

IN THE MATTER OF: AN ARBITRATION

**AND IN THE MATTER OF: A GRIEVANCE FILED BY
MARIJKA SPYTKOWSKY DATED JULY 10, 2001
AND A GRIEVANCE FILED BY THE TRANSCONA SPRINGFIELD
TEACHERS' ASSOCIATION NO. 12 OF
THE MANITOBA TEACHERS' SOCIETY DATED JULY 10, 2001**

BETWEEN:

**THE TRANSCONA SPRINGFIELD TEACHERS' ASSOCIATION NO. 12
OF THE MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as the "Association") and
MARIJKA SPYTKOWSKY (hereinafter referred to as the "Grievor")**

- and -

**THE TRANSCONA SPRINGFIELD SCHOOL DIVISION NO. 12,
(hereinafter referred to as the "Division").**

AWARD OF ARBITRATION

MEMBERS OF THE BOARD

A. Blair Graham, Q.C. Sole Arbitrator

APPEARANCES

Garth Smorang, Q.C. On behalf of the Association and Ms Spytkowski

Robert Simpson On behalf of the Division

INTRODUCTION

This matter was heard on October 18, 2001

Neither party raised any objection to my appointment as sole arbitrator, nor to my jurisdiction to determine the matters at issue.

There are two grievances which form the subject matter of these proceedings. Both are dated July 10, 2001. One grievance has been filed by Marijka Spytkowski (the "Grievor"), and the other has been filed by the Transcona Springfield Teachers' Association No. 12 (the "Association"). The grievances read in part as follows:

(a) Association Grievance:

"Beginning on or about June 20, 2001, and continuing to the present, the Division has unreasonably withheld its consent for additional leave of absence for Marijka Spytkowski (the Grievor) to fulfill her duties as President of the Association. As a result of the Division's failure, the Grievor will be assigned half time to a classroom for the 2001 – 2002 school year and will not be available to the Association to perform her duties as President of the Association on a full time basis, contrary to the needs of the Association. As well, the Association grieves that the Division has failed to return the Grievor to a position no less favorable than the one held by her prior to her previous leave. The Association grieves that the Division has violated Article 7.02 of the Collective Agreement, the Agreement as a whole, and s. 80 of The Labour Relations Act."

(b) Spytkowski Grievance:

"Beginning on or about June 20, 2001, and continuing to the present, the Division has unreasonably withheld its consent for additional leave of absence for the Grievor for the purpose of fulfilling her duties as President of the Association.

Further, in assigning the Grievor to return to a position at Anola School for the 2001 – 2002 school year, the Division has failed to reinstate the Grievor to a position no less favorable than the one held by her prior to her previous leave. The Grievor grieves that the Division has violated Article 7.02 of the Collective Agreement, the Agreement as a whole and s. 80 of The labour Relations Act".

THE EVIDENCE

The evidence at the hearing consisted of 14 exhibits and the testimony of two witnesses, Marijka Spytkowski, on behalf of herself and the Association, and Ken Bell ("Bell"), the Superintendent of the Division, on behalf of the Division.

The background facts are essentially uncontested. They can be summarized as follows:

1. The Grievor, Ms Spytkowski, is the President of the Transcona Springfield Teachers' Association, and has held that office since approximately September 1998.
2. Exhibit 1 in these proceedings is a Collective Agreement between the Division and the Association, which was in effect between January 1, 1997 to June 30, 1998. The Collective Agreement for the subsequent period, namely July 1, 1998 to June 30, 2000 has only recently been

signed. Article 7.02 in Exhibit 1 remains unchanged in the Collective Agreement in effect between July 1, 1998 to June 30, 2000. It is the Article which I must consider and construe in determining this grievance. It states:

"7.02 Leave for Executive Positions with the Association or The Manitoba Teachers' Society

(a) At the request of the Association, the President of the Local Association shall, upon reasonable prior notice, be given one-half time off regular teaching duties to attend to Association matters. The Division shall not unreasonably withhold its consent for additional leave of absence for this purpose. ("underlining added for emphasis") There shall be no loss of benefits and the Association shall reimburse the Division for the entitled salary for the percentage of time that the President is absent from teaching duties. The Association will also reimburse for the appropriate percentage of allowance, where applicable, benefits (such as UIC, CPP, and Group Life Insurance premiums, etc.) and any other costs related to the President's leave. The right granted herein shall be in place of and not in addition to the rights granted by Article 7.01 of this Agreement. Upon the return of the teacher to the Division, the teacher shall be reinstated in a position no less favorable than the one held by the teacher prior to the leave.

