

IN THE MATTER OF AN ARBITRATION:

BETWEEN:

THE SCHOOL DISTRICT OF MYSTERY LAKE NO. 2355
(hereinafter referred to as "*the Board*")

- and -

THE THOMPSON TEACHERS' ASSOCIATION NO. 45-3
OF THE MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as "*the Association*")

BOARD OF ARBITRATION:

P. S. Teskey, Chairperson
G. D. Parkinson, Nominee of the District
E. Kostyra, Nominee of the Association

DATES OF ARBITRATION:

November 16 and December 17, 1994

LOCATION OF ARBITRATION:

Mystery Lake Motor Hotel
Thompson, Manitoba

APPEARANCES:

R. A. Simpson, Counsel to the District
M. Myers, Q.C., Counsel to the Association
J. Empey, Grievor

AWARD

This matter concerns the disciplinary suspension of Mr. Empey and his subsequent grievance with respect to the same, and the policy grievance of the Association regarding the same matter (Exs. 3 and 4 respectively), both of which allege that the disciplinary action taken was without justification and seek the appropriate remedy.

We might also note that this matter is very much related to the previous decision of the majority of the Board of Arbitration concerning similar grievances with respect to Mr. B. Edgar, which Award issued on November 4, 1994 (we might note that the then Nominee of the Association dissented). That Award concerned Mr. Edgar's participation in the same situation and the same discipline had been imposed by the District upon both himself and Mr. Empey. The grievance of Mr. Edgar was denied and the discipline upheld by the majority of that Board.

As much of the background has been canvassed in the previous Award, we do not find it particularly helpful or necessary to the parties to reproduce all of our comments previously set forth but will attempt to focus only on any significant differences in evidence and submissions that exist between the two situations. We are very much aware (and the earlier Award indicates same) that the two sets of grievances must be determined separately and distinctly but it is also fair to say that much of the documentary and viva voce evidence (particularly the District's witnesses and, to a large extent, that of Mr. Empey) was essentially identical to that presented at the Edgar hearing and has been set forth in the earlier Award.

The evidence of both the grievor and Mr. Edgar was essentially as stated at pp. 4-7 of the November 4, 1994 Award until the point when the physical altercation began.

At pp. 7-8 of the earlier Award, the previous evidence of both participants concerning the physical fight is canvassed and it is noted at p. 8 that "There were no witnesses to the altercation itself" as no such witnesses were presented at the earlier hearing.

Mr. Empey's testimony at the present hearing amplified to some extent his view that, upon returning to the office area to get his clipboard, he had only responded to what he perceived as a threat of a physical assault upon himself by Mr. Edgar (Mr. Edgar maintained essentially the same version of events as dealt with in the earlier Award).

In direct examination, the grievor confirmed that there had been a heated and "unpleasant" discussion between himself and Mr. Edgar prior to the physical altercation. He was walking out the office door when Mr. Edgar made the "fuck you" comment to him. That comment made him very upset to the extent that his hands were shaking. He walked out into the shop area towards the hoist. A student, C. Gulak (his evidence will be discussed shortly), required his help to get his truck onto the hoist. Mr. Empey realized that the students required direction but indicated that, since he was not thinking clearly at the time, he needed his clipboard which had a list of student assignments. He thought that it was on his desk (he later found it on top of the tool box outside the office door).

He then re-entered the office holding the door open with his foot to reach over to his desk for the clipboard. Mr. Edgar was then at his own desk with his back towards him. According to the grievor, Mr. Edgar then turned around and "took a swing" at him, at which time Mr. Empey blocked the swing and put Edgar in a headlock to immobilize him. He hit Mr. Edgar a few times in the head because he was "pissed off" that Edgar had swung at him.

Mr. Edgar was "flailing away trying to get away" and hit Empey in the stomach. They both then fell to the floor. The grievor still had the headlock on Edgar who kept trying to hit him. Accordingly, Mr. Empey hit Edgar a few more times (he estimated four) to make him stop struggling. Then Edgar got up and left and the grievor went out to the shop area, apologized to the students and told them to go home.

In cross-examination, the grievor agreed that he apologized to the students partly because he could not continue to teach them at that time and partly because he had just had the fight with Mr. Edgar. He also did not know how Edgar got so "badly beat up" and did not like to think that he caused all of those injuries but was satisfied that he had. The grievor acknowledged that he had blue belt judo training and that judo was a "close contact thing" but he had not used judo during the fight to defend himself.

