IN THE MATTER OF AN ARBITRATION

BETWEEN:

The Government of the Northwest Territories

(the “Employer”)

AND:

The Union of Northern Workers, a component of the
Public Services Alliance of Canada

(the “Union”)

Rescheduling Meetings Grievance (Grievance #18-P-02251)

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| APPEARANCES: | Jeremy Walsh and Pauline Ross, for the Employer<br>Michael Penner, for the Union |
| ARBITRATOR: | Randall Noonan |
| DATE OF HEARING: | November 21, 2023 |
| DATE OF AWARD: | January 5, 2024 |

**Introduction**

1. The parties agreed that this arbitration board has jurisdiction to determine this policy grievance filed by the Union.

2. The issue in dispute is the interpretation of Article 37.07(d) of the collective agreement and, in particular, the last sentence of that article, which is highlighted for emphasis below:

> (d) Where an employee is required to attend a meeting with the Employer or a representative of the Employer to deal with matters that may give rise to the suspension or discharge of an employee, that employee shall be advised 24 hours in advance of the meeting of his/her right to have a representative of the union at the meeting. **At the employee's request, the meeting will be postponed for a maximum of three (3) working days.**

3. Although details of a particular incident that gave rise to the grievance were scarce, I will set out the context as it was explained at hearing.

4. There are several things to which the parties agree in relation to the article in dispute:

   - An employee is entitled to Union representation at a meeting with the Employer that could give rise to a suspension or discharge. Both parties characterized that right as fundamental and important.

   - The employee must choose to exercise the right to be represented by the Union. The Employer's obligation is met if the Employer provides notice of the meeting 24 hours in advance of the proposed time and advises the employee of the right to Union representation. The employee may choose not to exercise that right.

   - The 24-hour notice is typically provided through a letter to the employee which both parties refer to as the Notice to Appear ("NTA").

   - The employee has an automatic right to have the meeting postponed (from the proposed time set out in the NTA) for a maximum of three working days.

5. The point in dispute is whether the request to postpone the meeting must come from the employee directly or whether it may also come from a Union representative on behalf of the employee.

6. The Employer submits that the language "At the employee's request" is clear and that language does not allow for a Union representative to make the request to reschedule the meeting. The Union, on the other hand, argues that once the employee has asked for Union

representation and contacted the Union, the Union representative is acting on behalf of the employee and is perfectly entitled to ask for the meeting to be rescheduled.

7. The Union called two witnesses at the hearing, both of whom are Service Officers of the Union. There are currently six Service Officers employed by the Union.

8. Chris Parsons testified that he has been a full time Service Officer since January 2019, and that the majority of his duties deal with meetings with and on behalf of employee members of the Union, including disciplinary meetings with the Employer. He said that it is typically a Service Officer who attends such meetings although shop stewards may sometimes attend, particularly if the matter does not appear to be serious.

9. Mr. Parsons said that he will attend between 80 to 100 such meetings per year and it is routine for him to converse with someone in Labour Relations to discuss the upcoming meetings and to ask for rescheduling when he would not be available at the time set out in the NTA. He testified that no one from management has ever told him that it was not appropriate for him to make such requests.

10. Mr. Parsons pointed to several email chains in which he discussed the timing of disciplinary meetings with Employer representatives and in which his requests for rescheduling were agreed to without any suggestion that it was the employee (and not him) who should make the request. He said that he has never been told that he could not make requests for rescheduling and that he has never seen a situation in which the Employer continued with a meeting when the Union representative was unavailable.

11. Mr. Parsons also testified that 90% of grievances filed on behalf of Union members are filed by the Union and that the Employer regularly accepts that process notwithstanding that Articles 37.03 of the collective agreement, strictly read, would require the employee to file the grievance. That article reads:

> 37.03. An employee who wishes to present a grievance at any prescribed level in the grievance procedure, shall transmit this grievance to his/her immediate supervisor or local officer-in-charge who shall forthwith:
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> (a) forward the grievance to the representative of the Employer authorized to deal with grievances at the appropriate level; and
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> (b) provide the employee with a receipt stating the date on which the grievance was received by him/her.

12. The Union also called Jori Lacey, another Service Officer to testify. Ms. Lacey's evidence was very similar to that of Mr. Parsons. She said that she reaches out to Labour Relations to reschedule meetings routinely although she tries to be respectful of everyone's time and not to reschedule unless necessary. Ms. Lacey also identified a number of email strings is which

she arranged for rescheduled meetings directly with a Labour Relations officer, without complaint and without ever being told that it was not appropriate to do so.

