

IN THE MATTER OF AN ARBITRATION

INTO A DIFFERENCE

BETWEEN:

The Times Colonist

(the "Employer")

AND:

Victoria-Vancouver Island Newspaper Guild, Local 30223

(the "Union")

(Policy Grievance: Article 6.10: Not Filling two Positions  
of Employees Temporarily Absent: CAAB No. 2001/193)

|                   |                 |
|-------------------|-----------------|
| Arbitrator:       | Joan I. McEwen  |
| Employer Counsel: | Michael Korbin  |
| Union Counsel:    | David McInnes   |
| Dates of Hearing: | May 1 & 2, 2001 |
| Date of Award:    | May 31, 2001    |

## **I. Nature of Dispute**

The Union grieves that the Employer violated Article 6.10 of the Collective Agreement when it failed to search for external candidates to fill the positions of two reporters who commenced one-year sabbaticals in September 2000. The Union submits that—because no employees applied for/were qualified to fill those positions—the Employer should have advertised for external candidates.

Article 6.10 provides:

### **“Article 6 Security**

Whenever an employee is temporarily absent for any reason for a period in excess of thirty (30) days, the Management shall either temporarily promote the employee obviously next in line, or post a temporary position for the duration of the employee’s temporary absence.”

The Union and the Employer disagree regarding the meaning of the word “post”. Whereas the Employer submits that its obligation is limited to internally posting temporary vacancies, and filling those vacancies in the event that a qualified employee applies, the Union submits that the Employer must—in the event that no qualified employee applies—make every reasonable effort to fill the job from outside the bargaining unit.

## **II. Evidence**

Deborah Service-Brewster, an administrative officer for the Union since 1993 and chief Union spokesperson in both the 1994-1998 and 1998-2000 rounds of bargaining, testified regarding the reason why the Union negotiated new Article 6.10 language in the current Collective Agreement. The predecessor language provided that

“Whenever any employee is temporarily absent by reason of illness, vacation, disability or written leave of absence, the Management shall where necessary and possible provide adequate help and shall, where necessary,

temporarily promote the employee obviously next in line to fill any position so vacated.”

In November 1997, the Union abandoned a grievance that asserted that the Employer’s discretion to determine whether or not it was “necessary” to fill a temporary vacancy should be subject to the test of “reasonableness”. Based on comments made by the arbitrator in the course of the hearing, the Union concluded that (a) it would likely lose the case, and (b) its best course of action would be to pursue the matter at the next round of bargaining.

Service-Brewster testified that it was for that reason that the Union tabled its initial Article 6.10 proposal on May 21, 1998:

“Whenever any employee is temporarily absent by reason of illness, vacation or disability, or written leave of absence, for a period in excess of five days, the Management shall provide a replacement for the duration of the employee’s temporary absence.”

Service-Brewster testified that, because both a change in ownership (from Thompson to Southam) and a major downsizing were pending, the Employer did not respond to the Union regarding this initial proposal. On August 19, 1999, the Union tabled an amended Article 6.10 proposal:

“Whenever any employee is temporarily absent for any reason for a period in excess of five (5) days, the Management shall either temporarily promote the employee obviously next in line or post a temporary position for the duration of the employee’s temporary absence.”

Asked to explain why the language was amended, Service-Brewster said that the Union committee had two concerns, namely (1) to broaden the reasons for the absence so as to include “any reason”, and (2) to lay out the *process* by which positions should be filled such that internal employees would not be left out. Once the Employer has posted a position, it must first post internally, then conduct an external search for a suitable candidate.

As an example of situations where positions are posted internally, and then filled externally, Service-Brewster referred to Article 3.7 (a) of the Collective Agreement:

“The Management agrees to recognize and to carry out in practice whenever feasible and in the best interest of Management the principle of promotion or voluntary transfer of staff members. To this end, and whenever a vacancy occurs affording an opportunity for promotion or voluntary transfer of a Guild member, Management agrees to notify the Guild in advance of any proposal to appoint someone not already on staff so that representations may be made on behalf of any Guild member. The Guild agrees to make such representations to Management no later than two working days following receipt of the notification from Management of the possibility or intention to appoint someone not already on staff. Where an employee or employees make application to fill a vacancy carrying with it a starting salary less than the five-year rate, or in the editorial department classifications above the five-year rate, Management agrees to fill the vacancy with the employee with the greatest seniority making application, subject to ability and qualifications. It is agreed that Management shall be required to fill the position with only one employee before having the right to hire the most suitable applicant should that employee not be confirmed in the position following the trial period. Management is committed to developing and promoting its employees, but where the vacancy carries a five-year salary progression and Management posts and hires at the “after five-year” rate, it will be entitled to fill the vacancy with the applicant deemed by Management to be best suited for the position.”