As to the later meeting with Mr. Fraser and Mr. Donovan which resulted in the "Administration Report" (Ex. 13), there is no mention at all in Ex. 13 of Mr. Edgar having taken the first "swing"; rather, the reason given for the start of the physical altercation appeared to be the "fuck off" comment as noted in the earlier Award, Mr. Empey again testified that he did not tell Fraser and Donovan everything that happened since he did not feel anything he said would have made any difference.

The words "jumped Mr. Edgar" in Ex. 13 were not his own words but he had told them that he did not jump him from behind as Mr. Edgar had said. Mr. Empey had made the other comments attributed to him in Ex. 13.

The grievor then went home and started writing his statement (Ex. 17) because he knew that somebody would ask for such a statement and also was aware that what he had told Mr. Fraser was not complete. He had begun to write Ex. 17 before being contacted by the R.C.M.P. Once that contact came, he then spoke to Mr. Ulrich and to legal counsel and provided Ex. 17 to Mr. Fraser, Mr. Wilson and the R.C.M.P. The relevant portion of Ex. 17 reads as follows:

"Remembering my work assignments for my students I came back into the office. As I came back in Bill spun around. At the same time he made a threatening physical gesture. He raised his right hand as he turned. He had a look on his face I interpreted as being out of control. He swung on me. Trying to defend myself I put him in a headlock and tried to quiet him down. Bill was struggling and trying to hit me, he did hit me in the stomach as he was bent over at this time. In the ensuing struggle we fell to the floor, I was on top. I hit him several times. I only hit him when he was struggling against me."

In cross-examination, he acknowledged that, at the time he wrote Ex. 17, he knew that the R.C.M.P. was likely to become involved. He had faxed the draft statement to legal counsel and only the last sentence above quoted was added by counsel although the grievor felt that it was true.

We might also note that Ex. 17 also indicates that there were no witnesses to the altercation.

In direct examination, he testified that he was not "testy" at the February 18 meeting with the Board of Trustees but only nervous. In cross-examination, he indicated that he did speak at the meeting although not with Mr. Ulrich's approval. Mr. Ulrich had apparently

told him that he would prefer if Mr. Empey did not speak and it was stupid for him to have done so. However, he felt that the meeting was a formality and that the Trustees would not change their minds and that was the attitude he unfortunately showed at that time.

We might also note that during the cross-examination of Mr. Wilson, it was indicated that three letters of support (Exs. 22, 23 and 24) were provided, one from Mr. M. Gawinski, the Department Head (although the letter is signed from Mr. Gawinski as a "Teacher" and there is no reference to his being the Department Head), one from Mr. N. Laine (the instructor at the Thompson Judo Club), and one from Mr. M. Brooks (another instructor at the School). All are commendatory of his teaching skills and indicate that those individuals found the grievor to be easy to get along with.

Subsequent to the suspension Mr. Empey managed to obtain employment at Mid-West Drilling from March 4 until the end of the first week in August. We were not provided with his specific rate of pay but the grievor indicated that it was substantially less (approximately one-third of his teaching salary).

Mr. Empey also completed the counselling and anger management training required by the District and was advised by letter of June 14, 1994 (Ex. 31) that he would be reinstated into his teaching position as at August 29. Both he and Mr. Edgar signed a statement (Ex. 32) dated June 11, 1994 as follows:

"We will do our absolute best to do our jobs, get along with fellow colleagues and each other and behave in a professional manner. There will be no physical or verbal abuse between us. We will seek mediation to help us resolve current issues. In the future we will make appropriate use of the chain of command."

The documentary evidence also indicates that the grievor was more and earlier ready to enter into a mediation process than Mr. Edgar although ultimately that did take place.

Subsequent to the suspension, Mr. Empey met with his solicitor concerning the criminal charge. He was advised that, without a witness, the case would be difficult. Upon returning to Thompson and giving the matter more thought, he felt that Chad Gulak might have seen something. He spoke to Chad's mother and told her that it was important to know if he had seen anything and then spoke to Chad on the telephone. He had also indicated to Mrs. Gulak that if she did not want Chad to become involved, he would respect her decision.

A few days later, Chad provided him with a written statement (Ex. 26) which reads as follows:

"I Chad Gulak grade 12 student of the R. D. Parker School Power Mechanics class have witnessed a fight between Mr. Edgar and Mr. Empey.

