IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD
- the Employer

-and-

THE ESSEX AND KENT COUNTIES SKILLED TRADES COUNCIL
- the Union

AND IN THE MATTER of a grievance of Jim Crabb

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Leonard P. Kavanaugh	- Counsel
and others	

On behalf of the Union:

Ernest A. Schirru	- Counsel
Tom Snaden	- Union Representative
Jim Crabb	- Grievor

Hearings held June 8, June 13 and August 31, 2005, in Windsor, Ontario.

AWARD

I. INTRODUCTION

This is a discipline grievance. The Union referred the grievance to arbitration before the Ontario Labour Relations Board under the Construction Industry provisions of the *Labour Relations Act, 1995* and the Employer referred it to arbitration under the expedited arbitration provisions of the same *Act.* I was subsequently appointed under the expedited arbitration provisions.

The parties disagreed as to my jurisdiction to hear this grievance and, assuming I had jurisdiction, whether I should defer to the OLRB which had already decided that it had jurisdiction.

On the merits of the matter, the Union initially argued that the Employer did not have cause for the discipline. The Union later abandoned that argument but continued with its alternative submission that the Employer, having arranged for a Union representative to be present when it investigated the facts of a complaint about the grievor's misconduct, was also required to have a Union representative present when it delivered the letter imposing the discipline.

II. THE EVIDENCE

The Greater Essex County District School Board, the Employer, operates schools in Windsor and Essex County.

The Essex and Kent Counties Skilled Trades Council, the Union, is comprised of six unions representing skilled trades, including the United Association of Journeymen and Apprentices

of the Plumbing and Pipe Fitting Industry of the United States and Canada Local No. 552.

Jim Crabb, the grievor, is a plumber and has worked for the Employer for the past 20 years.

The grievance contests discipline which the Employer imposed upon the grievor by letter dated April 4, 2005.

May 6, 2005, the Union referred this grievance to arbitration before the Ontario Labour Relations Board under Section 133 of the *Labour Relations Act, 1995.* May 18 the Employer referred this grievance to arbitration under Section 49 of the *Labour Relations Act, 1995*, leading to my appointment After I was appointed, but before the first day of hearing, the OLRB heard preliminary submissions and ruled that it had jurisdiction. However, the Board did not begin to hear the substance of the grievance.

I ruled early in this arbitration that I had jurisdiction and that I would proceed with the hearing.

The Union initially asserted that the discipline was imposed without just cause. The first two hearing days were largely devoted to Employer evidence related to the issue of cause. At the beginning of the third day the Union conceded that the Employer had just cause for discipline and advised it would only argue that the discipline was void because it had been imposed without the presence of a Union representative.

There had been a meeting March 23, 2005, attended by Tom Snaden as Union representative, the grievor, and three representatives of the Employer - Al Cook, Manager of Facility Services, Murray Inverarity, Coordinator of Maintenance, and Dan Martin, Mechanical Supervisor and the grievor's immediate superior. The issues which led to the April 4

discipline were discussed at that time.

Tom Snaden is the Business Manager for the Plumbers Union. He testified that he had been invited to the March 23 meeting and had been advised before attending that there had been another incident with the grievor. He agreed that the purpose of the meeting was to investigate the allegations about the grievor and he further agreed one purpose of a Union representative attending such a meeting was to ensure that the person being investigated did not incriminate him/herself. At the meeting the Employer read the letter of complaint to Mr. Snaden and to the grievor. If the allegations in that letter were true, Mr. Snaden expected the Employer to discipline the grievor. Mr. Snaden agreed that he had stayed at the meeting after the grievor left. At the end of the meeting Mr. Snaden anticipated that the Employer would impose discipline, although he did not know what that discipline would be.

