently challenged by one of the parties. Rather, when arbitrators have relied upon a past practice, it typically will have been a uniform practice over a number of years, such as one which had existed "through several renegotiations", or one that had existed under the previous collective agreement or one that "had been openly and without surreptition carried out for ... a long period".

The Union in its caselaw materials has cited arbitrator Hamilton's award in the *DHL Express (Canada) Ltd* case, also referenced in the *Brown and Beatty* discussions on the significance of both negotiating history and past practice. The following passages from the case, with reference to the manner in which negotiating history should be assessed, are instructive:

> **Caution must be exercised when negotiating history is relied upon as the basis to resolve an alleged ambiguity. In *Re Fort Garry Care Centre and U.F.C.W., Loc. 832* (unreported), May 3, 2002, [summarized 69 C.L.A.S. 47], I distilled the manner in which negotiating history must be assessed. At pp. 28 and 29:**
>
> > **In order for negotiating history to be an aid to interpretation, the evidence adduced must disclose either a shared intention or consensus between the parties with respect to the meaning urged by one party (see *Re Hiram Walker and Sons Ltd. and Distillery Workers, Local 61* (1973), 3 L.A.C. (2d) 203 (Adams) at p. 209). It is not unusual for a party to leave the bargaining table with its own view of what a particular clause means. But, such unilaterally held views cannot be the determinant of an arbitrator's primary task which is to ascertain the common intention of the parties by interpreting the language which both parties have agreed to in the Agreement.**
> >
> > **When an arbitrator delves into negotiating history to analyze statement made during the given and take of negotiations,**

caution must be exercised. As noted, the evidence must disclose a consensus and not simply transform the "unilateral hopes" or expectations of either party into a meeting of the minds. In *Re Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303 (1983)*, 81 L.A.C. 117 (Burkett), the board commented on the admissibility of negotiating history to both establish and resolve a latent ambiguity. At p. 122:

> **"... a board of arbitration must be mindful of the dynamics of the bargaining process and assessing evidence of this type tendered for this purpose. The difficulty lies in the fact that each party approaches a bargaining table with its own agenda and its own expectations which may colour its understanding of what has transpired. If evidence of negotiating history is to establish and resolve a latent ambiguity it must establish that the parties were of a single mind as to the meaning and application of the language in dispute. Evidence of one side's expectation or of one side's understanding is not evidence of agreement and a board of arbitration must be sensitive to this essential distinction when relying on evidence of negotiating history as an aid to ascertaining the intention of the parties" [arbitrator Hamilton's emphasis]**

Arbitrator Hamilton, in having considered the evidence in the *DHL Express(Canada) Ltd.* case covering the conduct of the parties, including during contract negotiations, he adopted arbitrator George Adams' comments from a case where there was a dispute over whether an actual representation was made at negotiations as allegedly relied upon, *Re Sudbury District Roman Catholic Separate School Board and O.E.C.T.A.* (1984), 15 L.A.C. (3d) 284, at p. 293, which I also find to be helpful in considering the issue at hand, and where he stated:

> **In collective bargaining negotiations much is said and much can be misunderstood or misinterpreted. But what should be clear to the parties involved in the process is that the language they have achieved in their agreements is the language on which they must generally rely. More substantial and concrete evidence of an oral representation is required than was adduced before me in order to avoid the express terms of an agreement.**

On the whole of the evidence presented in this matter, were an ambiguity to exist allowing extrinsic evidence as an aid to interpretation, ultimately it would be of too little assistance. During the collective bargaining process, the principal negotiations concerning the language in question commenced on June 13, 2005 when the Employer tabled the first A1.02 proposal, and carrying on into two sessions the following day, June 14. Changes were made with respect to the Union's deleting the initially proposed "similar" modifier in reference to a job which could be performed in the same facility, and the Employer adding examples of the types of facilities considered to be included in the reference, and also adding subparagraph (b) specifically dealing with the nursing position situation with its reference to the other position having to be more than two pay ranges apart. As bargaining progressed, I accept, some or other of the parties' respective negotiators were most probably not taking the language the same way. It may well be, as explained by Ms. Woodward in her testimony that the employer-side negotiators of which she was one, who had drafted the entire initially proposed Appendix A1, had it in mind that with the deletion of "similar", the modifying end-words of subparagraph (a), "... as the employee performs in the employee's other position" were meant to modify "job" and not "facility", which if that were the interpretation would presumably mean that employees would only be excluded from working the same job in the same facility. However it seems highly unlikely that interpretation could have been jointly held at the time, inasmuch as the Union plainly made it known at the table that it wanted "similar" deleted in order that there would be no controversy over comparisons between jobs at a site, and whether they were closely enough related to exclude a person from holding both. The Union was openly looking for more restriction, not less. It seems more likely, from the Employer's perspective, that its negotiators in the final language draft were aiming at requiring those persons covered by the language not to be