Monday, February 14/94

My truck was scheduled to go into the shop for repairs, and Mr. Empey instructed me to bring it into the shop. I drove my truck into the shop and positioned it in front of the lifting ramp. Mr. Empey was in the office, and so I stood outside waiting for him. I needed assistance putting my truck onto the ramp. He came out of the office, and I began to walk towards him. He appeared to be upset and was looking for something. He turned and walked back to the office, opened the door, and entered holding the door open with the heel of his left foot. He appeared to be looking for something on his desk.

Where I was standing I could see Mr. Empey's left side. It then appeared that Mr. Empey jerked his body backward suddenly as if to avoid some sort of aggression. The next instance both men grabbed one another and fell to the

floor. Mr. Empey appeared to have Mr. Edgar in a head lock, and both men were lying on their sides. It looked like they were trying to punch one another. I became concerned and tried to tell the other students. The other student's did not believe me and therefore did not respond for some time. When I looked back at the office the door was closed. Some students came over to me. The office door opened shortly after and Mr. Edgar came out. He had blood on his face and walked out abruptly. Mr. Empey came out and walked over to us. He apologized to the class for the event that took place.

In conclusion I would like to say that Mr. Edgar has demonstrated instances of verbal and physical abuse to the students. Mr. Empey has never condoned with Mr. Edgar's abusive behavior. He has always walked away from confrontation and told us students to ignore and not retaliate to Mr. Edgar's behavior."

That statement was provided to legal counsel and to Mr. Ulrich and was subsequently provided to Mr. Wilson on March 14. Mr. Wilson testified that he did not feel that Ex. 26 corroborated Mr. Empey's version of events and he did not interview Mr. Gulak at the time. The reason he did not do so was because everything had already been determined and the Board of Trustees had dealt with the incident. He also felt that Ex. 26 was incredulous given the earlier statements from the participants who had both indicated that there were no witnesses. The Trustees had already taken into account the relevant facts and had made their decision and part of their rationale was not to delve into all the fine details. No other investigations were conducted.

Both Chad Gulak and Mrs. Gulak testified at the hearing.

Chad Gulak is eighteen years old and currently resides in British Columbia where he is in an apprenticeship program as an automotive mechanic. He had resided in Thompson for approximately four years, and attended the Collegiate. In the 1993/94 school year, he had originally been taught by the grievor and then by his replacement after the suspension.

His evidence as to the events in question was essentially identical to his statement in Ex. 26. That report was prepared by himself (with some assistance in terms of spelling from his father) and, although it was suggested to him and to this Board that there was collusion between himself and Mr. Empey, we are satisfied that such an allegation has not been established. However, it is also apparent that Mr. Gulak had considerable respect and warmth for Mr. Empey as a teacher but the same could not be said in terms of his feelings towards Mr. Edgar who had also taught him (there was some reluctance upon his part to admit that but the message was reasonably clear and those feelings are also displayed in Ex. 26). Accordingly, while we accept the actual factual matters testified to by Mr. Gulak and as contained within Ex. 26, it is necessary to separate fact from perception as to its contents. We do not believe that Mr. Empey directly attempted to influence those factual matters but it is our impression that the perceptions expressed by Mr. Gulak may well have been influenced by his feelings towards the two teachers.

Mr. Gulak's viva voce evidence and Ex. 26 do support the proposition of Mr. Empey that he had left the office and then returned. We also accept that Mr. Gulak saw Mr. Empey jerk his body backwards but not necessarily Mr. Gulak's impression of why that may have been. Neither did Mr. Gulak appear to us to have been in a position to have observed in detail what transpired between the two teachers (he admitted that he could not see their hands and what he did see would have been of very short duration) and much of his testimony as to what he thought occurred was based upon supposition rather than direct observation.

We also do not find it implausible that there may have been somewhat more discussion between Mr. Gulak, Mrs. Gulak, and the grievor than was testified to at the hearing. However, neither do we think that such discussion, even if it did take place, materially affects our decision in any event.

Mr. Simpson's final submission was very much similar to that canvassed at pp. 26-30 of the November Award. In addition to the previous authorities cited at pp. 28-29 of the earlier Award, we were also provided with the summary of the decision in Re Metro-Calgary and Rural General Hospital District #93 and Canadian Union of Public Employees, Local 1240 (September 27, 1976, W.L.A.C., A. Beattie) and Re Canron Ltd. and International Molders & Allied Workers, Local 16 (1975), 9 L.A.C. (2d) 391 (Shime), both of which are generally in accordance with the authorities already discussed in the earlier Award.

