16/76

LABOUR RELATIONS BOARD OF BRITISH COLUMBIA

SIMON FRASER UNIVERSITY

EMPLOYER

ASSOCIATION OF UNIVERSITY AND COLLEGE EMPLOYEES, LOCAL 2

UNION

DECISION OF THE BOARD

PANEL:	PAUL C. WEILER, CHAIRMAN; CLARE ALCOTT, MEMBER; PETER CAMERON, MEMBER.
DATE OF HEARING:	FEBRUARY 10, 1976.
DATE OF DECISION:	MARCH 15, 1976.
FOR THE EMPLOYER:	TERENCE E. WOLFE.
FOR THE UNION:	LEO McGRADY.

I

On November 20th, 1975, Simon Fraser University (the University) applied to the Labour Relations Board under Section 108 of the Labour Code, seeking review of an arbitration award. The award in question was the product of the first grievance and the first arbitration proceeding generated under the original collective agreement between the University and the Association of University and College Employees, Local 2 (AUCE). In turn, this application is the first occasion on which the Board has been required to examine and apply the new standards contained in Section 108 for the review of arbitral decisions in the Province.

II

The first contract between AUCE and the University was signed and came into effect on June 9th, 1975. On June 13th, in accordance with a memorandum from the Deputy Librarian, a new and uniform starting time was established for employees in the Library:

> " For some time now, Library supervisors have found it impossible to provide adequate supervisory coverage for all existing support staff schedules.
>
> After consulting with other members of the Library's managerial staff, the Director of Personnel and AUCE representatives, I have made the following decisions:
>
> > Effective Monday, June 16, and until further notice, regularly scheduled day shift work [sic] not begin before 8:00 a.m., with this exception: Library controlmen will regularly start their shift at 7:45 a.m. on weekdays to allow employees time to enter the building and get to their work stations. "

Apparently, the Library did not open to the public until 8:00 a.m. and that was also the normal starting time for supervisors. However, a number of employees had been regularly scheduled to begin work at earlier points of time (7:15, 7:30, and so on). These were employees whose duties did not directly involve service to the public and who worked on a schedule of four longer days each week. Hence, the decision of the University to schedule all employees in the Library to start work no earlier than 8:00 a.m., at a time when their supervisors were present, had the effect of altering the regular hours of work of this category of employee.

The University's action immediately produced a group grievance brought by all the AUCE members working in the Library:

> " On June 13, 1975 the usual time of opening the front doors of the Library was changed from 7:15 AM to 7:45 AM, and employees were informed that no work was to be done before 8:00 AM. These restrictions on the time when employees can work constitutes a violation of Articles 23.01 and 23.03, and other relevant Articles.
>
> Full redress, including restoration of employees' right to a flexible work week [are required]. "

As can be seen, the grievance essentially focussed on Article 23 of the collective agreement, a provision which defined the hours of work and established the concept of the "modified work week":

> " ARTICLE 23
>
> 23.01 Standard Work Day will be seven (7) hours, exclusive of the meal period.
>
> 23.02 Standard Work Week will be thirty-five (35) hours in any five (5) consecutive days.
>
> 23.03 Modified Work Week is an organization of the hours of work agreed to by the University and the employee to provide fewer but longer working days. Any such modification will be arranged so that the total number of hours worked biweekly are seventy (70). "

The grievance was not settled by the parties and eventually it was brought before a sole arbitrator on October 25th. At the outset of the hearing, the Union agreed to this proposed question from counsel for the University:

" Has the University breached the collective agreement by changing the shift starting time to 8:00 a.m.? "

During the course of the hearing, the focus of argument ultimately settled on Article 25 of the agreement. The Union argued that Section 25.03 had been violated because the University's decision was made without notice to or consent from the employees:

" 25.03

(a) Posting: Shift schedules shall be posted fourteen (14) days in advance.