By April 4 the Employer had prepared a letter of discipline. It delivered this letter to the grievor in the following way. Mr. Martin, the grievor's supervisor, approached the grievor near the end of the work day about 4:00 pm and asked the grievor to come with him to a room elsewhere in the building. The grievor asked whether he needed a Union representative and Mr. Martin advised that he did not. The grievor and Mr. Martin went to a room which the grievor described as a conference room. Mr. Cook and Mr. Inverarity were already seated. The grievor said that they "shot" the letter across the table, he read it, asked "Is that it?", was advised it was, and he left.

The Union received its copy of the discipline letter by mail April 8.

The grievance before me was filed on the Union's behalf by its lawyers. The grievance made no mention of a failure to provide a Union representative when the discipline was imposed April 4.

Mr. Snaden testified that the Union enforced the provisions of Article 5.02 requiring the presence of a Union representative when an employee was subject to discipline and gave as an example his presence at an earlier investigation meeting March 1, 2005, which also concerned the possible discipline of the grievor. At the end of that March 1 meeting Mr. Snaden said he knew a letter would be coming outlining the facts and that he thought it would include discipline.

The letter imposing the discipline resulting from that March 1 meeting was delivered by Mr. Martin, the grievor's supervisor, and dated March 7, 2005. In order to deliver that discipline letter Mr. Martin drove his truck to the location where the grievor was working, rolled down his window, handed the discipline letter to the grievor, advised the grievor he was only the messenger, and left. No Union representative was present when Mr. Martin delivered that disciplinary letter and no grievance was filed.

In reply, both Mr. Cook and Mr. Inverarity testified about the Employer's practice regarding Article 5.02. Although it was unclear as to how long the provision has been in the agreement, they testified as to their knowledge of the practice over the last 10 or so years. They said that discipline was normally given by a supervisor to the person being disciplined and that a Union representative was not typically present. They acknowledged that if an employee was being dismissed or if the Employer had a concern about the possibility of trouble, the Employer might arrange for a Union representative to be present and that the Employer had done so on occasion. One example of this occurred when the Employer had disciplined an employee for fighting.

Mr. Cook also testified as to why all three of the grievor's superiors attended at the delivery of the discipline in dispute in this grievance. He noted that when Mr. Martin delivered the earlier discipline letter to the grievor in March, Mr. Martin had indicated to the grievor that

he was only the messenger. Mr. Cook testified that he was concerned about that and the fact that the grievor's supervisor had not "taken ownership" of the discipline and that he wanted to show the grievor that his three superiors were united on this discipline.

Both Mr. Cook and Mr. Inverarity testified that the Union had not previously claimed that a Union representative was required for the delivery of discipline.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the key provisions of the parties' 2003-2006 collective agreement:

ARTICLE 5 - UNION REPRESENTATIVES

. . .

5.02 If an employee is subject to disciplinary action by his/her superiors, he/she shall be allowed to have with him/her a Union representative if he/she desires.

. . .

ARTICLE 9 - GRIEVANCE PROCEDURE

9.01 It is agreed that it is the spirit and intent of the Agreement to adjust employee or employer grievances promptly.

. . .

IV. EMPLOYER POSITION

The Employer submitted that I had been properly appointed under Section 49 of the *Labour Relations Act, 1995* and had jurisdiction. As for whether I should exercise my jurisdiction, the Employer submitted that an arbitration hearing held in Windsor would be more efficient, less costly and less disruptive for the participants and that it would likely be concluded sooner than would an OLRB hearing. In addition, there were no issues of interpretation of the *Act* which might suggest it would be desirable to have the special expertise of the OLRB

which deals with that *Act* on a regular basis. The Employer asked me to exercise my jurisdiction.

On these issues, the Employer referred to *Re Autoland Chrysler (1981) Ltd. and Teamsters, Local 879* (2003), 119 L.A.C. 94th) 309 (Bendel).

The Employer submitted that although the Union had conceded on the issue of just cause, it was now hoping to succeed on a technicality. This issue of the presence of a Union representative had not been included in the grievance, a grievance which had been drafted by counsel.

