

IN THE MATTER OF AN ARBITRATION

BETWEEN:

GOVERNMENT OF THE NORTHWEST TERRITORIES

(the “Employer”)

AND:

UNION OF NORTHERN WORKERS
(PUBLIC SERVICE ALLIANCE OF CANADA)

(the “Union”)

(together the “Parties”)

(Grievance #18-P-02316 – Temporary Transfer Assignments)

ARBITRATOR:

Amanda Rogers

COUNSEL:

Trisha Paradis
for the Employer

Yafa Jarrar
for the Union

HEARING:

September 22-24, 2020
Virtual hearing

DATE OF AWARD:

October 29th, 2020

This matter pertains to a grievance filed by the Union on June 12, 2018 challenging the Employer's use of temporary Transfer Assignments. The parties agreed this Board of Arbitration was properly constituted.

FACTS

Agreed Statement of Facts

The Parties filed an Agreed Statement of Facts, which sets out the facts underlying the Grievance as follows:

1. The Union has filed Grievance #18-P-02316 on June 12, 2018. It is attached as Exhibit "A".
2. The Grievance makes the following allegations:
 - i. The Employer is bargaining outside the Collective Agreement by offering Transfer Assignments to bargaining unit members, without the involvement of the Union as exclusive bargaining agent; and
 - ii. Reference to the Staff Retention Policy within Transfer Assignment Agreements violates the Collective Agreement (the Collective Agreement is included as a separate document).
3. The Employer denied the grievance at the final level on August 15, 2018. The denial letter is attached as Exhibit "B".
4. The Employer's policy on Transfer Assignments is described in the Human Resources Manual "1408 - Transfer Assignments", several revisions have been made to the Human Resource Manual pertaining to the policy on Transfer Assignments. Copies of the revised policies from 1992, 1998 and 2018 are attached as Exhibit "C". The Union is not a party to Employer policies and guidelines, including the Human Resources Manual. The Union is notified of updates to the Human Resource Manual as they take place, input is not sought from or provided by the Union.

5. The Human Resource Manual currently states that Transfer Assignments are a temporary redeployment of an employee into another position, either within their own Department, or inter-departmentally.
6. The Human Resource Manual indicates that Transfer Assignments are used to:
 - a. Meet immediate operational requirements;
 - b. Contribute to an employee's career development;
 - c. Redeploy an affected employee;
 - d. Address unique human resource considerations, such as a duty to accommodate; or
 - e. Cover acting periods greater than six weeks.
7. The Human Resource Manual currently states that Transfer Assignments are available to employees who:
 - a. Have indeterminate or term positions; and
 - b. Have successfully completed the probationary period in their current position.
8. Individual Employees must agree to enter into Transfer Assignments. Opportunities for Transfer Assignments may or may not be through a competition process, and can be offered by the Employer at their sole discretion.
9. When an Employee enters into a Transfer Assignment, the Employer requires them to sign a Transfer Agreement, which sets out certain terms which apply to the home department, receiving department (if applicable), and the Employee. A copy of the standard Transfer Agreement Templates are attached as Exhibit "D" and "E".
10. In some cases, a return to the Employee's original position may be guaranteed. If an Employee's original position is eliminated or filled indeterminately while they are on Transfer Assignment, the Transfer Assignment Agreement identifies that they may be subject to the Staff Retention Policy. The Staff Retention Policy is attached as Exhibit "F".
11. The Union is notified of Transfer Assignments for bargaining unit members via a monthly movement report produced by the Employer and delivered to the Union. The movement report for each month is provided to the Union as per Article 14.01 of the Collective Agreement.

Transfer Assignments were not specifically identified in the Movement Reports until the December 2017 report was prepared and sent to the Union in February 2018. A copy of the most recent movement report from July 2020 and the movement report from November 2018 are attached as Exhibit “G”. The Employer does not provide details of individual Transfer Assignments to the Union.

12. The GNWT Transfer Assignment Data for the past five fiscal years, prepared by the Employer is attached as Exhibit “H”.

Relevant Collective Agreement Provisions

The following provisions of the Collective Agreement are relevant to the determination of the grievance:

ARTICLE 2 INTERPRETATION AND DEFINITIONS 2.01 For the purpose of this Agreement:

...