(b) Changes: The employer shall provide the employee with at least one (1) week's notice for any change of shift. The change of shift must be with the consent of the employee. "

The University responded that Section 25.03 was not in point because only the starting time had been changed, not the actual shift. In its view, all of these employees had been and continued to be on the "day shift", one of only three shifts contemplated by Section 25.01 of the agreement:

" ARTICLE 25

25.01

SHIFT	TIME BOUNDARIES	RATE	
		Mon. 12:01 a.m. - Sat. 12:00 p.m.	Sun. 12:01 a.m. - 12:00 p.m.
Day	8:00 a.m. - 6:00 p.m.	reg. hrly. rate	r.h.r. + 50¢/hr.
Afternoon	6:00 p.m. - 12:00 p.m.	r.h.r. + 65¢/hr.	r.h.r. + $1.15/hr.
Night	12:00 p.m. - 8:00 a.m.	r.h.r. + 90¢/hr	r.h.r. + $1.40/hr.

Shift times will be calculated in one-half (1/2) hour increments or part thereof.

Employees will be paid shift rate for those hours actually worked in a shift, exclusive of meal breaks.

" Employees working a day shift will not be eligible for shift rates where their modified work day extends beyond the prescribed hours of day shift. "

The arbitrator heard evidence relating specifically to the situation of two of the affected employees, [redacted] and [redacted]. In his award, he stated that in order "to have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties thereto", he should amend "the question" to read:

" Has the University breached the collective agreement by changing the starting times of [redacted] and [redacted] to 8:00 a.m.? "

From that perspective, he accepted the Union's argument based on Article 25, in particular its conception of what is meant by a "shift" within this University:

" The University's shifts do not follow the usual industrial model with a day shift, an afternoon shift and a graveyard shift, making the usual three shifts for continuous operations. The University has several day shifts based on the standard work week with different starting times, other shifts based on the standard work week and a variety of modified work weeks, some based on a one week cycle and some, including Mill's, based on a two week cycle. "

Having adopted the premise that each of the regular schedules of these employees constituted a particular shift, the conclusion was inevitable that the alteration in the scheduled hours for [redacted] and [redacted] amounted to a change in their respective shifts without sufficient notice and without their consent. On that basis, he concluded that the University breached Section 25.03 of the collective agreement.

III

The new language of Section 108 of the Labour Code reads:

" 108. (1) On the application of a party affected by the decision or award of an arbitration board, the board may set aside an award of the arbitration board, or remit the matters referred back to the arbitration board, or stay the proceedings before the arbitration board, or substitute the decision or award of the board for the decision or award of the arbitration board, on the ground

(a) that a party to the arbitration has been or is likely to be denied a fair hearing, or

(b) that the decision or award of the arbitration board is inconsistent with the principles expressed or implied in this Act, or any other Act dealing with labour relations. "

The University challenged the arbitrator's award under each of these headings. First of all, it argued that the arbitrator ignored the significance of Section 25.01 which established only three shifts under this agreement -- day, afternoon, and night -- and thus erred in interpreting Section 25.03 as requiring an employee's consent to a mere alteration of the shift starting time. Such a violation of the wording of the collective agreement made the award "inconsistent with the principles expressed or implied" in the Labour Code. Secondly, when the arbitrator altered the question which he proposed to decide, he was said to have changed the essential nature of the issue of contract interpretation. Since counsel for the University had originally presented his case from the earlier point of view, he was not able to offer evidence and argument relevant to this specific interpretation adopted by the arbitrator. Accordingly, it was argued, the University had been denied a fair hearing in this arbitration.

III

As we stated at the outset of this decision, this is the first time the Board has had to interpret the standards in Section 108 for review of arbitration awards. That Section has transferred the primary responsibility for supervision of arbitrators from the Court of Appeal to the Labour Board. We examined the legal background to Sections 108 and 109, and the lines of division they contemplate between the Court and this Board, in our recent decision in City of Vancouver vs. CUPE [1976] 1 Canadian LRBR. However, in that proceeding, it was eventually held that there had not been an award by an arbitrator acting under a collective agreement and thus Section 108 was not applicable at all. In this case, we unquestionably have an arbitration award which is subject to Section 108. Accordingly, the Board must now begin to articulate the criteria by which we will exercise the responsibility conferred on us by that new provision.

