

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 29th.

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 18th, 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.