(s) "Lay-Off" means an employee whose employment has been terminated because of lack of work or because of the discontinuance of a function and who is suitable for continued employment in the Public Service. Lay-Off does not mean an employee whose employment has been terminated because of a transfer of the work or function to another employer where the employee is offered employment with the new employer.

...

ARTICLE 33 LAY-OFF

33.01 (a) (i) Where the duties of a position held by an employee are no longer required to be performed, the Employer may lay-off the employee. The Employer and the Union recognize the necessity and the justice of the application of the merit principle, which means qualifications and competence, in determining who will be laid off. It is agreed that where two employees of equal merit face being laid off, length of service will be the deciding factor.

(ii) In order to minimize the adverse effects of lay-off, the Employer will provide retraining where practical.

Relevant Policy Provisions

For reference, the Staff Retention Policy (the “Policy”) sets out, in part:

1. POLICY STATEMENT

The Government of the Northwest Territories (GNWT) values the members of the territorial public service and the work they do. It is committed to the retention, retraining and development of existing staff as required to provide job security, career development and to maintain a skilled, stable and competent territorial public service. The following guide the application of this policy:

- (a) the provision of reasonable job security to members of the territorial public service;
- (b) the need to mitigate adverse effects of organizational restructuring through the retention, retraining and development of staff wherever possible;
- (c) fair treatment of employees when organizational restructuring is necessary; and
- (d) the value of continuity of employees in the territorial public service.

2. PRINCIPLES

The GNWT adheres to the following principles when applying this policy:

- (a) The GNWT will not utilize lay-off or voluntary separation to terminate the employment of an employee for poor performance or misconduct.
- (b) Lay-off - The GNWT recognizes that in some circumstances lay-off is unavoidable and is the only viable option for the Employer and the employee.

...

Section 4 of the Policy sets out, *inter alia*, the following definitions:

4. DEFINITIONS

- (a) **Affected Employee** - an employee who has been notified by their department, board or agency that they are subject to voluntary separation due to their position being transferred to another community; or that they are subject to lay-off due to the position being eliminated as a result of a reorganization, business plans or other formal organization changes; the hours of work have been reduced by the Employer; and/or that the job description of the position has changed by more than 50 percent.

...

- (f) **Lay-Off** - the termination of employment because of lack of work or because of the discontinuance of a function where the terminated employee is suitable for continued employment in the territorial public service. “Lay-off” does not include termination of employment because of a transfer of the work or function to another employer where the employee is offered employment with the new employer.

...

The controversial sections of the template transfer assignment agreement used by the Employer are as follows:

9. The Employing Department guarantees that upon completion of the transfer, should *(Name of Transferee)*'s home position be filled, a position within the Employing Department will be provided to them.

OR

The Receiving Department guarantees that upon completion of the transfer, should *(Name of Transferee)*'s home position be filled, a position with the Receiving Department will be provided to them.

10. If a reasonable job offer cannot be made to the transferee at the end of the transfer the '*Staff Retention Policy*' will apply.

Evidence of Avery Parle

At the hearing, Union Service Officer Avery Parle gave evidence about his experience representing members in respect of temporary transfer assignments. While Mr. Parle acknowledged transfer assignments provide employees the opportunity to trial a new position and are typically viewed favourably by members at the outset of these arrangements, he noted that issues can arise at the end of the assignment when members experience "sticker shock" at learning their substantive position has been backfilled with an indeterminate employee and is no longer available. According to Mr. Parle, employees in this situation are often surprised their job is not protected, and are unfamiliar with the Policy.

Mr. Parle's evidence was that the Union does not dispute the Employer's ability to backfill a temporary vacancy created by a transfer assignment. Rather, Mr. Parle testified, the Union's position is that an indeterminate incumbent whose temporary assignment is ending must be guaranteed a job to come back to, even if their position becomes superfluous because the Employer has backfilled it with an indeterminate employee. Mr. Parle testified that the Employer's failure to guarantee the return of an employee on transfer assignment to their substantive position creates a "serious potential risk" that employees' employment status may be changed in a way not contemplated under the Collective Agreement. In his view, the Staff Retention Policy ought only to apply in situations where the definition of layoff has been met under the Collective Agreement.