Asked whether its new proposal was explained to the Employer, Service-Brewster testified that the Union advised the Employer that it needed the language “given the reorganization”. She said that the Union did not tell the Employer that the amended language required the Employer to fill temporary vacancies.

Service-Brewster testified that, when she returned to work following a three-week vacation, she learned that the current Article 6.10 language had been signed off on September 13, 1999. The new Collective Agreement was ratified on September 29<sup>th</sup>.

Service-Brewster testified that, subsequent to ratification, numerous employees began leaving their employment as the result of a buy-out agreement reached during collective bargaining. Although the Union did not think it fair to invoke Article 6.10 during that time

of transition, it became concerned when two reporters commenced their one-year sabbaticals in September 2000 and were not replaced. On October 18<sup>th</sup>, the Union filed a written grievance in that regard and, in early December 2000, two "Internal Position Vacanc(ies)" in respect of those two Senior Reporter positions were posted.

Service-Brewster testified regarding various other temporary vacancies that have arisen since the effective date of the new Collective Agreement. In one case, the absent employee was attending to his ill wife and the Union's decision not to grieve was based on its wish to spare him the stress of the dispute. In another case, involving the temporary absence of a duty team employee, the Employer—faced with a Union grievance—filled the position with a telephone sales solicitor. The third case involved the temporary absence of a telemarketer. In that case, a classified clerk filled her position and the position of the classified clerk was filled by another employee. The work performed by that third employee was distributed among the part time clerks. Service-Brewster testified that, because the part time employees received more hours, the Union concluded there was no need to grieve. The fourth case similarly involved the distribution of hours among part-time employees.

Finally, Service-Brewster referred to two Internal Position Vacancies, the first involving a posting for temporary part time Customer Service Representative work for sick leave coverage, which position was filled by an employee in Circulation. The Employer is in the process of interviewing for the second posting, namely a position seeking coverage for the Circulation employee's absence.

Asked how the Union is advised of vacancies, Service-Brewster testified that the Union is given job postings, which are then placed on the Union bulletin boards. She said that—even in those cases where the Employer is entitled to ignore seniority and fill vacancies externally, most typically cases involving outside sales people and reporters—the Union still receives job postings. Although most Reporter positions are filled from outside the bargaining unit, in 1996 a Reporter position was filled from within the bargaining unit.

Service-Brewster said that, in her opinion and given the past practice between the parties, the Article 6.10 requirement to post covers both internal and external postings.

Service-Brewster said in cross-examination that—while the language changed from “provide a replacement” to “post a temporary position”—the intent did not. She said that, because management posts notices regarding jobs that are both internally and externally filled, the Union assumed that the word “post” obligated the Employer to at least use its best efforts to fill the vacant position. She added the caveat that “if no-one is qualified, we would not expect (the Employer) to make a silk hat out of a sow’s ear.”

Asked to agree that the words “post” and “posting” contained in several Articles of the Collective Agreement, as well as the term “Internal Position Vacancies” noted at the top of position vacancy notices, relate to employees only, Service-Brewster said that the purpose of posting vacant positions is to communicate information and advise the Union and employees of vacancies that exist, however they are to be filled.

Service-Brewster agreed that—when the Employer wishes to solicit external applicants, e.g., for the bargaining unit position of Circulation Telephone Sales Solicitor—it both advertises and vets resumes already on file.

Testifying regarding the Employer practice under the old Article 6.10, Service-Brewster said that—when the Employer chose to fill a temporary vacancy—it typically promoted an employee who had relieved in the job before. She said that, in one case, an employee promoted pursuant to a job posting to relieve pending an employee’s sabbatical leave remained in that position for the duration of two additional successive sabbaticals. She said that the Employer had never, to her knowledge, hired an external candidate to relieve for a temporary absence.