appointed into a relief position in a facility where the person was already performing in another position, but not yet holding any relief position, as would be the understanding of both Mrs. Hunter and Ms. Perry. Hence the need to carve out another approach for nurses who could work in the same facility as long as the jobs were more than two pay ranges apart. In short, with neither of them on the Employer's bargaining team at the table, they both viewed the language as meant to restrict only FTE rated indeterminate employees under subparagraph (a) from moving into the newly created relief employee category at the same facility. Their interpretation came not only from reading the language but also discussing its application with their employer-side colleagues, with Mrs. Hunter having been involved in creating the Employer's Q & A document, and Ms. Perry managing the ongoing roll-out programme, on that basis. Their interpretation, which would be the Employer's interpretation presented in final argument, would allow managers to place relief employees working at the same location in multiple relief positions, which is to say the "stacking" of relief employees within any facility, at any time, regardless of their duties, under either subparagraph (a) or (b).

The principal difficulty which the Employer faces in its having come to rely on an interpretation which excludes relief employees from being considered "an employee" for purposes of the restrictions addressed by A1.02, subparagraphs (a) and (b), even were some level of ambiguity found to exist as alleged, is that the Union witnesses, Ms. Baisi, and Mr. Parsons, as plainly disclosed in evidence, held a completely different view of the language they were negotiating at the table on June 14 - 15, 2005. They were quite adamant, and uncontradicted in their testimony as to the concerns they wanted addressed, and the understanding they took away from the table from the negotiated wording. Despite the somewhat debatable handwritten notes made by Ms. Woodward at the time, it is not exactly clear what was being verbally represented or understood on the receiving

end at the time of the negotiators conveying concerns across the table. Certainly she viewed the eventual wording differently than either Ms. Baisi or Mr. Parsons. It seems most likely that there was some amount of initial misunderstanding or misinterpretation, concerning which I do not see either party going over to the other's point of view in the months which followed. Realistically, the parties' actions at the negotiating table do not necessarily show any mutually held understanding as to the meaning of the A1.02 restrictive provisions, and in particular as to the meaning of "an employee" with respect to whoever was to be incorporated within that reference as being subject to the work related restrictions thereunder.

Further, in my view, the extrinsic evidence consisting of the parties' practice subsequent to negotiations, does not show any clear preponderance in favour of the Employer's interpretation, or that the Union should be taken as somehow having fallen in line with the other's view that the language, as negotiated and written into the new collective agreement, allowed the Employer to place relief employees into whatever multiple positions were available within the same facility. The Union's April 2006 Q & A response document was provided to Ms. Woodward some four months subsequent to its receiving the Employer's December 2005 Q & A document setting out its plan for the relief employee integration, which by then had been underway since the previous month. Therein, the Union plainly stated its position with respect to employees holding an additional relief position having to work at another facility in order to do so. While it agreed with the Employer's view that indeterminate employees could hold relief positions in another facility it rejected the Employer's approach of one being able to hold several relief positions, including different ones, in the same facility. Thereafter the interpretation dispute was discussed both informally and at the quarterly consultation meetings. Following a specific instance coming to light of a relief employee, nurse