Mr. Parle's evidence was that the Employer's use of transfer assignments can impact staff entitlements under the Collective Agreement such as pension contributions, which he noted could be impacted if an employee were reassigned to a lower paying position following the end of a temporary assignment. He further testified that transfer assignments are sometimes utilized by employees to avoid bullying and harassment in the workplace, and for these reasons fall under the Union's representational responsibilities.

Evidence of Deborah Ross

Manager of Human Resources, Deborah Ross, testified the Employer uses transfer assignments to meet operational requirements in a variety of circumstances including backfilling employees on leave or to fill various other short-term staffing needs, referring to the various reasons for transfer assignments set out in the Human Resources Manual section on Temporary Assignments. Ms. Ross' evidence was that there is no consistent practice in respect of how transfer assignments are awarded. Sometimes, she testified, the Employer may post an available transfer assignment as a vacant position or sometimes an opportunity could arise from a Minister "tapping an employee on the shoulder" for a short-term opportunity. Ms. Ross testified that the Employer selects employees for transfer assignment based on merit, and prefers to select employees who are "suitable" and "highly recommended." According to Ms. Ross, transfer assignments provide an opportunity for employees to develop and acquire a broader range of skills and knowledge to expand their career goals. Ms. Ross confirmed in her evidence that transfer assignments are completely voluntary. She estimated there are presently about 500 active transfer assignments, and testified she herself was presently in a transfer assignment.

With respect transfer assignment agreements, Ms. Ross' evidence was that the Employer uses two standard templates for departmental and interdepartmental transfer assignments respectively, however the specific terms of each agreement are determined by the manager(s) and agreed to by the transferring employee. Ms. Ross acknowledged employees could request changes to the terms of the agreement, but testified it would be up to an individual manager to decide whether to agree to the employee-requested changes or not. She did not agree that this constituted "negotiation." In respect of when the Employer will elect to backfill a position with an indeterminate employee while the incumbent is on a temporary assignment, Ms. Ross testified that some positions are harder to backfill than others. For those harder-to-fill positions, such as a Speech Pathologist for example, her evidence was that the Employer is less inclined to commit to return an employee to their previous position following a transfer assignment, since it is far easier to attract a qualified applicant to the North by

offering an indeterminate position. Indeed, Ms. Ross testified was that it is not always possible to fill a term vacancy, and that requiring departments to do so would “tie their hands in terms of staffing.” In cases where the Employer elects not to guarantee an employee’s job following a transfer assignment, Ms. Ross testified she advises managers to discuss this with the employee, and that it is up to each respective manager to decide whether to send an email to an employee or have a verbal discussion with them about this risk. With respect to an indeterminate employee whose position is no longer available following the conclusion of a transfer assignment, Ms. Ross testified that the Employer would attempt to make a “reasonable job offer” – which she defined as a position at the same or higher wage rate. Ms. Ross testified that while an employee who turns down an unreasonable offer continues to be on staffing priority as the Employer looks for a reasonable position, an employee who turns down a reasonable offer would be effectively resigning.

Under cross-examination, Ms. Ross was asked about the staffing information the Employer provides to the Union, which she testified is accurate to the best of her knowledge. Ms. Ross was unable to explain however, why there were casual and relief employees recorded as being on transfer assignments as well as employees whose status was described as “casual over 6 months no pens.” Ms. Ross acknowledged casual employees are defined in the Collective Agreement as temporary employees for up to four months, and was adamant in her evidence that employees retain their employment status while in a transfer assignment, even in cases where an indeterminate employee is backfilled by an indeterminate employee and therefore no longer has a position to return to. Ms. Ross emphasized employees are told that if their position is going to be filled with an indeterminate employee they have the choice to decline or cancel the transfer assignment. In those cases, she testified, an employee will be offered a reasonable alternate position or “double billed” in their original position if it is “operationally feasible.” Ms. Ross pointed to the staffing information provided by the Employer, testifying that in the past five years only two bargaining unit members were “redeployed” to different positions following the end of a transfer assignment, and only one bargaining unit member was laid off. Mr. Ross testified the Employer’s intent, as indicated by the name of the Policy, is to retain all its employees and that it does everything in its power to retain expertise and to find work for employees.