There were no consequences resulting from the absence of a Union representative - the grievor was invited to the room and given his disciplinary letter; he read it and left. There was no investigation that day, no dialogue. The Employer had previously come to a decision and the discipline letter had been prepared in advance of the grievor attending.

Article 5.02 addresses a meeting to interview an employee. That Article covers the March 23 meeting and a Union representative was present then. But on April 4 there was no interview, no investigation, no new facts, no suggestion of change in the discipline, and no harm.

In terms of Article 5.02, the grievor was "subject to" discipline at the meeting March 23 but he was not subject to discipline April 4. On April 4 he was simply being advised of the discipline which the Employer had already decided to impose.

The grievor's earlier discipline had been imposed in a similar manner. Mr. Snaden attended a meeting March 1 at which the matter was discussed but, when Mr. Martin delivered the

letter of discipline, no Union representative was present. That discipline was not grieved. This indicated the parties shared a common view of the provision. It was also consistent with the evidence of the Employer's long practice.

The Employer said it was permissible to mail a letter of discipline to an employee. The Union submissions suggested that a Union representative must be present when that mail arrived. But that could not have been the intent, and the parties similarly did not intend that a Union representative had to be present if the letter of discipline was personally delivered.

In reply to the Union submission that it was proper to deliver the first discipline without a Union representative being present because Mr. Snaden had known at the end of that first investigatory meeting what the discipline would be, the Employer argued that that was factually incorrect and disputed the Union's summary of Mr. Snaden's testimony regarding Mr. Snaden's knowledge at the end of the investigatory meetings.

The Employer asked that the grievance be dismissed.

V. UNION POSITION

The Union submitted that I had no jurisdiction to hear this matter. The Union noted that it had referred this same grievance to arbitration before the OLRB under Section 133 of the *Act* and argued that, once a referral had been made to the OLRB, no proper referral could be made under Section 49 and I was therefore without jurisdiction.

In the alternative, the Union submitted that, as the OLRB had exclusive jurisdiction under Section 133, I should decline to proceed with a hearing on the merits and instead defer to the Board.

On these issues, the Union referred to the following authorities: *Re Hotel, Restaurant & Cafeteria Employees Union, Local 75 and Royal York Hotel* (1983), 149 D.L.R. (3d) 268 (Ontario Divisional Court); *Re Ontario Public Service Employees Union and Ontario Public Service Staff Union* (2004), 135 L.A.C. (4th) 280 (Saltman); and *Re David Chapman's Ice Cream Ltd. and United Food & Commercial Workers, Local 175* (1993), 31 L.A.C. 94th) 318, (Bendel).

Regarding the grievance itself, the Union submitted that the right to the presence of a Union representative was an important benefit, not a technicality. While the issue was not included in the written grievance, it had been raised at the start of this hearing and the Employer was not prejudiced by the issue being considered.

The Union drew a distinction between the two instances of discipline - that is the March 7 and April 4 discipline - submitting that Mr. Snaden knew at the end of the investigatory meeting there would be discipline in the first instance, but not in the second instance being grieved here. The collective agreement requires a representative for the investigation and also when the Employer communicates the discipline. In the first case it was clear what discipline would be imposed at the end of the investigatory meeting, but it had not been clear in this second case. If the Employer informs the Union of the discipline at the investigation meeting, as it did with the first instance of discipline, then there is no need for the presence of a Union representative on delivery of that discipline.

In the alternative, the Union said it had not waived its right to enforce this provision.

The Union asked that I declare the discipline to be null and void because no Union representative had been present.

The Union relied upon the following authorities: *Re Hickeson-Langs Supply Co. and Teamsters Union, Local 419* (1985), 19 L.A.C. (3d) 379 (Burkett); *Re Medis Health and Pharmaceutical Services and Teamsters, Chemical and Allied Workers, Local 424* (2001), 100 L.A.C. (4th) 178 (Kirkwood); and *Re Board of Governors of Riverdale Hospital and Canadian Union of Public Employees, Local 79* (2000), 93 L.A.C. (4th) 195 (Sturdykowski).