It would be premature to state such criteria in a comprehensive, finished way. As with other provisions of the Code, the proper use of Section 108 will emerge only from the Board's experience in a series of distinctive and illustrative cases. However, at the outset of the process, we do want to sketch our understanding of the role of the arbitrator under the Labour Code. Only from that perspective can one appreciate the proper scope of Board review of arbitration decisions. (As well, we might add, the proper scope of the Board's original jurisdiction, under Section 96 of the Code, over grievances under the collective agreement. See Board Policy Statement: Section 96 of the Code [1976] 1 Canadian LRBR.)

The intent of Section 108 cannot be appraised in a legal vacuum. This provision was enacted in 1975 as part of a general overhaul of the legal framework for grievance arbitration. For the first time in Canadian labour law, the B.C. Legislature stated

in an explicit and systematic way, the mandate of the labour arbitrator:

> " 92. (2) It is the intent and purpose of this Part that its provisions constitute a method and procedure for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work. "

This is in striking contrast to the common-law position that collective agreements were not legally binding and should be enforced by union self help through strike action (see Cassiar Asbestos [1975] 1 Canadian LRBR 212 at pp.216-17). There are two significant reasons why Canadian legislatures have uniformly selected arbitration as the vehicle for securing the rights and obligations under the collective agreement. First of all, by contrast with the ordinary courts, arbitration is faster, cheaper, and informal and thus accessible to the broad range of grievances arising under the collective agreement. Secondly, by contrast with a public agency such as a labour relations board, arbitration is a private system of adjudication subject to the control of the parties who are affected by its decision. The union and the employer, who are free to negotiate the general terms of the collective agreement, are also able to design their own arbitration format and to select their own arbitrator to apply that agreement to concrete cases. As this Board has recently stated:

> " Moreover, this preference [for arbitration] flows quite naturally from the logic of our overall system of collective bargaining. Under the Labour Code, the parties are free to negotiate the terms of their own agreement with a minimum of government control. In effect, the parties act as their own legislature, establishing the rules and conditions under which employees will work in the enterprise. In turn, Part VI of the Code invites the parties to set up their own private system for judging claims and disputes arising under the agreement which they have created. The parties are free to tailor the arbitration procedure and format to their own needs. Most important, they can select their own arbitrator and thus ensure that the person who judges their dispute will have demonstrated a degree of understanding which is mutually acceptable to both sides. In sum, arbitration is an integral feature of the process of self-government through collective bargaining. "
>
> (Board Policy Statement: Section 96 of the Code)

In order to facilitate the achievement of this goal -- the resolution of disputes under collective agreements without stoppages of work -- the 1975 amendments to the Code provided statutory guidance to the arbitrator:

> " 92. (3) An arbitration board shall, in furtherance of the intent and purpose expressed in subsection (2), have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties thereto under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute. "

When the language of Section 92 (3) is examined closely, it is apparent that the Legislature envisaged a subtle task for the arbitrator, directing him at one and the same time to respond to the tug of apparently conflicting considerations. On the one hand, while the arbitrator must grapple with the merits of the grievance, it is clear that an arbitrator is not entitled to decide on the basis of his intuitive assessment of the equities of the individual case. Section 92 (3) obliges the arbitrator to evaluate these merits by reference to "the terms of the collective agreement". The union and the employer negotiated that agreement. In turn, the arbitrator whom they select must respect the bargain these parties made. Otherwise, grievance arbitration would gradually be transformed into a disguised system of ad hoc, interest-dispute arbitration. This obligation to the agreement was aptly expressed by Mr. Justice Douglas of the U.S. Supreme Court:

> " Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. "

But the major premise of Section 92 (3) is legislative recognition of the special character of the interpretation of collective agreements. A seriously-contested dispute about the meaning of such an agreement can rarely be settled simply by the literal construction of the language on the face of the document. The practical features of collective bargaining produce a distinctive cast to collective agreements; in turn, this requires a complementary approach by the arbitrator to the task of interpretation.