POSITIONS OF THE PARTIES

Union’s Position

The Union submits that that Employer's administration of temporary transfer assignments contravenes the Union's exclusive bargaining authority and the Collective Agreement. According to the Union, as bargaining agent for the employees of the Employer it has the exclusive right to negotiate their terms and conditions of employment. It is a clear violation of the Collective Agreement, it argues, for the employer to be entering into Transfer Assignments with bargaining unit members without involving the union. The Union asserts the Employer does not have the right to privately negotiate contracts of employment with employees that contradict or undermine rights in the Collective Agreement. It notes transfer assignment can impact numerous employee entitlements under the Collective Agreement such as pensions or employment status.

The Union takes the position that the staff movement reports produced by the Employer do not provide sufficient detail about these assignments and takes issue with the fact that the reports are provided after transfer assignments have been agreed to. The Union asserts the Employer's provision of this information does not discharge its obligation to involve the Union in this process. Further, the Union submits, an adverse inference ought to be drawn from the fact the Employer did not call a witness from Human Resources in the Department of Finance who could speak to the policy reasons behind the categories listed in the summary information about staff movement provided to the Union, which the Union notes has not remained consistent over time.

The Union acknowledges transfer assignments can provide positive work opportunities for bargaining unit members and that these assignments are voluntary and require an employee's interest and willingness to work in an assignment. Its issue, in addition to its position that it has a right to participate in these agreements, is that the Employer's application of its Staff Retention Policy to transfer assignments creates the possibility that employees who accept temporary transfer assignments may lose their jobs in a manner not contemplated by the Collective Agreement. The Union notes that under the Collective Agreement, a layoff only occurs where there is a "lack of work" – which it argues is not the case when a transfer assignment ends and an employee is not returned to their home position because it has been backfilled with an indeterminate employee. The grievance notes the terms 'promotion', 'demotion' and 'transfer' are all defined in the Collective Agreement. According to the Union therefore, the Employer's administration of transfer assignments breaches the terms and conditions set out in the Collective Agreement. The Union also points to Mr. Parle's evidence that sometimes transfer assignments are used by employees to avoid bullying and harassment in the workplace – issues the Union asserts it has a right and obligation to be involved in.

The Union does not object outright to the Employer's use of transfer assignments. Rather, it asserts management rights must be exercised reasonably and in a manner consistent with the terms and conditions stipulated in the Collective Agreement. According to the Union, the way by which the Employer has been administering transfer assignment agreements is a significant departure from rights collectively bargained, and has a significant impact on members given that it can result in loss of employment. Further, the Union alleges, the Employer has not been following its own policy in respect of transfer assignments, which stipulates that only term or indeterminate employees who have passed their probationary period are eligible for these assignments. The Union points to the summary staff movement information provided by the Employer which includes employees on transfer who are identified as "casual employees over 6 months no pens", noting that at the time the grievance was filed casual employees were defined under Article 2.01(m)(i) and Appendix A5 as being hired for "a period not to exceed four (4) months of continuous employment in any particular department." This period has been extended to six months under the current Collective Agreement. Moreover, the Union notes the probationary period is defined under Article 2.01(y) as a period of six months from the date an employee is appointed.

The Union argues the 30-day grace period provided for in the transfer agreements that allows either side to cancel a transfer assignment agreement means an employee whose position is backfilled with an indeterminate employee could lose their indeterminate status if alternate work cannot be found for them. The Union notes the 1992 Human Resources Manual makes no reference to the Staff Retention Policy, and the Employer never notified the Union when it started applying this Policy to transfer assignments. According to the Union, it only became aware of this practice through complaints from its members, who it notes are shocked when told they may not be able to return to their home position. The Union's asserts this possibility is inconsistent with the terms and conditions of employment as set out in the Collective Agreement.

In terms of remedy, the Union seeks a declaration that the Employer's unilateral negotiation of transfer agreements and its reference in these agreements to the Staff Retention Policy violates the Collective Agreement. It seeks an order that the Employer cease its current practice of entering into transfer agreements, and a direction that any future transfer agreements referring to the Staff Retention Policy must involve the Union.