Asked to comment on notes made by various Union representatives in the course of collective bargaining, Service-Brewster testified that the thrust behind the Union’s proposal was that the Employer should not be able to distribute an absent employee’s work such that

those remaining would have to bear a heavier workload. She said that the impact of the reorganization “crystallised” what had been a concern even before the Union had any knowledge that downsizing would occur. Asked whether avoiding an excessive workload was the Union’s sole concern when making the subject proposal, Service-Brewster said that it was more than that: “We didn’t want the absent employee to feel guilty and the present employees having too much work to do.”

Service-Brewster agreed that the Union wished to protect the existing employees. She said that the Union wanted to address “workload and training issues”, as well as deal with the stress associated with the reorganization.

Asked to agree that the redistribution of an absent employee’s work to part-time employees does not conform to the letter of Article 6.10, Service-Brewster said that, in not filing a grievance when that occurred, the Union was “trying to be reasonable”.

Asked why the Employer cannot elect to have the work of a Senior Reporter simply not performed during her absence, Service-Brewster replied, “how do I measure that? The Employer is already saving money in that the absent employee is paying for her own sabbatical.”

Service-Brewster agreed that, where the Employer lays off an employee, or when an employee quits or is fired, the Employer is not obligated to replace him/her. Service-Brewster also agreed that the Employer is entitled to lay off employees, “subject to bumping”.

Employer counsel asked how, given that Article 16.2.1 defines a “temporary employee” as an employee employed for no more than six months, individuals hired to replace employees on one year sabbatical leaves can be called “temporary” employees, Service-Brewster said that the Union and Employer have always agreed that replacing employees on sabbatical is not contrary to the Collective Agreement. She also said that the Union has not required the

Employer to replace employees who are absent for an indefinite period “because the Employer would not know how long” a replacement would be needed.

Service-Brewster testified that the Employer has always “posted” vacant positions, “even where there is no realistic expectation of the position being externally filled.” She agreed that—in the case of non-Reporter positions—it is “common for Guild members to apply and get them”.

Debbie England, a District Circulation Manager and Chief Shop Steward, testified that the Employer did not respond to the Union’s initial Article 6.10 proposal. She said that, when the Union’s amended proposal was discussed with the Employer on September 2, 1999, the Union linked it to “workload” concerns. The Union agreed to the Employer’s counter proposal that “5 days” be changed to “30 days”.

In cross-examination, England testified that the initial proposal was changed both to make it clear that the employee’s absence could be for any reason, and also to ensure that internal candidates were not overlooked. England testified that, although the word “replace” does not mean the same thing as “post”, the Union’s intention was that temporary vacancies would be “posted and filled”. England agreed that, although her assumption has always been that posting means filling, the Union did not discuss with the Employer the reason for the amended proposal.

Murdoch Davis, Deputy Publisher and Editor-in-Chief, testified that, within the Newsroom, editors oversee various departments, and that assignments range from features, crises, court cases, etc. He said that no “beat” is exclusive, and that some stories take longer than others, for example from 1/3 day to a full month. Davis testified that the two reporters who went on sabbatical in September 2000 were both paid at the “after five-year” rate referred to in Article 3.7 (a).

Davis said that, because both he and the publisher were new to the job, and because the newspaper was in the process of being sold, there was a delay between the commencement

of the sabbaticals, the filing of the grievance, and the posting of the two Senior Reporter positions. Davis said that replacements had not been budgeted for, and that his mandate was to effect cost savings. When the “disagreement with the Union” regarding the Employer’s obligation to seek external applicants had “crystallised”, and even though the “consensus” was that there were no qualified internal candidates, the Employer posted the positions internally to “fulfil our end of the deal”. He said that—had a qualified internal candidate come forward—the Employer would have promoted that individual.

Davis testified that—in contrast to Article 19.9 that fixes the number of District Managers at no less than 14--Article 6.10 is not a “manning clause”. He said that, just as the Employer may reduce the number of reporters through attrition (Article 7.4), it need not hire outsiders to fill temporary reporter vacancies.