What are these special features? Collective agreements deal with the entire range of employment terms and working conditions often in large, diverse bargaining units. The agreement lays down standards which will govern that industrial establishment for lengthy periods -- one, two, even three years. The negotiators are often under heavy pressure to reach agreement at the eleventh hour to avoid a work stoppage, and their focus of attention is primarily on the economic content of the proposed settlement, not the precise contract language in which it will be expressed. Finally, the collective agreement, though the product of negotiations over many years, must remain a relatively concise and intelligible document to the members of the bargaining unit and the lower echelon of management whose actions are governed by it. (See Cox, "Reflections Upon Labour Arbitration" (1959) 72 Harvard Law Rev. 1482.)

What are the implications of these characteristic features of collective bargaining? The agreement which is the end-product of such a bargaining process must be approached by arbitrators with a very different set of mind than a judge construing a corporate indenture developed by batteries of lawyers for two large corporations. In particular, the arbitrator must recognize that while some provisions of the agreement provide objective, almost automatic criteria, many others are expressed in general, imprecise language allowing broad scope for judgment in their application.

(For instance, an employee can only be disciplined for "just cause", or overtime must be distributed on an "equitable basis".) It is the latter type of contract provision which produces the interpretation grievances that go to arbitration. Section 92 tells the arbitrator that in order to resolve these disputes in a manner which minimizes the likelihood of industrial unrest, he must exercise the area of judgment left to him by the contract in an effort to provide a realistic and sensible solution to the industrial relations issue posed by the case. What are the criteria which the arbitrator can turn to in this endeavour? The actual practices in the plant or industry; the implications of statutory policy; a consensus reached by arbitrators as to the manner in which the problem should be dealt with. Section 92 (3) makes it clear that the arbitrator need not be diverted from that task by legal rules drawn from the common law of contracts or the relationship of "master and servant".

Another significant innovation in the legal framework for arbitration is embodied in the new Section 98 of the Code. Arbitrators are required by the Code to respect the integrity of the agreement negotiated by the parties in juding the substantive benefits and obligations of the parties. However, once an arbitrator concludes that the agreement has been violated, Section 98 confers on the arbitrator the remedial authority necessary to provide a final and conclusive adjudication of the contract dispute. This section is designed to overturn, once and for all, the truncated version of arbitration contemplated by the Supreme Court of Canada in its Port Arthur Shipbuilding decision (see Weiler, "The Remedial Authority of the Arbitrator", (1974) 52 Can. Bar Rev. 29). Pursuant to Section 98, the B.C. arbitrator now has the statutory authority to award damages, reinstate employees, substitute disciplinary measures, relieve against procedural defects, or apply relevant employment legislation in situations where one or more of these steps is appropriate. The arbitrator is thus able to respond, in a satisfactory and

conclusive manner, to the merits of the grievance before him, and thus prove an antidote to industrial unrest during the terms of the agreement.

It is not our intention to write a detailed essay on the law of labour arbitration. However, we must now begin to formulate the criteria for Board supervision of labour arbitration. Section 108 of the Code says simply that arbitration awards must be consistent with the "principles expressed or implied in this Act ...." That language is not crystal-clear on its face and the Board must plumb beneath the surface to fathom the legislative meaning. For that purpose, we must emphasize the legal context in which Section 108 was enacted: at that same time, the Legislature was spelling out, in Sections 92 and 98, the role it contemplated for the arbitrator. Hence, this forms the backdrop within which the Board's own role in superintending the arbitration process must also evolve. From the background which we have sketched we draw two lessons, one negative and one positive.

First of all, we are convinced that the Legislature did not intend the Board to be a full-fledged avenue for appeal from arbitration decisions. Appeal as a matter of course from arbitration would be destructive of the entire character of the system. Labour arbitration was conceived as a relatively quick, inexpensive, and informal means of resolving contested grievances. Each of those virtues would be drastically eroded if the parties came to believe that every time they lost an arbitration case they could come to the Board with a good chance of upsetting the original verdict. Even more significant, this would detract from the private character of arbitration as a feature of industrial self-government. Instead of the arbitrator selected by the parties -- a person responsive to their needs and expectations -- having the authority to assess their evidence and read their contract, this Board, a public, statutory agency, would have the final say in

resolving grievances under the collective agreement. In summary, grievance arbitration is one of the crucial mechanisms for the constructive settlement of disputes under the Code. It would be destructive of the integrity of that institution, and inconsistent with Section 27 (1) (c) of the Code, for this Board to engage in obtrusive, second-guessing of the arbitrator's judgment.