The Union relies on the following authorities: *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 SCR 718; *North Bay Regional Health Centre v. Canadian Union of Public Employees, Local 139 (Third Weekend Premium Grievances)*, 2018 CanLII 39768 (ON LA); *Unifor v. Bell Canada*, 2016 CIRB 823 (CanLII); *Cape Breton University Faculty Association v. Cape Breton University*, 2016 NSLB 243 (CanLII); *Noël c. Société d'énergie de la Baie James*, [2001] 2 S.C.R. 207, 2001 SCC 39 (CanLII); and *Association des juristes de justice c. Canada (Procureur général)*, 2017 SCC 55.

Employer's Position

According to the Employer, temporary assignments are a necessary staffing mechanism used for immediate operational needs or to retain employees who need to be redeployed. While the Employer acknowledges that the specific terms of each transfer assignment will vary, it notes these variances between agreements are due to operational requirements and staffing challenges experienced in the North. It points to the evidence of Ms. Ross that some positions are quite difficult to fill, and may not be possible to fill as a term position. The Employer submits that in all cases it has administered transfer assignments fairly and in good faith. The Employer denies the Union has an obligation or explicit right to negotiate transfer assignment agreements on behalf of members, and says that such a finding would infringe on employees' right to make independent decisions about their careers.

The Employer asserts it has the management right to backfill employees who are in temporary transfer assignments in whatever manner it sees fit. This right, it states, is expressly recognized in section 37 of the *Public Service Act*, R.S.N.W.T. 1988, c. P-16 [the "*Act*"], which it argues provides it with broad discretion to backfill employees who go into temporary assignments with either a term or indeterminate appointment depending on the specific nature of the need. According to the Employer, transfer assignments are a leave of absence from an employee's home position not contemplated under the Collective Agreement, and the Employer is entitled to backfill the home position pursuant to section 37 of the *Act* which states:

37. (1) Where an employee has been granted leave of absence for a period in excess of two months, the Minister may appoint another person to that employee's position and, in that event, the employee ceases to be the incumbent of that position but, during the remaining period for which the employee was granted leave of absence, the employee shall, subject to this section, be deemed to be the incumbent of an equivalent position in the establishment.

...

(3) Where an employee is on leave of absence and another person is appointed to his or her position under subsection (1), the Minister shall, during or after the expiration of leave,

appoint the employee without competition to another position in the public service for which the employee is qualified.

As transfer assignments are a discretionary mechanism, the Employer takes the position that there is no nexus between the grievance and the Collective Agreement.

The Employer refutes the Union's argument that transfer agreements can jeopardize the indeterminate status of an employee, stating that indeterminate employees maintain their employment status regardless of how their home position is filled. The Employer observes that the Staff Retention Policy would not apply if the Union is correct that the indeterminate status of employees was somehow altered by the provisions of a transfer agreement. In other words, the Employer notes, the Policy does not apply to term employees whose terms have ended. It says any concern transfer assignments could be used to improperly oust an indeterminate employee is undermined by the data showing that the Employer has retained nearly 100% of employees who have taken transfer assignments in the past five years. The Employer claims the mere potential for consequences down the road is not enough to warrant arbitral interference. Further, the Employer takes issue with the concern raised by the Union that an employee could be backfilled during the thirty-day cancellation period provided for under the agreements, stating this argument is undermined by the realities of staffing in the North and the fact that employees may only be backfilled under the *Act* when they are absent for two months or more.

The Employer takes the position that reference to its Staff Retention Policy in transfer assignment agreements is consistent with section 37(3) of the *Act* which requires that it appoint an employee whose substantive position is no longer available at the conclusion of a transfer assignment to another position. The Employer alleges that under the *Act*, as set out above, it is required to look for a position for which the employee is qualified or, in other words, a "reasonable" position. This, the Employer argues, is precisely what Ms. Ross testified the Employer does when an employee's substantive position is no longer available because it was backfilled by an indeterminate employee. The Employer draws further support for its position from the management rights clause in Article 7 of the Collective Agreement, which states that the Collective Agreement "in no way restricts the Employer in the management and direction of the Public Service" except to the extent management rights are expressly curtailed in the Collective Agreement.