Davis testified that—although Article 16.2.1 provides that (a) temporary employees should be hired for “a special project or for a specified period of time”, and (b) the term of a temporary employee is “not to exceed six (6) months”)--the Union’s position is that (a) individuals should be hired to fill temporary absences of indefinite duration, and (b) outsiders should be hired to fill (one year) sabbatical leaves. He said that those inconsistencies, irrespective of the Union’s flexibility to date, create operational difficulties for the Employer. For example, he said that he was concerned about the contingent liabilities should employees hired to fill temporary vacancies demand permanent employee status at the end of six months. As well, the Employer is not prepared to expend significant amounts of money to search for and hire someone on a temporary basis only.

Asked to distinguish between the internal posting and external hiring process, Davis said that—whereas postings reflect temporary opportunities available to employees—the Employer either advertises or refers to its “hot file” of existing applications should it wish to hire externally.

Davis said that the Employer did not look externally to fill the subject vacancies because it saw its Article 6.10 obligation as relating to employees only. Davis testified that he views Article 6.10 as providing

“an opportunity for betterment, for learning skills. The provision is part of an Article called Security. That happens when you broaden your skills and experience.”

Davis testified that the remaining reporters have not been asked to work extra hours, and that—when a special section on Cancer was needed in the Spring—a reporter was hired for a one month period to write the article. He said that, unlike production work that tends to be more or less constant, reporting assignments can be flexible in duration. The Employer can choose to run more International stories and assign fewer local stories when a reporter is absent.

In cross-examination, Davis agreed that, in the context of the “old” versus the “new” Article 6.10, the word “post” in Article 6.10 must, to have any meaning at all, mean both posting *and*—if a qualified employee applies—awarding the job to that individual. He agreed that that obligation exists whether or not a replacement is needed.

While agreeing that the Employer has posted temporary vacancies greater than six months in duration, including the two December 2000 Senior Reporter postings in this case, Davis said that--because the postings in question contravene the clear language of the Collective Agreement--the Employer was lucky not to have ended up with a grievance. He said that, even though the Union may have agreed to extensions in the past, there is no guarantee it will do so in the future.

Davis testified that, when he arrived in September 2000, the newspaper was seriously under performing its budget. He said that temporary staff reductions was a more attractive alternative than laying off regular employees.

Cindy Robertson, the Director of Human Resources, testified that, under the old Article 6.10, the Employer had the discretion whether or not to fill temporary vacancies. She said that, whereas “Internal Position Vacancies” are posted both on the Human Resources and Union bulletin boards, management positions are (1) posted on the Human Resources bulletin board, and (2) advertised in the Times Colonist.

Robertson testified that “post” signifies an internal process, one used to let employees know of bargaining unit vacancies. She said that the Union’s first proposal was rejected because it would have obligated the Employer to *fill* all temporary vacancies—whether internally or externally. Robertson testified that “the Employer would *never* have agreed that it *had* to replace”. The Employer agreed to the Union’s amended proposal because it simply obligated the Employer to post internally and, if a qualified employee applied, place that individual in the job. Robertson said that the Employer views that obligation positively because—although it represents some loss of management rights--“moving people within the organization is a good thing”.

### **III. Submissions**

#### **A. The Union**

The Union submits that it has established on the evidence that Article 6.10 obligates the Employer to take reasonable steps to cover Reporters’ sabbatical leaves. Given that it is rare that non-reporter employees are qualified to cover Senior Reporter positions, the only sensible interpretation of the language is that external candidates should be considered.

Union counsel submits that there is very little evidence of mutual intent at the bargaining table. Given that evidence of unilateral intention is not relevant, the focus of the dispute must be the plain meaning of the language in the context of the old language, the grievance that was withdrawn under the past Collective Agreement, and the language of the current Collective Agreement as a whole. Under the old language, the focus was not *how* positions

would be filled but, rather, on whether the Employer's discretion to fill or not fill should be fettered.

Union counsel argues that the focus throughout the most recent round of bargaining was whether or not the Employer must *fill* vacant positions. The narrow question in this case is what do the words "post a temporary position" mean. Although the Employer says that "post" is different from "replace", it has made the significant concession that "post" carries with it an obligation to fill. Nothing in the wording of Article 6.10 suggests that external hiring is precluded.