.....

(c) For the purpose of this Article "no less favorable" shall be deemed to be a position as may be determined by the Division. The Division shall exercise its judgment in placing that teacher in a reasonable fashion having regard to all relevant factors including the educational needs of the Division and the interests of the teacher."

3. Jeff Tuckwell had been the President of the Association for a two-year period (1992-1994). During his term as President, Mr. Tuckwell had requested, and had been granted, a half-time leave from his teaching duties in each of the two years he had served as President.
4. Nancy Patterson had been the President of the Association for a two-year period (1994-1996). During her term as President, Ms Patterson had requested, and had been granted, a full time leave from her teaching duties in each of the two years she served as President.

5. Henry Waddell had been the President of the Association for a two-year period (1996-1998) immediately before the Grievor became President. During his term as President, he had requested and had been granted, leaves from his teaching duties which were somewhat different in each of the two years. But which resulted in him receiving a 5/7th leave (more or less) from his teaching duties in each of the two years he served as President.
6. In each of the first three years of her presidency (1998-1999, 1999-2000, and 2000-2001) the Grievor had requested and had been granted a full time leave from her teaching duties. In other words, the Grievor, in each of those three years, requested a supplemental half time leave, in addition to the half time leave referred to in Article 7.02 of the Collective Agreement. The Grievor's requests were made in writing to the Division, and those requests were considered by the Board of the Division, and were approved.
7. During her testimony, the Grievor described her duties as President of the Association. She indicated that her duties as President had increased over the time she had been President, and estimated they had "increased two-fold". The Grievor stated that in her opinion, the teachers of today are more politically active and aware of working conditions than were their predecessors. She also stated that the Transcona Springfield Association is among the most active of the Associations in the Province. To illustrate her point about the increasing workload of the President, she referred to having tracked on a monthly basis, her incoming and outgoing telephone calls related to Association business in each of the first three years of her presidency. Such calls had increased from 176 calls per month in the first year, to 357 per month in the second year, to 411 per month in the third year.
8. By letter dated June 4, 2001, the Grievor wrote to Bell, who had then only recently become the Superintendent of the Division, pursuant to Article 7.02(a) of the Collective Agreement requesting a full time leave of absence from her teaching duties for the purpose of fulfilling her duties as President of the Association. Bell took the necessary steps to have the Grievor's request considered by the Board of the Division at a meeting to be held later that month.
9. The Board considered the Grievor's request on the evening of June 19, 2001, firstly in the in-camera meeting of the "Committee of the Whole" which typically preceded board meetings, and then in a regular board meeting, which was open to the public, and which

followed immediately after the meeting of the Committee of the Whole.

10. The Board's discussion of the Grievor's request for leave during the in-camera meeting lasted for approximately 20-25 minutes, and will be commented upon in greater detail elsewhere in this Award.
11. The Grievor, as was her custom, attended at the regular Board meeting on June 19 as an observer. The Grievor's request for full time leave was considered by the Board in its regular meeting on June 19, while one of the nine trustees was temporarily absent from the meeting. A motion was made for the approval of the Grievor's request. Four of the trustees then present, voted in favour of the motion, and the other four voted against the motion. According to the rules of the Board, the tie vote resulted in the motion being defeated. No request for a further vote on the motion was made following the return to the meeting of the trustee who had been absent when the motion was presented and voted upon.
12. During the regular Board meeting, the Board did not ask any questions of the Grievor, nor did the Board inquire as to whether the Grievor wished to make a submission in support of a request for a full time leave.
13. On June 22, 2001, the Grievor and Bell had a brief telephone conversation in which the Grievor asked Bell if there was a reason or reasons for the Board's denial of her request. Bell advised that the matter had been discussed during the in-camera meeting of the Board, but that he was not prepared to divulge the details of those discussions to the Grievor. Bell also indicated that it was the Grievor's general request for the supplemental one-half time leave that had been denied, but that the Grievor could still present requests for specific, time limited leaves of absence, and that such requests would be considered by the Board.
14. By letter dated June 25, 2001, Bell wrote to the Grievor to formally advise her of the Board's decision. The letter stated in part:

"As requested in your letter of June 4, 2001, the leave of absence requested was full time in nature. The Board of Trustees voted to not support this request for leave application.

The decision of the Board of Trustees means that your leave for T.S.T.A. purposes will be as per the Collective Agreement and will be a one-half time leave of absence

from regular teaching duties."