The Employer rejects the Union's assertion that its reference to the Policy undermines or contradicts the layoff provisions of the Collective Agreement. The Employer alleges the absences created by employees on transfer assignments are a type of leave not contemplated under the Collective Agreement. It says its Staff Retention Policy applies to any employees who are laid off, and that its reference to the Policy in the transfer assignment agreements is intended merely to ensure the Employer is acting diligently by pointing out the potential risk to some employees who accept a transfer assignment. The Employer stresses that employees are then free to choose whether they wish to assume that risk or to stay in their current position, and that this decision is entirely voluntary. Any indeterminate employee can face layoff under the Collective Agreement, the Employer notes. There are no categories of employees exempt from the possibility of layoff. According to the Employer, nothing in its approach to transfer assignments violates the Collective Agreement. Any requirement that the Union be a signatory to transfer assignment agreements or be involved in their administration would infringe the Employer's ability to direct its workforce and unduly involve the Union in staffing decisions.

While the Employer acknowledges the Union has not raised an estoppel argument, it asserts past practice would be inoperative in this case since its right to backfill employees arises under statute, and an estoppel cannot apply to legislation. The Employer concedes that its Human Resources Manual changed between 1992 and 1998 in respect of whether employees on transfer assignments would be guaranteed the right to return to their substantive position, but asserts this change cannot give rise to any past practice that could support an estoppel argument. According to the Employer, the appropriate place for the Union to address any concerns it has over the Employer's use of transfer assignments is in collective bargaining.

The Employer relies on the following authorities: *Blue Line Taxi Co. v. R.W.D.S.U.*, 1992 CarswellOnt 1237 (ON LA); *National Steel Car Ltd. v. U.S.W.A., Local 7135*, 2005 CarswellOnt 3413 (ON LA); *Pepsico Bottling Group (Canada) ULC v. Saskatchewan Joint Board R.W.D.S.U., Local 558*, 2016 CanLII 20427 (SK LA); *Saint John (City) v. I.A.F.F., Local 771*, 2011 NBCA 31.

In addition to the *Public Service Act*, R.S.N.W.T. 1988, c.P-16 as noted above, the Employer also referenced the *Public Service Regulations*, R.R.N.W.T. 1990, c. P-28.

DECISION

Union's exclusive bargaining authority

Before delving into the specifics of this case, it is useful to set out some basic principles. It has long been established that the right of individual employees to bargain terms and conditions of employment directly with their employer is ousted by the existence a collective bargaining relationship (see, for example, *McGavin Toastmaster Ltd. v. Ainscough, supra*).

This restriction on individual bargaining within unionized environments extends beyond the confines of the explicit terms of the collective agreement. As observed by Arbitrator Weatherill in *Canada Post Corp.* (1988), 1 L.A.C. (4th) 138 at para. 12:

It was argued that the memorandum in question was "outside the collective agreement", as indeed it was. It is not the case, however, that matters affecting terms and conditions of employment which are not dealt with in a collective agreement may properly be the subject of individual bargaining. The bargaining agent's rights of representation are not limited to those matters covered by an agreement. They are, as this agreement acknowledges, sole and exclusive rights of representation.

The Union in this case does not, however, take issue with the Employer's right to enter into transfer assignments agreements wholesale. Indeed, it is clear that both the Union and the Employer agree transfer assignments provide positive work opportunities for employees who want to enhance their career opportunities and broaden their skills. The issue raised in respect of the Employer's use of transfer assignment as set out in the grievance is far more narrow – namely, that the Employer is breaching the Collective Agreement by not involving the Union in the negotiation of these agreements, and by not guaranteeing that indeterminate employees will be returned to their substantive position following a transfer assignment.

Transfer Assignments vis-à-vis the Union's Exclusive Bargaining Agency and the Collective Agreement

After carefully considering the evidence and submissions of the Parties, I concur with the Union that the Employer's current practice of administering transfer assignments undermines the Union's exclusive bargaining authority. Specifically, the Employer has breached the Collective Agreement and engaged in impermissible direct bargaining with employees by entering into transfer assignment agreements with individual employees that contain provisions that are inconsistent with employees' rights and entitlements under the Collective Agreement.