Although the Employer asserts that its obligation is limited—by virtue of the word "post"—to filling only where a qualified *employee* comes forward, the evidence establishes that "post" has application to positions that may be filled internally *or* externally. It is clear on the evidence that, even though the Employer may have no expectation/intention of filling a position internally, for example where it "posts and hires at the "after-five" rate" pursuant to Article 3.7, there exists an obligation to post internally.

In light of that evidence, limiting "post" in the way proposed by the Employer, i.e., by limiting it to situations where the Employer intends to fill a position *internally* is not a sensible interpretation. The Employer having conceded that "post" includes an obligation to *fill*, then—given the Employer's practice of posting irrespective of whether it intends to fill a position internally or externally—the only logical interpretation is that the Employer's Article 6.10 obligation is to *fill* the temporary position if at all possible.

Union counsel submitted that, although management views the Union's position as representing an unacceptable encroachment on its rights, the Employer must live with the bargain it struck. The fact is that *all* vacancies—whether to be filled internally or externally—are "posted" or communicated in this way. The obligation to "post" must mean an obligation to "fill". Were that not so, then the new language would be of no practical value vis-à-vis the Reporter positions..

The Employer failed to negotiate language that said “we will fill vacancies only where workload requires”. The language that was agreed to frees the Union from having to police the workload issue.

Union counsel submits that, because the Employer did not respond to the Union’s first proposal, that proposal cannot be used as a benchmark against which to contrast its second proposal. The current language should be interpreted without regard to the meaning of the word “replacement”.

Responding to Davis’ evidence that temporary attrition is acceptable in light of the parties’ agreement that *permanent* attrition can occur, Union counsel submits that this case is about the Employer having negotiated a positive obligation to fill a temporarily absent position irrespective of whether (a) there is a need to fill it, or (b) overriding budgetary constraints. As for the Employer’s concerns about the inconsistencies between the definition of a “temporary” position and Article 6.10, counsel submits that the Employer has a long-standing practice of filling temporary vacancies outside the constraints of the Collective Agreement language.

Referring to the applicable legal principles, counsel submits that—although management has the right, absent specific language, to determine whether temporary vacancies will be filled—language such as that found in Article 6.10 creates a positive obligation to replace. Although there may be cases where the Union would not challenge the Employer’s failure to hire an external replacement, for example where the vacancy is relatively brief and the required skill level is extremely high, the facts of this case manifest a clear breach of the Agreement. The subject two vacancies were known far in advance, and it was apparent to all concerned that there was no realistic expectation of employees being qualified to fill those vacancies.

## **B. The Employer**

Employer counsel disputes the Union's argument that the Employer's interpretation would render illusory the obligation contained in Article 6.10, and says that—in agreeing to fill temporary vacancies with qualified employees—the Employer gave up part of its very strong management rights as endorsed in Article 2.2 of the Collective Agreement:

“The Guild recognizes that matters of Management and direction of staff are vested exclusively in the Management and agrees not to abridge this right.”

Counsel submits that the Union is seeking to add language to Article 6.10, namely an obligation to replace with external candidates in certain circumstances (e.g., taking into account the complexity of the job, the length of the vacancy, etc.), not just post and fill internally. Not only does Article 6.10 not infer such an obligation; the search process proposed by the Union is so uncertain and nebulous that it would be a nightmare to apply and enforce.

Although Union witnesses insisted that the word “post” carries with it an obligation to “replace”, Service-Brewster testified that the rationale for the Union's second proposal was two-fold, namely ensuring that *employees* were (a) “not left out” in terms of the process of filling vacant positions, and (b) were not deluged with extra work when one or more of their peers are absent. The word “replacement” was dropped, and the Union's sole across the table explanation of the second proposal focused on “workload”, not “manning” issues.

Notwithstanding the absence of any bargaining history evidence to support its position, the Union continues to assert that the word “post” means either “replace” or “make reasonable efforts to replace”. Not only do the words “post” and “replace” bear completely different dictionary meanings; both case law and the posting provisions found elsewhere in the Collective Agreement make it clear that “posting” is a way of communicating *internally* within the organization. Where the Collective Agreement addresses the matter of hiring *externally*, different words are used: see, for example, Articles 3.5 and 3.7 (a). Service-Brewster agreed that posting is a method of communicating information to the Union and employees. She further agreed that—when the Employer intends to hire externally—it both posts *and* advertises externally.