Mahler, holding several relief positions in the same facility not more than two pay ranges apart, the Union grieved, as remarked upon in the testimony of Ms. Baisi. As indicated by Ms. Perry, the Employer was not about to back down from its view that any relief employee, whether a nurse or some other worker, could hold multiple relief positions in the same facility, with "an employee", for its purposes being the person being restricted by A1.02, meaning a full-time FTE rated indeterminate employee. Mr. Parsons' testimony adds little to the interpretation debate with respect to the parties' supposed practice subsequent to ratification. He was clear enough in his testimony on what he thought was being negotiated during collective bargaining, from his seat at the table. It was no different than Ms. Baisi indicated, his concern throughout focusing on the Employer not being able to stack relief employees in the same facility, which had long been the Union's bone of contention with respect to the Employer's use of casuals. His one-time contrary comment to Mr. Chapman in about December 2006, long after the Union's position had been communicated to the Employer in its Q & A response document, cannot realistically in the circumstances described in evidence be taken as indicating Union acquiescence or any mutual understanding reached between the parties as to the proper construction of the language, as a meaningful aid to interpretation. What was described as a lone verbal misstatement, thereafter corrected in subsequent meetings prior to the grievance being filed, given all the rest that was occurring in terms of ongoing periodic consultation meetings, provides no assistance on the interpretation issue. Nor, I conclude, does the February 2007 letter from the Deputy Minister, confirming the Employer's "position" on appointing employees to two or more relief positions in the facility, followed by some further joint union/management consultations, and then the Union's eventual grievance when it ultimately was unable to reach any acceptable resolutions of the difference. It is unfortunate that the ongoing language interpretation issue was not

reduced to a policy grievance sooner than it was, with the Union apparently being of the view that the Employer would come around to re-working its relief employee integration so that it would not continue violating the collectively bargained language, as the Union understood it, with the Employer continuing to follow a different interpretation of the A1.02 requirements. Nevertheless, the time delays and parties' actions are not sufficient for me to conclude that the Union and the Employer were ever in agreement as to the proper interpretation under the negotiated language.

On the whole of the testimony and materials presented at hearing, while there has been an allegation tabled of an ambiguity existing on the wording of the new A1.02, and while there arguably may be some level of *bona fide* doubt in operation about what category of employees are to be restricted by A1.02 in its application to the Employer's numerous facilities throughout the Northwest Territories, this arbitrator ultimately accepts that the extrinsic evidence does not support any finding of a mutually understood interpretation at any time, whether through bargaining table negotiations or following the post-ratification relief worker integration process. It is apparent on the evidence that the parties have interpreted the wording differently throughout, as has been made clear from the two Q & A information documents, from which approaches detailed therein neither party ever resiled through to the time of the Union taking issue with the employee Mahler situation, and then eventually filing its interpretation grievance in this matter. By the time of filing its grievance in late November 2007, the Union had come to realize that the difference in their respective interpretations was not able to be settled outside of the grievance and arbitration process.

In my view, ultimately, I am left to resolve the difference on the basis of the negotiated language as written into the collective agreement as the best indicator of the parties' mutually negotiated contractual obligations. Frankly, were I to go one way or the other based on the parol

evidence received in this matter, it would be more a matter of my accepting one side's version, or the other, to be the better of the two presented as to what they meant on the basis of who sounded more convincing as to the heartfelt merits of their own interpretation, which would not be appropriate. It would indeed amount to giving unwarranted preeminence to the unilateral expectations of one party, which might well not be reflected on the language they chose to cement their intentions, to paraphrase the learned editors of *Brown and Beatty*.

In my looking to the contract language itself, certainly A1.02 subparagraphs (a) and (b), are placed in the collective agreement in the context of the new Appendix A1 dealing with the rights and obligations of the newly created relief employee category, and also are to be read in the context of the collective agreement as a whole, which includes rights and obligations attaching to various defined categories of employment. On my review of the negotiated language, I do not conclude that under subparagraph (a), "an employee" for purposes of describing those persons being appointed into relief positions during the currency of the agreement, but being restricted from performing a job in the same facility as the employee performs in the employee's other position, can be defined as meaning only those already holding full-time FTE rated indeterminate employment at the time. Nor do I conclude on the wording that "an employee" contemplated under subparagraph (b) has to have been holding a nursing position on a full-time FTE rated basis when appointed as a relief employee in the same facility before being restricted by having to be more than two pay ranges apart from the employee's other position.