VI. CONCLUSIONS

During the first day of the hearing I gave an oral ruling that I had jurisdiction in this matter and would be proceeding with the hearing.

Under Section 49 the limitations on the appointment of an arbitrator are primarily time limits. The time limits spelled out in Section 49 for the appointment of an arbitrator had been met in this instance and therefore under Section 49 I was properly appointed and had "exclusive jurisdiction" under Section 49(4).

As the OLRB had previously decided that it had jurisdiction (in the language of Section 133 (3) of the *Act* it also had "exclusive jurisdiction"), the major issue was whether I should exercise my jurisdiction or defer to the OLRB. I ruled that I would proceed with the grievance for three reasons.

First, a hearing held in Windsor, as this arbitration hearing was, appeared to be more convenient for the parties and for most of the persons attending the hearing than travelling to Toronto for an OLRB hearing. The parties were from Windsor and 10 of the 11 persons then in attendance were from Windsor or nearby, Union counsel being the one exception. A hearing in Windsor was more convenient and less costly for the persons involved than would be a hearing in Toronto before the OLRB.

Secondly, the issues raised by the grievance involved matters of fact finding and the interpretation of the parties' collective agreement. There were no issues raised by this grievance which required the interpretation of the *Labour Relations Act, 1995*. The OLRB deals with that *Act* on a regular basis and has the primary responsibility for the interpretation of the *Act*. Had there been matters requiring the interpretation of that *Act*, it might suggest it would be preferable to defer to the OLRB, but there was nothing in this grievance to suggest the OLRB was better suited to resolve the matter.

Thirdly, in their collective agreement the parties have agreed that the prompt resolution of grievances is important (see the extract from the grievance procedure, Article 9, quoted above). It was unclear when the OLRB would be able to hear the matter as the parties had not yet been contacted about a date for a hearing. There was a suggestion that it might be late fall - early December was suggested - for a first OLRB hearing day on the merits of the dispute. It appeared that the matter would be dealt with more quickly through arbitration than through the OLRB process and this also favoured proceeding with the arbitration.

Moving to the merits of this case, the Union conceded on the issue of cause during the hearing and proceeded only with the submission that the discipline was void as no Union representative had been present at the delivery of the discipline.

I turn to the Employer concern that the grievance did not mention the issue of a Union representative's presence at the delivery of the discipline letter. Although the issue of whether a Union representative was present when discipline was delivered was not explicit in the written grievance, the grievance clearly contests the imposition of the discipline, and this issue was expressly raised by Union counsel at the beginning of the hearing. Arbitration is intended to be a process to deal with the real differences between the parties. The propriety of the imposition of this discipline was the point of the grievance, there was no

prejudice to the Employer, and I have therefore decided to deal with the Union concern regarding the presence of a Union representative.

I agree with the Union, and with the Union's authorities, that the right to the presence of a Union representative is an important right. But that right is not a general statutory right; the right must be found in the collective agreement. In this instance, if the grievor had a right to the presence of a Union representative on April 4, that right must be found in Article 5.02.

Article 5.02 is a brief article. It provides simply that when "subject to disciplinary action" an employee has the right to a Union representative. The words "subject to disciplinary action" are not as clear as one might like, and the two parties disagreed as to whether the article applied in this situation. When interpreting a collective agreement the task of an arbitrator is to determine the intention of the parties.

The first step in seeking intention is to carefully review the words in dispute. What is intended by "subject to" discipline? Does that have the same meaning as, for example, the words "every time discipline is being addressed"? I do not think so. Instead, I think it is intended to be more limited. "Subject to" conveys to me an element of conditionality. I think an employee is subject to discipline when the Employer is contemplating, or considering, discipline, that is before the Employer has decided to actually impose the discipline. Once the decision has been made to impose discipline the conditional element is no longer present, and the employee is no longer "subject to" discipline. I acknowledge, however, that the parties may have had another intention and I consider other approaches to determining their intention.