13. The Employer's only witness was Tammy Goodliffe, a Labour Relations Advisor for the Employer. Ms. Goodliffe testified that meetings are rarely postponed. She said that requests to reschedule sometimes come to her from Union officials and sometimes from employees through their supervisor. When asked by a Union official to reschedule a meeting, she said her practice is to ask that official to have the grievor arrange the rescheduling with the grievor's supervisor, who will, in turn, contact her. She said that this was a direction given to her by the Employer's Advice and Adjudication Manager. She admitted that there was no written policy in relation to requiring that a rescheduling request must come directly from the employee.

14. Ms. Goodliffe agreed that a disciplinary meeting would never proceed without a Union representative present when the employee had asked for Union representation. She stated that if a meeting started without a Union representative present and the employee wanted Union representation, she would adjourn the meeting until a Union representative could be present.

15. When asked about the evidence of Mr. Parsons and Ms. Lacey to the effect that no one had ever told them that was the policy, she said that she could not speak to how her Labour Relations colleagues handled matters, but that she asked that the request come directly from the employee.

16. In cross-examination, Ms. Goodliffe was asked what the purpose of the policy is, given that there will always be a Union representative present during disciplinary meetings when the employee requests one. Her reply was that the policy's purpose is to comply with the collective agreement.

**The Parties' Arguments**

17. The Union argues that the evidence showed that the Employer had never consistently applied a policy of requiring rescheduling requests to come directly from the affected employee as opposed to from the Union. It argues that the only evidence the Employer produced was that Ms. Goodliffe apparently has a consistent practice, but that practice does not seem to be followed by others in the Employer's Labour Relations department.

18. In a similar vein, the Union argues (and the Employer does not dispute) that the Employer routinely accepts grievances filed by Union representatives on behalf of employees when the language of Article 37.03 would, if taken literally, require that the grievance come directly from the affected employee. It argues that it makes no sense to read Article 37.07(d) in a literal, non-purposive manner, while accepting a broader interpretation of Article 37.03.

*19.* The Union argues that the right to union representation in disciplinary meetings is sacrosanct and that any provisions of a collective agreement relating to the right to representation should be read purposefully (*Medis Health and Pharmaceutical Services v. Teamsters, Chemical and Allied Workers, Local 424 (Satar Grievance)* (2001), 100 L.A.C. (4th) 178 (Kirkwood), at paras 35 and 38). It submits that the Employer's literal reading of Article 37.07(d) is not purposive and is, in the end, an exercise in futility. It claims that the Employer's interpretation of the clause leads to an absurdity of form.

20. In support of the proposition that the right to union representation is of fundamental importance, the Union cites *Northwest Territories v. Public Service Alliance of Canda (Rabesca Grievance)* (2012), 219 L.A.C. (4th) 165 (Sims) at para, 58; *Medis (supra);* and *Canada Safeway Ltd. and R.W.D.S.U. (MacNeill) (Re)* 1999), 82 L.A.C. (4th) 1 (Ish, Wallace, Shalansky).

21. In its argument, the Employer does not dispute the importance of representational rights and says that it is not trying to deny those rights. It points out that no meetings proceed without Union representation where it is wanted by the employee.

22. The Employer relies on a literal interpretation of the collective agreement and points out that the collective agreement is clear as to when an employee can have Union representation. It cites the following examples:

> 37.02 If he/she so desires, an employee may be assisted and represented by the Union when presenting a grievance at any level.
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> 37.14 An employee shall have the right to present a grievance on matters relating to the application or interpretation of this Agreement provided he/she first obtains the authorization of the Union prior to presenting such grievance.
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> 37.17 The time limits stipulated in this procedure may be extended by mutual agreement between the Employer and the employee, and where appropriate, the Union representative.

23. The Employer argues that "Employee" is a defined term in the collective agreement and the definition does not incorporate a Union representative taking the place of an employee.

24. The Employer cites *Canadian Labour Arbitration, 6th Edition (Brown and Beatty)* at section 4;21 for the proposition that words should be given their normal or ordinary meaning and that the word "employee," as defined and used in the collective agreement, does not include a Union representative.

25. The Employer cites *C.L.A.C. V. B.C. Transportation Financing Authority,* [2001] BCCA 437, at para 30, for the proposition that a union is not empowered to act as an agent on behalf of its members. In discussing s. 27 of the *Labour Relations Code*, the Court said, at para 30:

> In my view, s. 27 of the Code cannot bear the interpretation placed upon it by the appellants. It does not purport to give a union which has been certified as the bargaining agent for an appropriate bargaining unit unrestricted powers to act as agent at large for its members. Under s. 27, the union is certified as the "bargaining agent"; not simply the "agent" of an appropriate bargaining unit. As such, its exclusive authority is "to bargain collectively for the unit and to bind it by a collective agreement...." I am simply unable to read into the language of s. 27 a general power in a union "which has been certified as the bargaining agent for an appropriate bargaining unit" to act as a general agent for the members of that unit for any and all matters related to employment. In that respect, I agree with the following submission contained in paras. 8 and 9 of the factum of the respondent, TFA, with regard to the scope of s. 27 of the Code:
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> > 8. A trade union only has the role of exclusive bargaining agent once it is certified as the bargaining agent for an appropriate bargaining unit, through the procedure outlined in the *Code.* The role of the trade union as bargaining agent is with respect to the employer that employs the union's members. The modifying term "bargaining" before the term "agent" connotes that the trade union's role is not as an agent at large, but as an agent that bargains with the employer of its members regarding the members' working conditions.