As well as reiterating the points raised previously, Mr. Simpson suggested that the earlier Award had basically answered the grievances here and that the only change was really the identity of the grievor.

It was suggested that the evidence of Mr. Gulak was suspect and that Ex. 26 had been prepared essentially for the purpose of the criminal charges as had been suggested by the grievor's solicitor.

The documentary and other evidence relating to post grievance matters should properly be given little weight. It was the function of this Board to determine the propriety of the action taken by the Trustees based upon the information that was known to them

at the time the decision was taken. Even if considered, the post grievance evidence only showed that the District succeeded in what it was attempting to do in terms of correctional discipline and Mr. Empey had now been returned to work.

It was submitted that the sole reason that this Board was constituted was to afford Mr. Empey a further opportunity to persuade us that his version of events was more accurate than Mr. Edgar's and that the discipline imposed was too severe.

In that respect, the most accurate account of events from the grievor was shown in Ex. 13, written shortly after the events in question. Mr. Empey had indicated that he felt that it was not "much of a scrap" but had also conceded that he had shown poor judgment. He had indicated that he had been abused enough and "that was enough". That was consistent to a large extent with Mr. Edgar's version of events.

There was no question that the escalating argument had been created by both teachers. What ended up happening was characterized as a "severe physical beating" which would have been inappropriate even if there had been some level of provocation or fearfulness upon the part of the grievor.

It was also difficult to accept that Mr. Empey was sincere in testifying that he felt "physically threatened" by Mr. Edgar as it was very clear that Mr. Empey would have the best of any such confrontation.

Exhibit 17 had to be considered a self-serving document which the grievor hoped would get him out of trouble.

The fact that there had been no investigation conducted by the Trustees or the Administration was of little import given the fact that both Mr. Edgar and Mr. Empey had indicated there were no witnesses to be interviewed. Mr. Gulak's statement in March provided no reason to change the result of what had already been considered.

Exhibit 26 was to be viewed with considerable caution since the events described by Mr. Gulak did not jive with the description of events provided by either of the teachers involved. Neither would Mr. Gulak have been in a position to have actually observed a great deal of what transpired and his statement was given some weeks after the fact.

Even if the grievor's evidence was to be accepted, it still would have been open to him to have simply walked out the office door and to have avoided the situation entirely rather than going back in and "beating the hell out of" Mr. Edgar. Exhibit 12, the medical report from Dr. Taylor indicated that significant injuries had occurred and it could be inferred that the force exerted was unreasonable and excessive in the circumstances.

Mr. Simpson stressed the importance of deterrence of this kind of conduct to the District.

In his submission, Mr. Myers suggested that the case law was not the most significant factor in this instance and that the fundamental issue involved was the level of penalty imposed. It was acknowledged that some discipline was warranted but suggested that the level of discipline set by the Trustees was excessive.

It was also submitted that there were differences between this situation and that of Mr. Edgar. Mr. Empey had been candid and honest and his evidence ought to be believed.

He had been upset at the time he spoke to Mr. Fraser and Ex. 13 ought not to be given great weight given that. However, the grievor had quickly corrected the accuracy of his report in Ex. 17.

The prior bad relationship between Edgar and Empey was mostly created by Mr. Edgar who still harboured ill feelings as shown through his evidence. Mr. Edgar was described as the type of individual who could be "very wearing and unreasonable" and the sort of person who was "difficult" and "complaining and whining" much of the time. That perception was borne out by Mr. Gulak's testimony that the other students did not like Mr. Edgar. In short, it had been a frustrating situation for the grievor who got along well with everybody else except Edgar.

There had been inconsistencies in Mr. Edgar's own evidence as to whether the grievor had actually left the office before returning and the fight then ensuing.

Mr. Empey had been consistent in his various statements although there had been some amplification of what had transpired.

Essentially, the grievor had acted in self defense as he had perceived that Mr. Edgar was about to assault him. Given that situation, his response should not be considered in an overly critical light.

It had been unreasonable for the Administration of the District not to have interviewed Mr. Gulak or any of the other students given Ex. 26 which was ignored at the time. If the matter had been properly reviewed in mid-March, the Trustees would have been able to have seen some distinctions between the two situations.