While Davis testified that meaning can only be given to the obligation to “post” by inferring a corresponding obligation to promote qualified employees, he also testified that the Employer would never have agreed to fetter its discretion by being required to hire replacements for temporarily absent employees.

Employer counsel submits that, even where the parties have *expressly* dealt with the issue of hiring externally, e.g., Article 3.7, there is no *obligation* on the part of the Employer to hire. Rather, words such as “entitled to fill a vacancy” and the “right to hire the most suitable applicant” are used. By contrast, the Union seeks—by torturing the language contained in Article 6.10—to impose an *obligation* to hire where the matter of external hiring is not even alluded to. To add to the absurdity, counsel argues, the Employer does *not* have to find a replacement where a Union member quits, dies, is dismissed or retires.

Employer counsel submits that the negotiating history evidence in this case supports the Employer’s position. When the Union proposed language that would have, on the evidence of Service-Brewster, required the Employer to hire externally, the Employer did not agree. The second proposal contained no obligation to replace, and the Employer accepted it. Robertson testified that she took comfort in the amended proposal. At the very least, the Union has failed to establish a mutual intent, namely the intent to require the Employer to replace temporary absences. Absent evidence of mutual intent, the Union cannot establish—on the facts of this case—that management’s right to set its own staffing levels has been fettered: see, e.g., *Re Board of School trustees of School District No. 23 (Coquitlam) and Canadian Union of Public Employees, Local 561*; 52 L.A.C. (4<sup>th</sup>) 266.

There is no evidence of arbitrariness or unfairness to the remaining employees in this case. Management simply decided, for budgetary reasons, that it would cut back on the volume of reportorial work being done. Deciding not to fill a temporarily vacant position is preferable, counsel submits, to laying off a regular employee.

Consistent with the Employer’s Article 3.7 (a) commitment to uphold the principle of “promotion or voluntary transfer of staff members”, the Employer agreed that—so as to

foster a skilled and mobile work force—it would fill temporary vacancies with employees wherever possible. Hence, the Union *did* gain something at the bargaining table; Article 6.10, one of the “Security” provisions, manifests a concrete commitment on the part of management to advance the interests of the bargaining unit members. That commitment has no bearing on individuals outside the bargaining unit, persons who would be employed for a short time only, and in whom the Employer has no vested interest.

The practical difficulties of administering Article 6.10 in the way suggested by the Union are huge. Not only are the attendant costs of hiring externally significant; temporary employees possess certain rights and rapidly acquire others. They may—irrespective of the Union’s position—claim entitlement in respect thereof.

In summary, counsel argues that—given the significant incursion on management’s rights urged by the Union—the onus on the Union is to prove its case on the basis of clear, convincing and cogent evidence. This the Union has failed to do. Although the facts of this case involve two one-year sabbaticals, the interpretation advanced by the Union would have application to all absences in excess of 30 days. To require the Employer to replace absent employees on the facts of the case would be to add a Union right to the Collective Agreement, a right that it failed to win at the bargaining table.

#### **IV. Decision**

After carefully considering all of the evidence and submissions before me, I have concluded that the grievance must be dismissed.

The Union’s position is that the Employer breached Article 6.10 of the Collective Agreement by not conducting an external search to fill the temporary absence of two senior reporters. Article 6.10 provides

#### **“Article 6 Security**

Whenever an employee is temporarily absent for any reason for a period in excess of thirty (30) days, the Management shall either temporarily promote the employee obviously next in line, or post a temporary position for the duration of the employee's temporary absence."

Counsel for both parties agreed that the dispute before me involves a very narrow issue, namely whether the obligation to "post" includes the obligation to search externally in cases where no qualified employee applies.

The essence of the Union's position is that—because the Employer has traditionally posted bargaining unit positions that it has every intention of filling externally—the mutual and reasonable expectation of the parties is that "posting" embraces positions that are to be filled either internally or externally. Given that the Employer posts in *all* cases involving bargaining unit jobs, the word "post" in Article 6.10 obligates the Employer to search both internally and externally for temporary replacements.