Assuming that Section 108 does not provide an open-ended appeal on the merits of the arbitrator's award, what is the nature of the responsibility conferred on the Board? It is fairly clear what Section 108 (1) (a) contemplates as regards arbitration procedure. Within the informal, non-technical character of arbitration, the Board must ensure that the parties receive a "fair hearing": one conducted by a neutral arbitrator who allows each a full opportunity to present its own case and to meet the position of the other side. As regards the substance of the arbitration decision, Section 108 (1) (b) directs the Board to ensure that the arbitrator respects the principles of the statute. In particular, the Legislature had in mind the subtle mandate contained in Section 92 (3). While remaining faithful to the terms of the negotiated agreement under which he was appointed, the arbitrator must approach that agreement with principles of interpretation which make sense within contemporary industrial relations. Within that frame, the arbitrator's assessment of the evidence and his reading of the contract must remain final.

V

As we stated earlier, the University argued that the particular arbitration award before us ran afoul of each of the two criteria for review under Section 108. First of all, the University argued that the arbitrator misinterpreted and misapplied Section 25.03. On its face, that provision applies only when there is a change of

shift. From Article 25.01, the University draws the inference that there are only three shifts contemplated by this agreement: day, afternoon, and night. Accordingly, a marginal alteration in an employee's starting time cannot be taken to be a complete change in his or her shift. When the arbitrator held otherwise, this was characterized not only as an amendment of the collective agreement, contrary to the arbitrator's jurisdiction under Article 10.04, but also as a violation of the fundamental principle of the Labour Code that the parties are free to negotiate their own agreements and the bargains they strike must be respected by their arbitrator.

The Union advanced quite a different analysis of the agreement. It argued, contrary to the University, that Article 25.01 did not purport to define "shift" for all purposes of the agreement. Instead, that provision simply sets the parameters within which the different shift premiums are paid for hours worked. (And we might note a feature of the clause which is suggestive of just that: the afternoon "shift" referred to by Article 25.01 has a time span of only six hours, although the standard work day contemplated by Article 23.01 is set at seven hours.) The Union's position is that implicit in both the practice of the University and the structure of this agreement is the concept of the flexible work week: a heterogeneous variety of shift schedules tailored to the work demands of the University program and modified work weeks established by agreement with the employees. The arbitrator accepted the Union's analysis of the agreement. He held that the individualized schedules of the two employees, [redacted] and [redacted], each amounted to a "shift" within the meaning of Article 25.03; thus the consent of each employee was required before her schedule could be changed.

No doubt that conclusion is rather surprising. One does not normally understand a shift in a collective agreement as referring to the schedule of each individual employee. Moreover, the result

does constitute a serious inroad into the managerial prerogative at the University. If it wants to alter the schedules of a group of employees to reflect changes in its program, it has to obtain the consent of each of them. Some members of the group may consent, others may not; what will happen if that occurs is uncertain. But by the same token, the presence of a clause like 25.03 in any collective agreement, let alone a first contract, is unusual to say the least, and there is no doubt that the University agreed to Article 25.01, and it was on that basis that the arbitrator rested his decision.