15. The Grievor was subsequently assigned to a one-half position at a rural school for the 2001-2002 school year but, with the consent of the Division has continued to work on a full time basis as President of the Association, and has not been working as a teacher pending the decision in these proceedings.

THE POSITION OF THE PARTIES

The Position of the Association

The Association asserts that the law with respect to the granting of leaves of absence to employees is relatively well settled. Mr. Smorang provided me with several cases, from which a number of principles emerge. Those cases included Re York University and the Canadian Union of Public Employees, Local 1356 (1976) 12 L.A.C. (2nd) 213, and Re Whitby Boat Works Ltd., and the United Brotherhood of Carpenters and Joiners, Local 2679 (1980) 27 L.A.C. (2nd) 269. Brown and Beatty in the third edition of their text Canadian Labour Arbitration summarize the law with respect to the granting of leaves of absence and refer to substantially the same principles as outlined by Mr. Smorang in his opening statement and in his argument.

The principles referred to by Mr. Smorang can be summarized as follows:

1. When a collective agreement uses wording indicating an employee's request for a leave cannot be unreasonably withheld, an employer is required to make a diligent inquiry into the basis for the employee's request;
2. Having made such an inquiry, the test as to whether or not to grant the request for leave is objective, at least in part. In other words an employer cannot deny a request for a leave simply based on its own subjective assessment of its operational requirements, or on its own assessment of the legitimacy of the employee request;
3. Unless reasonable grounds, assessed on an objective basis, exist for denying the request, a denial by the employer will be considered to be unreasonable, arbitrary, or capricious;
4. The onus to demonstrate that there were reasonable grounds for the denial of the request for leave is on the employer.

On the basis of the above noted principles, and the wording of Article 7.02 of the Collective Agreement, the Association asserts that the Division acted unreasonably in withholding its consent to the Grievor's request for an additional one-half leave of absence, because the Division made no inquiry as to the basis for the Grievor's request, and the Division did not have reasonable

grounds, on an objective basis, to deny the request for additional leave. The Association also asserts that the Division has not discharged the onus upon it to demonstrate that there were reasonable grounds for denying the Grievor's request for additional leave.

The Position of the Division

The Division did not take serious issue with the principles outlined by the Association, at least as they related to provisions in collective agreements stipulating that an employer is not to unreasonably withhold its consent to a request for leave.

However, Mr. Simpson on behalf of the Division argued that those principles are only applicable to requests for relatively short leaves of absence which are requested for a particular, time limited purpose. Mr. Simpson submitted that the cases relied upon by the Association have to be read in the context of their own facts. He pointed out that the York University case dealt with a request for leave for a 5 day period, and that the Whitby Boat Works case involved a request that the employee involved be permitted to take his third week of vacation at a particular time.

According to the Division, principles applying to requests for short leaves of absences for particular purposes, cannot be extrapolated to apply to a request such as the request of the Grievor, being a general request for a one-half time leave.

The Division also argued that the granting of a leave is a management right, and that if a management right is to be restricted, the restriction must be clearly expressed in the Collective Agreement.

Finally, the Division pointed out that it did properly and fairly consider the Grievor's request during the in-camera meeting of The Committee of the Whole. It discussed the issue for between 20 and 25 minutes, and considered several factors, at least one of which would have favored granting the leave. Those factors were:

- i) Whether or not granting a full time leave for a fourth consecutive year would result in a diminishment of the Grievor's ability to teach effectively;
- ii) Whether or not the job of the Association President actually required a full time commitment to properly discharge the responsibilities of that position;
- iii) That Article 7.02 of the Collective Agreement only provided the Grievor with a half-time leave on request as of right, and that it was within the discretion of the Division to deny the additional half-time request;
- iv) Whether or not it would be more disruptive to students if the additional request for leave were denied, but the Grievor was allowed to make additional specific requests for leaves of short duration.

The Division contended that because the above noted factors were discussed and considered by the Board, the Division had established that there was no bad faith or capriciousness on its part. According

to the Division, in the absence of bad faith or capriciousness, an arbitrator should not interfere with the Division's exercise of its management discretion to deny a request for leave, even if that arbitrator might have reached a different conclusion when assessing the same factors.

ANALYSIS

Article 7.02 of the Collective Agreement is clear in stating that, at the request of the Association, and upon reasonable notice, an individual holding the office of President of the Association is to be given one-half time off regular teaching duties to attend to Association matters.

The Article is also clear that "additional leave of absence for this purpose" may be requested and that the "Division shall not unreasonably withhold its consent" to such requests. The "purpose" referred to in the Article must be "to attend to Association matters", which is included the purpose of the Grievor's request for additional leave.