Mr. Empey should not be considered as the originator of the situation, nor was he the cause of the situation escalating - all he did was respond. It was unrealistic to take the position, as Mr. Simpson had, that he should have just walked away. He had done that previously but was provoked again.

Mr. Myers was candid in acknowledging that schools were not the place to fight and that teachers were to be considered as role models. However, it was his submission that Mr. Empey's conduct, when compared to Mr. Edgar's, did not merit an equivalent disciplinary response and ought properly to have been significantly less.

The grievor had expressed remorse both immediately after the incident in terms of his apology to the students and throughout the process later. That attitude should be contrasted to that of Mr. Edgar who felt that he should not have been punished at all.

The grievor did not have any previous record of being a violent person and the necessary counselling could have been obtained while he remained at work.

The suspension was characterized as a severe financial hardship for Mr. Empey and, since the earlier Board of Arbitration did not have the benefit of Mr. Gulak's evidence, the result here could be different. Counsel suggested that the appropriate length of suspension should be from the incident until Ex. 26 was provided to Mr. Wilson on March 14.

In Reply, Mr. Simpson stressed that he was not submitting that both teachers were not responsible for the incident as the reality was that both of them were.

Exhibit 17 could not be considered as simply an expansion or amplification of Ex. 13 but was a "total change" given that it was the first mention of any physical threat to Mr. Empey.

At the time the decision was made, the Trustees had the right and the responsibility to remove the grievor from his position and force him to get help. The simple fact of the fight and the situation between the two teachers was enough in itself to lead to that conclusion.

Mr. Empey's remorse was shown more later but not as much immediately after the fact. His attitude had not been good when he first appeared in front of the Trustees.

Both individuals were at fault, both had to be removed for a significant period of time and forced to get help before they could come back to employment. No matter what penalty was meted out to Mr. Edgar, the grievor had to be gone from the school for the balance of the year as an appropriate disciplinary penalty and to deal with the situation in a realistic way.

Decision:

We might say initially that this Board is not devoid of any sympathy or respect for Mr. Empey. It is clear from the evidence that he has the capacity to be an effective and popular teacher amongst both his students and other staff. He may well be easier to get along with than Mr. Edgar but that is not the question for us to determine, nor is it the issue before us.

It was conceded by the Association and by the grievor that some level of disciplinary response was warranted. It is our function to determine whether or not a sufficient basis has been established such that the suspension imposed should be lessened.

With great respect, and for a number of reasons, we do not believe that a sufficient basis exists such as to persuade us to vary the penalty.

Even if we accept the proposition (and we have some difficulty doing so) that the actual physical altercation commenced by Mr. Edgar making some threatening movement or even "taking a swing" at Mr. Empey (either of which could be consistent with the jerking back of the head as was observed by Mr. Gulak), we have significant problems with his level of "fearfulness" (as opposed to "anger") and we have equal difficulty with the magnitude of his response towards such perceived aggression. Given that his foot was still holding the door open, he could have chosen to simply back out of the room and make "appropriate use of the chain of command" as referred to in Ex. 32. Rather, he chose to close the distance between himself and Mr. Edgar and then proceeded to administer to him what must be considered as a quite severe beating. It is difficult to accept that the grievor had any serious fears about his own safety at the hands of Mr. Edgar (although Mr. Edgar would appear to be more adept than Mr. Empey in the use of words as weapons). The grievor had significant training in judo but chose to vent his anger and frustration (and we do accept that, as indicated in the earlier Award, Mr. Edgar was a "participant in the incident") in a manner more becoming to a bar room brawl. It has been said many times that provocation is a mitigating factor, not a full defence.

Notwithstanding his additional statements in Ex. 17, Mr. Empey did not deny his earlier statements to Mr. Fraser and Mr. Donovan that "Mr. Edgar had told him to fuck off one time too many" and that "he guessed Mr. Edgar expected that he would let it slide" (Ex.

13). We have little doubt that those feelings contributed more to the level of his physical response than any reasonably perceived threat to his own life or limb. It is possible that, in the process of recollection, the grievor now honestly believes that he was the victim of aggression but we strongly suspect that part of his shame and remorse stems from the fact that he recognizes that his reaction was considerably greater than the situation warranted.

No matter who threw the first punch, we also feel that both teachers acted far less than professionally during the events leading up to the fight. In our view, that misconduct in itself is worthy of significant discipline.