In reaching these conclusions, which supports the Union's view that the negotiated language should be taken as limiting the Employer in its ability to stack relief employees working in multiple positions at the same facility, which is to say not to be done outside of a nursing situation when an

appointed relief position is more than two pay ranges apart from the employee's other position, firstly, one cannot avoid observing that "employee" within the confines of the relevant collective agreement has been specifically defined under article 2.01(m) to include various categories including the newly created "relief employee". Secondly, the newly negotiated section of the collective agreement, Appendix A1, wherein A1.02 is located, comprehensively deals with the rights, benefits and obligations, attaching to the new category of "relief employees". In other provisions, where specifically distinguishing them out from all other employees for one reason or another as presented on the language, the parties have expressly referred to them as "relief employees", for example A1.03 through A1.07. Thirdly, there is no doubt, were it not for any limiting language contained in the collective agreement, the Employer has the ability to hire any employee into multiple relief positions, whether that person be a full-time FTE rated indeterminate, a part-time, term, or relief employee. In this respect there is no conflict, in context, with any other provisions, for example the newly negotiated articles 4.03 and 4.04 which provide that "an employee" may occupy more than one position, that "an employee" appointed to a position, may be employed as a casual, and also that "an employee" may occupy more than one casual assignment. Fourthly, one has to have regard to the ordinary reading of the language where in labour relations matters a contractual reference to "an employee" would normally be taken as including all those bargaining unit members working for an employer. Fifthly, in order for the Employer's view of the language to be sustained, one would have to write into the A1.02 subparagraphs (a) and (b) provisions a modifying phrase that an employee "who is already a full-time FTE rated employee" may not be appointed, or a "part-time", or a "term", or however else the parties might have chosen to modify "an employee" to differently describe who should be restricted. However, the arbitrator is prevented by article 37.22 from amending any

provision in the collective agreement, which would be the situation were one to accept the Employer's view of the type of employee who should be restricted from being appointed. In my view, the language as written must be taken as restricting the appointment of "an employee", as defined by the collective agreement.

There was also some discussion by the parties' respective counsel at outset, on the issue of whether the final modifying phrase in A1.02 (a), "as the employee performs in the employee's other position" has reference to the "job" being worked or to the "same facility", which possible interpretive difference was also presented as another reason why an ambiguity might be seen to exist. By the time of the final argument, however, counsel were concentrating their arguments on what category of employee was meant not to be appointed as a relief employee performing a job in the same facility. I agree at this point that the normal and ordinary reading of the provision dictates that it is the facility itself which is being referenced by the modifying phrase and not just the job. A normal canon of construction suggests that a modifying phrase takes its application from the preceding specific word or phrase. Reasonably, it is the facility itself, with several examples having been provided in parenthesis, where the employee performs in his or her other position to which the described restriction relating to "an employee" being appointed into a relief position applies.

I am satisfied on the evidence that the grievance should succeed on the basis that the Employer has been violating the collective agreement A1.02 where it has been limiting the restriction against "an employee" being appointed into relief positions in the same facility, as described therein, by not including relief employees it would want to appoint into additional relief positions. At the same time, while the Employer has not argued any estoppel in the formal sense, even if that were to

be established on the evidence which would be entirely doubtful from what I have learned at hearing respecting the Union's longtime communicated stance subsequent to bargaining, since at least its own Q & A response document issued some four months subsequent to the Employer's Q & A document and management's roll-out of its relief worker integration programme, in my view, it is nevertheless appropriate for me to temporarily adjourn the remedy issue. I also conclude that it is appropriate for me to remain seized at this point with respect to providing directions and/or clarifications, and whatever other remedies might eventually need to be addressed, all things considered, including the numbers of already positioned employees whose working lives could be considerably disrupted. In the meantime the award will issue as a declaratory decision with a ruling that "an employee" in A1.02(a) and (b) includes the current employee category of "relief employee" as defined by article 2.01(m)(v) of the collective agreement, and that the referenced restriction is with respect to performing a job in the same facility where the person is already positioned.

I would expect that the parties should presently be able to sit down and attempt to work out an appropriate remedial resolution to the current situation which has developed of some relief employees having been appointed into multiple positions in the same facility, including some relief positioned nurses holding positions which are not more than two pay ranges apart from the other position. In the event they are unable, either side may choose to request the hearing be reconvened on 30 days notice to the other.

DATED this 26 day of November, 2008.

"Tom Jolliffe"
Thomas Jolliffe, Q.C.