The determinative issue in these proceedings is whether the Division's obligation under Article 7.02 not to "unreasonably withhold its consent for additional leave of absence" only arises in relation to requests for short term additional leaves, or whether the obligation also arises in relation to general requests for additional half-time leaves of absence.

Mr. Simpson, on behalf of the Division, ably argued that if the Association wanted its President to have the right to a full time leave, simply upon request and reasonable notice, they should have negotiated for the specific inclusion of that right in the collective agreement. Instead the Association agreed to a provision providing for only a one-half time leave.

Mr. Simpson also stressed that to apply the principles in the York University, and Whitby Boat Works cases, to longer term leaves would be to set too high a standard for employers. The application of such principles would result in a situation where it would not be practical for the Division to make the extensive inquiries necessary to properly assess and consider the competing considerations that might apply to requests for long term supplemental leaves.

Notwithstanding Mr. Simpson's able advocacy, there are two reasons why I am unable to accept his arguments. They are:

1. The actual words used in the second sentence of Article 7.02 are:

"The Division shall not unreasonably withhold its consent for additional leave of absence for this purpose."

Those words do not distinguish between requests for additional leaves of absence on the basis of whether such requests are for short term or long term leaves. In the result all requests for additional leaves of whatever duration, are to be treated in the same manner. The Division is obliged not to unreasonably withhold its consent for additional leave, regardless of the length of leave requested.

2. The Division's management right to exercise a discretion in the granting of leaves of absence to the Association

President, has been significantly restricted by Article 7.02. The Division has no discretion whatsoever to deny requests for a one-half time leave for the Association President, provided the Association makes a request and provides reasonable notice of the request. Moreover the Division cannot unreasonably withhold its consent for additional leaves for the President, if the purpose of the leaves is to attend to Association matters.

In the context of the wording of Article 7.02, I am not convinced that it would be impractical for the Division to properly assess the competing factors that ought to be considered in responding to requests for an additional one-half time leave of absence for the Association President. However if the Division sincerely feels that doing so would be impractical, it is open to the Division to attempt to negotiate an alternate Article setting forth a different standard that would apply to additional requests for leaves of absence for the Association President. The factors which the Board of the Division considered during the in-camera meeting of the Committee of the Whole on June 19, 2001, were legitimately considered by the Board in responding to the Grievor's request.

However in the context of an Article in the Collective Agreement which stipulates that the Division shall not "unreasonably withhold" its consent for additional leave of absence, and in which there is no distinction made between the types of leaves which may be requested, I am unable to conclude that the Division reasonably withheld its consent relating to the Grievor's request for an additional one-half time leave.

In order to demonstrate that it was not acting unreasonably in relation to the Grievor's request, it is my view that the Division must establish that it had made some inquiries with respect to the facts and circumstances surrounding the request, such as inquiring as to the responsibilities of the Association President, and the circumstances of the Grievor as they related to her ability to discharge those responsibilities. It also follows that the Division must establish that it considered the information obtained through those inquiries. The evidence does not show that the Division made such inquiries. For example, when the Division considered the Grievor's request for additional leave, the issue of whether the job of Association President required a full-time commitment of hours was discussed, but no specific inquiries were made of the Grievor, or any one else, either on or before June 19, 2001 as to the actual workload of the Association President, or how that workload may have varied in recent years.

In the absence of such inquiries, and the consideration of the information obtained through such inquiries, I have concluded that the Division unreasonably withheld its consent to the Grievor's request.

DECISION

The Grievances of the Association and the Grievor are therefore allowed. In terms of remedies, I am hereby:

- (a) declaring that the Division breached the Collective Agreement by unreasonably withholding its consent to the Grievor's request for an additional one-half time leave of absence for the 2001-2002 school year (effectively giving her a full-time leave of absence for the 2001-2002 school year) for the purpose of fulfilling her duties as President of the Transcona-Springfield

Teachers' Association.

- (b) ordering that the Grievor's request for an additional one-half time leave of absence for the 2001-2002 school year (effectively giving her a full-time leave of absence for the 2001-2002 school year) be granted without further delay.

On the basis of the evidence introduced at the hearing, I believe that the above-noted remedies are sufficient to provide a final and conclusive resolution of the grievances of the Grievor and the Association. However I will retain jurisdiction in the event the parties, or any of them, take the position that any further orders are required in order to conclusively resolve the grievances.

DATED this 15th day of November 2001.

A. BLAIR GRAHAM,
Sole Arbitrator