We also note the comments of the previous Board of Arbitration at p. 41 with respect to Mr. Edgar:

"... It is also fair to say that this Board is unanimous in its view that physical violence is abhorrent in any employment context and particularly between teachers who are in a position of having to work with each other and who are expected to set an example for the students they teach. We might also note that, while the grievor is certainly not an entry level employee, neither does he have exceptionally lengthy service and that service, while clear of a disciplinary record, can also not be considered as exemplary at least in terms of his ability to find a way to work with his colleague (we might say that also applies to Mr. Empey upon the evidence we have heard). We are not unaware that the length of suspension imposed created a very significant financial penalty for the grievor.

Nonetheless our conclusion is that the Board of Trustees has established all of the grounds (with the possible exception of physical abuse) listed in Ex. 5 and that, given all of the circumstances, a lengthy suspension was warranted. Their direction as to anger management and conflict resolution counselling also appears to us to have been particularly apt as without some change in the conduct of, and the relationship between the two, the likelihood of reoccurrence would more likely have been high rather than low. . ."

It appears to us that those comments are equally applicable to Mr. Empey in this instance as are the extracts from Re Cranbrook, Shewan et al, and Re Hitachi as quoted in the earlier Award. While we feel that Mr. Empey may well have been more provoked by Mr. Edgar than vice versa, we also feel that there has been some element of physicality established here.

Given our previous comments herein, we do not find that any significant miscarriage of justice arose from the failure of the District to make further investigations once Ex. 26 was provided. We tend to agree that neither it (nor the viva voce evidence of Mr. Gulak) provides a sufficient basis within a labour relations context for further ameliorating the penalty imposed. However, we would caution the District that it would appear to us to be far better practice to fully investigate within reasonable limitations such new information as may arise in a particular situation as we would presume that the District would never wish to allow a continuation of an unjust decision based upon erroneous or incomplete information once that was shown. However, as indicated, that is not the case here.

As was indicated at p. 38 of the November Award:

"... The Trustees took a broader approach to dealing with the situation than simply attributing blame over who had started the actual physical fight and, in this respect, we find no fault with their approach."

Those comments apply to Mr. Empey's grievance as well. The fact that this incident took place within the context of a school is of significant importance to us.

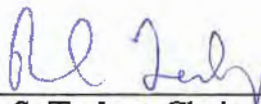
For all of the above reasons, the grievances are hereby dismissed.

It is our sincere hope that all concerned can now finally put this matter behind them and that the grievor, in particular, can now focus his energies and attention on his work with the students, which is obviously much appreciated by them.

Each party shall bear the expense of its own Nominee and shall share equally in the expense of the Chairperson.

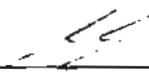
The Board also wishes to express its appreciation to both Mr. Myers and Mr. Simpson for their usual able representation and assistance.

DATED this 6th day of January, 1995.



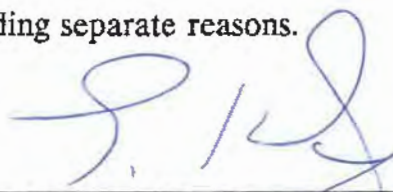
P. S. Teskey, Chairperson

I do/~~do not~~ concur and am/~~am not~~ providing separate reasons.



G. D. Parkinson, Nominee of the District

I do/~~do not~~ concur and am/~~am not~~ providing separate reasons.



E. Kostyra, Nominee of the Association

IN THE MATTER OF

AN ARBITRATION BETWEEN:

THE SCHOOL DISTRICT OF MYSTERY LAKE NO. 2355
(hereinafter referred to as "the Board")

- and -

THE THOMPSON TEACHERS' ASSOCIATION NO. 45-3
OF THE MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as "the Association")

GRIEVANCE OF J. EMPEY

DISSENTING AWARD OF EUGENE KOSTYRA

I have reviewed the majority Award with respect to this matter and I cannot agree with my colleagues in their decision. My comments are in regards to two areas of the majority Award.

Firstly, on page 7 the Award discusses the testimony of Mr. Chad Gulak, a former student of the School District of Mystery Lake who now resides in British Columbia. The majority Award indicates he testified at the hearing however, the majority Award fails to record that his testimony took place at a hearing which was held in Winnipeg on a Saturday approximately one month after the original hearing date in Thompson.