26. I note that the issue considered by the Court in *C.L.A.C.* was very different from that in the present case. In that case, the Respondent, Rapid Transit Project 2000, the company in charge of designing and building the Millennial Line Skytrain in the Lower Mainland of B.C., entered into a contract with another company, HCL, under which HCL would provide the labour force for the project. In turn, HCL contracted with the B.C. Highway and Related Construction Council (the "Council") which was a council of trade unions. Under that contract, only members of the Council could work on the project.

27. C.L.A.C. was not a member of the Council. It brought an action seeking a declaration that the contracts entered into breached s. 24(1) of the *Canadian Charter of Rights and Freedoms* by requiring C.L.A.C. members to become members of other trade unions when working on the project. At trial, C.L.A.C. clarified that it was not seeking *Charter* relief on its own behalf, but rather as an agent on behalf of its members.

28. In its determination, reflected in the paragraphs quoted above, the Court was not commenting on the agency role of a union in relation to an employer with whom it was the certified bargaining agent, but rather in relation to its role as an agent in matters falling outside the scope of the employer-employee relationship.

29. The Employer also relied on *British Columbia v. B.C.G.E.U.*, [1987] BCAAA No. 135 (Hope), for the proposition that an employee may enter into certain arrangements with an employer without union involvement.

30. In my view, that case is not helpful in determining the issues here. *British Columbia* dealt with whether an employee was free to enter into an agreement with the employer to end the employment relationship without the involvement of the union. The employee involved in that case had voluntarily agreed with the employer that he would retire from his employment on a certain date if the employer would transfer him to another work location located in the place the employee wanted to retire. Arbitrator Hope determined that the employee was bound by that agreement even though the union was not involved. The reasons for the decision can be elicited from the following paragraphs:

> 35. ...where an employee agrees with his employer to have the provisions of the agreement apply to him in a particular way, he is bound by that agreement unless it is in conflict with or subverts some provision of the agreement.
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> 40. There is little doubt in a review of the arbitral authorities that individual employees have the capacity to both initiate and terminate the employment relationship without the consent of the bargaining agent, subject of course to any provisions of the collective agreement governing those matters.
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> 41. [...]But, in my view, where a decision to terminate employment in the form of an early retirement is made freely and voluntarily, it cannot be seen as a violation of the collective agreement merely because it was not approved by the bargaining agent.

31. In the instant case, an employee who is faced with an upcoming disciplinary meeting has the right to choose whether to have Union representation at that meeting or not. If the employee, duly informed of their right, chose not to ask for Union representation, then Arbitrator Hope's decision may hold sway. However, when the employee asks for Union representation and contacts the Union to seek that representation, the Union is then engaged as the employee's representative for that meeting.

32. The question directed to me is whether the Union has the right to request a rescheduling of the proposed disciplinary meeting on behalf of the employee or whether the employee must make that request on their own behalf.

33. In my view, the Employer's interpretation of the last sentence of Article 37.07(d) would result in a triumph of form over substance to a highly unnecessary degree. Ultimately, the parties agreed that the result of a request for rescheduling is the same whether it comes from the employee directly or from a Union representative. Either way, the meeting will be rescheduled to a time when the Union representative is available.

34. I agree with the Union that the language of the collective agreement relating to the right to Union representation should be read in a broad and purposive manner. While a literal reading may support the narrow interpretation advanced by the Employer, I find that the language is broad enough to encompass and allow for a request to be made by the Union on behalf of the employee. That is because once the employee has chosen to have a representative of the Union at the meeting, that Union representative is acting for the employee and the request for the postponement contemplated in the last sentence *is* the employee's request even though the request is delivered by a Union representative.

35. Given that, I find that the Union's interpretation of Article 37.07(d) is the preferred interpretation and I hereby issue the declaration sought by the Union to that effect.

36. I will retain jurisdiction for a six-month period to deal with any dispute related to the interpretation or application of this award. If such a dispute is referred to me pursuant to this retained jurisdiction, that dispute shall be determined in an expedited fashion using a process that I will determine to be the most appropriate.

DATED AND EFFECTIVE this 5th day of January 2024.

Randall Noonan, Arbitrator