The Employer agrees that its practice is to post bargaining unit jobs internally even where it is entitled, and fully expects to, award those jobs to individuals outside of the bargaining unit. The Employer nevertheless submits that the word "post" necessarily connotes a method of communicating information, to employees and Union (only). In situations where the services of an external candidate are required, i.e., where no qualified employee comes forward, the Employer utilizes *non-posting* methods of communication, e.g., advertising, vetting resumes already on file, or following up on word-of-mouth contacts. In summary, the Employer argues that its practice of posting all bargaining unit vacancies does not obligate it to hire externally.

As in all cases involving interpretation grievances brought by the trade union, the Union bears the onus of proving a breach of the Collective Agreement. The issue before me in this case is whether the Union has established that, by not seeking to find external replacements for the absent employees in question, the Employer breached Article 6.10.

It cannot be disputed that the Union's position that Article 6.10 creates a manning clause in the event of a temporary absence of greater than 30 days would, if upheld, represent a significant encroachment of management rights. Whereas the Employer formerly had no obligation to fill temporary vacancies of any duration, it would now be obligated to fill—or at least make every reasonable effort to fill—all vacancies exceeding 30 days. This obligation would apply irrespective of (a) whether the length of the absence was known; (b) the duration of the absence; (c) the skill level of the job; and—most significant to the Employer—(d) economic and other business considerations.

Although the evidence indicates that management and Union personnel have, to date, resolved replacement issues in a practical and fair-minded way, the Employer submits that it must operate on the assumption that Collective Agreement entitlements (e.g., those enjoyed by temporary employees who work longer than six months) can be invoked at any time. The Employer is concerned about its contingent liabilities should, for example, a replacement for an employee on sabbatical suffer a long-term illness.

In summary, the interpretation advanced by the Union represents a significant limiting of the Employer's right to run its business in an efficient and cost-effective way. For that reason, the Union must present clear and convincing evidence to establish that the Collective Agreement has been breached.

Against this backdrop, I will turn to the next interpretive task, namely that of examining the plain meaning of the disputed language. Looking at dictionary definitions alone, the word "post" means something materially different from "replace". The Oxford Dictionary defines "post" as meaning to announce or advertise on a bulletin board, or to attach (a paper, etc.) in a prominent place. "Replace" means to find a substitute for. Whereas "post" is a method of communicating information, "replace" is the activity of finding a substitute.

Consistent with the dictionary definition of "post", the evidence is that—where "post" is used in the Collective Agreement—it means communicating via bulletin boards to employees and the Union about matters of interest to them: see, for example, Articles 3.2;

3.7 (f); 6.3 (e); 11.5. That Collective Agreement definition of “post” is consistent with the arbitral jurisprudence relied upon by Employer counsel in these proceedings.

In summary, the obligation to “post” in Article 6.10 appears, *on the face of it at least*, to mean simply that the Employer will communicate via Union bulletin boards to the Union and its employees when bargaining unit positions become temporarily vacant.

Having said that, arbitrators are entitled—where the language on its face is arguably ambiguous—to look beyond its plain meaning, to look at such “extrinsic aides to interpretation as evidence of past practice, negotiation history, industry practice, the labour relations climate within which the language was negotiated, etc. Does such an apparent ambiguity exist in this case?

In order to establish ambiguity, the Union relies upon the fact that the Employer conceded, during the hearing, that the word “post” includes the obligation to replace the absent employee should a qualified employee apply. The Union says that the significance of that concession is that, the Employer having agreed that “posting” includes the obligation to *fill*, then it follows—based on the Employer’s practice of posting *all* vacancies—that the Employer must try to fill the vacancies externally.

The Employer says that, in agreeing that the obligation to post carries with it the obligation to fill should a qualified employee apply, it did not expand the definition of “post”. Rather, it did so in order to make the posting obligation meaningful and consistent with the “security” concerns raised by the Union at the bargaining table. The Employer disputes the suggestion that, in agreeing to extend the meaning of “post” in this way, it in any way gave up its right not to fill the vacancy should no qualified employees come forward.

On the basis of the evidence before me, I am prepared to assume—for the purpose of resolving the dispute before me—that the word “post” contains an apparent ambiguity on its face. Notwithstanding the Employer’s submission that it never intended to give the word “post” a broader meaning than that contained in the dictionary, I will examine—because the

two interpretations advanced by the parties are arguably different from the plain meaning of “post”—evidence regarding past practice and negotiation history in order to determine whether that evidence assists me in my interpretive task.