The next step in seeking the intention of the parties is to consider whether any other provision in the agreement helps to shed light on the issue. I can find nothing else in this

agreement which helps in determining the parties' intention.

When, as here, the language does not lead to a clear answer as to the parties' intention, another approach is to consider the purpose of the provision, and given its purpose, consider how the parties intended it to be interpreted and applied. I had little evidence on the purpose, although Mr. Snaden testified that one purpose was to prevent an employee from incriminating himself/herself. Clearly the time at which incrimination is most likely to occur is at a meeting where the facts are being discussed and the Employer is endeavouring to reach conclusions as to what happened and whether to impose discipline.

But there are other common purposes for Union representation provisions. Some of the purposes are outlined in the several authorities which the Union provided and no doubt others can be derived though a consideration of the benefits to an employee and to the Union, and sometimes even to an employer, of a Union representative being present. The Union representative can serve as a witness to the exchange. A Union representative may provide advice to the employee. A Union representative will probably gain a clearer understanding of the facts of the dispute between the employer and the employee and will, as a result, be in a better position to handle a subsequent grievance if the employer imposes discipline. A Union representative may provide suggestions which assist in sorting out the problem in a satisfactory manner. A Union representative may also prevent interpretations of the collective agreement which are not in the Union's interests.

Most of the benefits of a Union representative's presence occur before the Employer has decided on the discipline - that is at the interview stage of the process - and I note that Mr. Snaden, a Union representative, was in attendance at the interview stage here. Once the decision on discipline has been made, the Union representative may well be of considerable assistance but that is through his or her involvement in the grievance procedure. None of the

above purposes seem to suggest that a Union representative could usefully be present when the Employer hand delivers a letter imposing discipline, nor usefully be present if the discipline letter is mailed to an employee. It is difficult for me to imagine any useful purpose which would have been served by Mr. Snaden's presence in the delivery of the discipline letters for this grievor, whether that might be as in the first instance when it was handed out the truck window by Mr. Martin in March, or when it was delivered in a room in the presence of the three superiors in April.

My consideration of the purpose of the presence of a Union representative suggests that it is unlikely that the parties would have intended that a Union representative had to be present for the delivery of a letter of discipline such as occurred in this grievance.

Another approach to interpreting a collective agreement is to look to the practice of the parties. The assumption here is that the parties knew when they negotiated the provision what they intended and if they have subsequently acted in a certain manner for a long time it is likely that their practice is a reflection of their original intention.

The practice here has been not to include a Union representative at the point of delivering the letter of discipline. The Employer acknowledged that on those occasions when it had a concern that an employee might become particularly upset, or even violent, the Employer had sometimes arranged for a Union representative to be present. Nevertheless, the practice suggests the parties shared a common view that the collective agreement did not require the presence of a Union representative at this stage.

Based on the three approaches to interpretation considered above, that is the language of the provision, the purpose of the provision, and the practice of the parties, I conclude that the parties did not intend to require that a Union representative be present at the time this

discipline letter was delivered to the grievor.

Finally, because of the time spent on this issue at the hearing, I will deal with another of the Union's arguments. The Union submitted that no Union representative was needed at the grievor's earlier March discipline because Mr. Snaden, the Union representative, already knew what discipline would be imposed. The Employer disputed that view of the facts and disagreed with the Union's submission that Mr. Snaden had known of the discipline at the end of that first investigatory meeting.

Given my interpretation that this collective agreement does not require a Union representative to be present when a discipline letter is delivered to an employee, it follows that whether or not the Union representative is advised at the investigatory meeting as to the nature of the discipline, there is no difference in the outcome. That is, whether I accept the Union's or the Employer's view as to Mr. Snaden's knowledge, the Employer was not required to have a Union representative present when it delivered the discipline in this case.

The grievance is dismissed.

Dated in London, Ontario, this 11th day of October, 2005.

Howard Snow, Arbitrator