Be that as it may, the answer to the University's position is found in our earlier analysis of Section 108. This case is an apt illustration of what it means to say that the Board is not a full-fledged avenue of appeal from the arbitrator's interpretation of the contract. This award was founded on a construction of the language of the particular contract, not on a broad principle of labour law or arbitration jurisprudence. The arbitrator did not ignore any of the relevant provisions of the agreement. The meaning he attributed to Section 25.03 is one which its language or context might reasonably bear. It was his responsibility, as the arbitrator selected by the parties themselves, to make the binding decision on the correct meaning of the words they used. Even if this Board might question whether his reading of Article 25.03 accurately reflects the expectations of the parties, that would not make his award "inconsistent with the principles" of the Labour Code. These observations of Mr. Justice Douglas are again a propos:

> " As we there emphasized, the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his. "

If the University finds this arbitrator's reading of Article 25.03 to be unpalatable, its remedy is not a Board reversal of the award under the Code. Instead, it must see that the language is re-written in the upcoming contract negotiations with the Union.

VI

At the actual hearing of this application, the University pressed its case much more strongly on the second branch of Section 108: alleging that it had been denied a "fair hearing" at the arbitration. That claim was founded, in particular, on the action of the arbitrator in changing the "question" which he proposed to decide. This action, the University said, totally altered the angle of vision from which the grievance would be analyzed. It thus denied the University the opportunity to present the evidence and argument which would be pertinent within that new frame of reference.

Clearly, none of the participants in this arbitration -- neither the parties, nor their counsel, nor the arbitrator -- appreciated the significance of the overall revision of the arbitration process which was effected by the 1975 amendments to Part VI of the Code. There is no longer a requirement in the Code that specific questions be submitted to the arbitrator for a ruling. Section 106 of the Code has been amended to render the Arbitration Act totally inapplicable to labour arbitration. Instead, as we stated earlier, the Code directs the arbitrator "to have regard to the real substance of the matters in dispute" (Section 92 (3)), and confers on him "all the authority to provide a final and conclusive settlement" of the dispute. The procedure followed in this case, of first formulating and then amending the question, was entirely unnecessary under the new Code.

Not only is the procedure no longer legally required; this case graphically illustrates why it is practically undesirable.

The true source of the complaint in the minds of the Library employees was the adoption of a new, uniform starting time in the Library, by which no employee could begin work earlier than 8:00 a.m. This management decision interfered with what employees considered an attractive flexibility in their hours of work, and through which a number of employees had come to expect that their work in the Library would begin earlier than 8:00 a.m. Accordingly, a group grievance was lodged, focussed specifically on this event. The grievance claimed that the University was in violation of Article 23 of the agreement (the "modified work week" provision), but also preserved the grievors' right to utilize other relevant articles in the contract. Nor did the grievance seek only a bare contract interpretation; it requested tangible relief for the employees, "full redress, including restoration of employees' right to a flexible work week".

What happened at the eventual arbitration hearing? Counsel for the University presented to the AUCE representatives (none of whom had ever seen, let alone participated in, an arbitration before) a question which attempted to compress into fifteen words the above-described dispute:

> " Has the University breached the collective agreement by changing the shift starting time to 8:00 a.m.? "

Not unexpectedly, that formulation did not capture the substance of the difference between these parties. First of all, it purported to transform the case into a policy grievance, in which a contract interpretation would be rendered covering the entire University operation. Secondly, that question subtly pre-judged the issues under the contract. When its wording is examined closely, the question does appear to embody the tacit assumption that the University had not actually changed any employee's shift; instead the University had only changed "<u>the</u> shift starting time to 8:00 a.m.". From that premise, the only area of argument left

is whether the agreement contains any limitation in management's right to fix and to change the exact starting time of a shift. In that manner, the entire flavour of the Union's claim from start to finish -- a claim which rested on the premise that the University employees had a wide variety of flexible, individualized shifts which could only be changed with their consent -- was ruled out from the outset.

It is precisely because this can be the unfortunate result of the procedure of submitting formal questions to the arbitrator at the outset of the case that this is no longer a requirement under the Code. The parties to a case normally familiarize themselves with the issues in dispute during the grievance procedure. At the outset of the arbitration hearing, counsel for each side may make a short opening statement sketching the position he will take for the benefit of the arbitrator. Normally, the presentation of evidence and argument and the exchanges between the participants at the hearing will sharpen everyone's understanding of the precise areas of disagreement under the collective agreement. At the end of this process, the arbitrator must assess the merits of the respective positions in light of the whole of the evidence and all of the contract and legal standards and then arrive at a decision which responds to the true substance of the grievance.