The Union submits that such limited negotiation history evidence as exists must be viewed through the lens of past practice. Because positions that the Employer intends to fill externally have always been posted internally, then the obligation to post must infer the obligation to conduct an external search. The Union argues that—given that mutual understanding—the shift in language from its first proposal:

“Whenever any employee is temporarily absent by reason of illness, vacation or disability, or written leave of absence, for a period in excess of five days, the Management shall provide a replacement for the duration of the employee’s temporary absence.”

to its second proposal:

“Whenever any employee is temporarily absent for any reason for a period in excess of five (5) days, the Management shall either temporarily promote the employee obviously next in line or post a temporary position for the duration of the employee’s temporary absence.”

is not material in this case. In other words, the Union says that, although it dropped the phrase “provide a replacement”, it believed that the phrase “post a temporary position” embraced the same notion of replacement.

Robertson testified that she did not agree, and never would have agreed, to manning language on behalf of the Employer. She said that it was only because the Union dropped its “replacement” language that the Employer agreed to the second proposal. In agreeing to that proposal, the Employer committed to filling temporarily vacant positions with qualified employees—even in cases where economic considerations dictated against that outcome.

Has the Union established that the mutual intention of the parties was that the Employer must use its best efforts to fill temporary vacancies with external replacements? I am

satisfied that the Union has failed to meet the onus of proving that a consensus was reached in that regard.

My conclusion is based on several factors, including the following:

- The Union's second bargaining proposal is, on its face, fundamentally different from its first proposal. Although the Employer did not expressly reject the Union's first proposal, the fact is that it did not accept it, for reasons given not to the Union at the time but given by Robertson in these proceedings. Given that the revised proposal is worded so differently from the initial proposal, and given that the Union spokesperson emphasized "workload" rather than "manning" issues when she presented it to the Employer, it is understandable that the Employer assumed that the absence of the phrase "provide a replacement" signalled a difference in intent.
- Robertson testified that—had the Union proposed manning language—the Employer would have rejected it. Davis echoed that view, and elaborated upon the cost and other business considerations that would have resulted in that rejection. Given those considerations, as well as the fact that—where the parties agreed on a minimum staffing level (i.e., Article 19.9), they used precise worded language to that effect, it is reasonable to accept the Employer's evidence that at no time did it intend to agree to manning language in this case.
- The Union's evidence is that dropping the phrase "provide a replacement" was not significant because "post" includes the obligation to "fill". While I accept the sincerity of the Union's belief in that regard, I believe that it was incumbent on the Union—given the significance of the right it sought to gain, as well as the plain meaning and common usage of the word "post"—to articulate to the Employer the particular gloss it placed on that word. Absent such an explanation, the Union at the very least ran the risk that the parties would not be "at one" regarding the meaning of the agreed-upon language.

- The Union's explanation as to why the obligation to "post" includes the obligation to "fill" does not stand up well to careful scrutiny. The Union says that—because the Employer posts all jobs, even those it intends to fill externally—therefore, agreeing to post means agreeing to replace externally if possible. The faultiness of that premise is evident from the fact that the obligation to communicate information internally does not *require* the Employer to hire outsiders. It appears from the evidence, as well as Article 3.7 (a), that the Employer advises employees of all job vacancies—whether or not it expects to fill the job from within—in accordance with the "principle of promotion or voluntary transfer of staff members". Internal notification gives interested employees and/or the Union the opportunity to argue that the employee(s) should be "afford(ed) an opportunity for promotion or voluntary transfer." The fact that the Employer internally posts jobs that it ends up filling externally in no way constitutes an obligation to fill the vacancy. To the contrary, the language of Article 3.7 (a) makes it clear that the Employer need *not* fill vacancies with external hires.
- Finally, the fact that the Employer agreed that the posting requirement must, to be meaningful, include an obligation to fill the vacancy with a qualified employee cannot, on the evidence before me, be viewed as containing a concession that posting *also* means taking reasonable steps to conduct an external search and hire an outside candidate.

For all of these reasons, I am satisfied that the Union has not established a breach of the Collective Agreement in this case. The grievance is therefore dismissed.

Award dated the 31<sup>st</sup> day of May, 2001

"Joan McEwen"

Joan McEwen, Arbitrator