The fact that the terms of individual transfer assignment agreements differ between employees, in my view, creates the opportunity for individual bargaining to take place—most notably, in respect of whether the employee is guaranteed a job to return to. The undisputed evidence is that some employees are guaranteed a position at the end of their transfer assignment and others are not. Sometimes this position is in the “employing” department and other times it is in the “receiving.” Although Ms. Ross in her evidence was reluctant to characterize the input from employees into the terms of their own transfer assignment agreement as rising to the level of “negotiating,” she did confirm that individual employees can indicate their preferred terms for these agreements and that an employee’s expressed preferences could then be accepted or rejected by the Employer. I find this situation is precisely the kind of direct bargaining with employees prohibited within a collective bargaining relationship. The fact that an individual employee can enter into a contract with the Employer that impacts their employment status fundamentally undermines the Union’s exclusive bargaining authority.

I note the term lay-off is defined in both the Collective Agreement and the Employer’s Staff Retention Policy and is contemplated in only two situations, where there is a “lack of work” and where there has been a “discontinuance of a function.” The Policy indicates employees will only be laid off if “lay-off is unavoidable and is the only viable option for the Employer and the employee.” The Policy Statement in the Staff Retention Policy indicates it applies to instances of organizational restructuring where the performance of a specific role is no longer required. Most explicitly, Article 33.01 of the Collective Agreement indicates the Employer may lay off an employee “[w]here the duties of a position held by an employee are no longer required to be performed.” Article 33.01 further stipulates that the “merit principle” will be applied in decisions about who will be laid off, with an employee’s length of service being the deciding factor when there are two employees of equal merit.

An indeterminate employee whose employment is not guaranteed following a transfer assignment does not fit neatly within these categories. To the extent it can be said there is a “lack of work” for an indeterminate employee following the end of a transfer assignment, I note this is the result of the Employer’s decision to backfill the employee’s substantive position with another indeterminate employee – not a result of restructuring or a reduction in the workforce. In those circumstances, it cannot be said that the criteria of Article 33.01 have been met, as the work of an employee’s

substantive position prior to their transfer assignment continues to be performed by their replacement. Further, there was no indication in the evidence that the Employer considers merit and/or length of service in determining which employee to layoff following a transfer assignment. To the contrary, the evidence was that an employee who signed off on a transfer assignment agreement - which did not guarantee their return to their substantive position - is the one automatically laid off in the event there is not a reasonable position in which they can be redeployed. For these reasons, I find the Employer's practice of entering into transfer assignment agreements with individual employees that do not guarantee an employee's return to their substantive position, and without the Union's involvement or agreement, violates the Collective Agreement.

In so finding, I note my conclusion does not interfere with or undermine the Employer's rights as set out in section 37 of the *Act*. The effect of my order is not to restrict the Employer from backfilling the position of an employee in a transfer assignment in whatever manner it deems necessary. Rather, the effect of my order is simply that the Employer is required to involve the Union in the negotiation of transfer agreements, if and when it seeks to alter an employee's terms and conditions of work including the most fundamental of conditions: an employee's job security. There is nothing stopping the Parties from agreeing that an employee going into a transfer assignment will be guaranteed the same or a comparable position, as contemplated in section 37(3) of the *Act*, in cases where they are temporarily vacating a hard-to-fill position. However the effect of a binding Collective Agreement between the Parties is that the Employer is no longer free to unilaterally alter an individual employee's terms and conditions of employment. Interpreting the *Act* to provide any such right would be, in my view, inconsistent with constitutional principles and the freely-negotiated language of the Parties' Collective Agreement.

It should be noted that the Staffing Retention Policy itself is not inconsistent with the Collective Agreement when applied to a properly laid off employee. In the normal course, where an employee is laid off because their job no longer exists, the Policy fleshes out the recall rights of employees. The concern is with the Policy being applied to an indeterminate employee being laid off in a context outside of that contemplated under the Collective Agreement.

While I acknowledge the unique staffing challenges faced in the North, and the Employer's consequent need for flexibility in staffing, this flexibility must be exercised in a manner consistent with the negotiated terms of the Collective Agreement. Further, I note that the Employer's evidence regarding the infrequency by which employees are laid off following a transfer assignment, and the importance it places on retaining its staff means this finding ought not to present a particularly significant burden on the Employer. To the extent that the Parties wish to re-examine the administration of transfer assignments, they are of course free to do so at the next round of collective bargaining.

It is so awarded.

Dated this 29th day of October, 2020 in Vancouver, British Columbia.



Amanda Rogers, Arbitrator