However, as we stated earlier, that was not the approach followed in this arbitration. The parties here did agree to a question which was put to the arbitrator at the outset of the hearing. The University conceded that, by reason of the statutory mandate contained in Section 92 (3) of the Code, the arbitrator had the legal authority to go beyond that question in attempting to resolve the substance of this dispute. However, in taking any such action, the arbitrator was also obligated to provide the University with a fair hearing with respect to the issues which the arbitrator found to be at the heart of the dispute.

Did the arbitrator's alteration of the question have the effect of denying the University a fair hearing? We had a considerable degree of evidence, even beyond that reported in the arbitrator's award, of what transpired at the hearing. Unfortunately, that evidence left the situation nearly as murky as before. Apparently, despite the wording of the initial question, the testimony in front of the arbitrator did focus almost entirely on what happened at the Library. The Union brought two employees as witnesses who gave evidence about the effect of the change of starting time on their work schedules. The University brought two witnesses who testified about the background to and the reasons for the scheduling change. The University contended that it had the management right to take this action under the contract and in light of the established arbitration jurisprudence. The Union responded that ordinary notions of management rights were not applicable in the University setting, especially in view of the provision in Article 23 for a modified work week set up by agreement with the individual employee. At some point in the argument, the Union focussed on Article 25 as the basis of its claim that the working hours of the employees could not be changed without their consent. The University's response was that what had occurred here was not a change of "shift", within the definition of "shift" as contained in Article 25.01. The Union countered that Article 25.01 did not purport to define "shift" for purposes of the agreement; it merely established the periods during which different shift premiums were paid. In any event, at the end of the hearing the arbitrator stated that in his view the real crux of the dispute did involve the University's right to change the employee starting time. The Union representative testified that the arbitrator also proposed a change in the question for decision. Counsel for the University testified that he did not recollect any such proposal by the arbitrator and he did not believe this had occurred. We had no testimony from the arbitrator on this point. We know only that he did alter the question in his award prior to reaching the conclusion that the University violated the collective agreement.

While the matter is not free of doubt, we are not satisfied that there is sufficient basis for overturning this arbitration award on the grounds that the University was denied a fair hearing. There are two reasons in particular for our conclusion. First of all, the proper interpretation of Articles 25.03 and 25.01 -- the contract provisions which were the ultimate basis of the decision -- was in fact a highlight of the argument. The University had the opportunity to and did in fact present its position on the merits of the issue of whether the shift had been changed. At no time did it suggest to the arbitrator that Article 25.03 was wholly irrelevant to the enquiry because the Union, in agreeing to the original question, had thereby agreed that there had been no change of shift. Secondly, the arbitrator's decision specifically disposed of the individual claims of only [redacted] and [redacted]. Their situations had this peculiarity: even on the University's conception of a "shift" under this agreement, they did actually experience a change of shift without their consent, because their starting time was moved from 7:15 a.m. or 7:30 a.m. to 8:00 a.m. The University's real concern with the decision is the implication in it that the same conclusion would follow for all changes of employee starting time, from 8:30 a.m. to 9:00 a.m. for instance. It contended that it had not taken the opportunity to adduce extrinsic evidence relative to the true understanding in the University of the nature of the "shift", evidence which could persuade an arbitrator that no change of shift would take place in the latter situation. In our view, it is still open to the University to bring forward such evidence in a future arbitration dealing with a grievance brought by an employee affected by precisely that kind of scheduling change. On that footing, a future arbitrator might well be persuaded not to follow all of the reasoning of this award in different situations as and when they arise. On that basis as well, we hold that the University was not denied a fair hearing on the merits of this case such that the award should be overturned under Section 108.

VII

Accordingly, on the basis of the standards for review of arbitration awards which is contemplated by Section 108 of the Code, we hold that there is not sufficient ground established in this case for setting aside the award of this arbitration board.

Paul C. Weiler, Chairman.

Clare Alcott, Member.

Peter Cameron, Member.