Furthermore, the majority Award does not report that Mr. Myers, Counsel for the Association, had requested Mr. Gulak testify by way of speaker phone call from his residence in British Columbia. The reasons for the request were that the student was not able to travel from British Columbia to Thompson as he had just started new employment and feared that he would lose such employment if he took the necessary days off to travel to Thompson. Mr. Myers had provided Mr. Simpson, Counsel for the Board, with notice of this request. Mr. Simpson argued that the Arbitration Board should reject the request of the Association as it could prejudice the Board's position in the proceedings.

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He further argued that it would be necessary to have the witness present to be able to properly cross-examine him on his testimony. The majority of the Board ruled at the hearing of November 16th that the testimony of Mr. Gulak must be in person at a hearing. I dissented at that time and I believe his testimony should have been allowed to be received via a speaker phone call. Boards of Arbitration have the jurisdiction to allow for testimony to be received in forms other than direct testimony if it can be established that there are problems or difficulties in having a witness testify in person. I find in the situation before this Arbitration Board that the Association had established there were legitimate difficulties in having Mr. Gulak present. I could not agree to the suggestion by the Board, that their position would be prejudiced by telephone testimony. Having the advantage of hearing this testimony in person, subsequently, I am even more convinced of these points than at the time of the majority members' decision and my dissent on November 16, 1994.

Additionally, there were significant costs and time added to the process as a result of the decision of the majority members of this Arbitration Board in this regard. Labour Arbitration was set up to be a process whereby workplace grievances could be resolved in a fair, efficient, timely and low-cost manner. The decision to not allow the telephone testimony in this case, I believe, goes against that and moves Labour Arbitration more towards the strict and costly processes followed in a Court of Law.

My second area of concern with the majority Award relates to upholding the length of the suspension imposed. I cannot disagree that the Board had reason to impose a level of suspension on Mr. Empey however, a careful review of the testimony before this Arbitration Board would lead one to the conclusion that the Board decided to impose an equal penalty on the two individuals involved without putting any weight to the levels of fault of the two individuals, nor did they fully investigate the information provided to them.

I have to disagree with the comments on page 14 of the majority Award: **"he may well be easier to get along with than Mr. Edgar but that is not the question for us to determine, nor is it the issue before us."** I believe the evidence provided to us clearly indicated that Mr. Edgar had made the work environment very difficult for Mr. Empey as he clearly did engage in verbal abuse towards Mr. Empey over a long period of time. As well, Mr. Empey was well liked and respected, not only by his students, but by fellow members of the teaching profession as stated by evidence noted in the majority Award. I further believe that these facts had to be taken into serious account as to the determination of degree of fault of the grievor.

I cannot agree with the majority Award comments on Page 15 where it is suggested that perhaps Mr. Edgar did not actually provoke a physical altercation. The testimony of Mr. Empey, collaborated by Mr. Gulak, was that Mr. Empey did "jerk back his head" which was in response to some type of physical action by Mr. Edgar toward Mr. Empey. I therefore believe that not only was there provocation through some considerable period of verbal abuse, but there was physical provocation as well.

Furthermore, on page 17 of the majority Award it noted that: **"we do not find that any significant miscarriage of justice arose from the failure of the District to make further investigations once Ext. 26 was provided"**. The majority Award goes on to say, in a somewhat contradictory manner, that: **"we would caution the District that it would appear to be a far better practice to fully investigate within reasonable limitations such new information as may arise in a particular situation..."**. I believe that a miscarriage of justice did take place even before the appearance of Ex. 26. The Board should have interviewed others like the students who were in the immediate proximity of the altercation to ascertain if they had seen or heard anything. Most certainly, once Ex. 26 was brought to their attention they should have carefully reviewed it and held subsequent investigations. This might have lead them to change their original decision with respect to discipline. On page 7 of the majority Award Mr. Wilson testified that they did not do any of this: **"because everything had already been determined and the Board of Trustees had dealt with the incident"**. It is my opinion that if they had done further proper investigation they would have found that there were significant differences with respect to previous information upon which they based their decision. I also believe that if they had carefully reviewed the information with respect to the prior situation between Mr. Empey and Mr. Edgar, as well as the information provided by his students and colleagues, they would have come to the conclusion that Mr. Empey should have had a shorter suspension than the four and one half months imposed by the Board. He should not have been treated the same as Mr. Edgar.

For all of the above reasons I would have upheld the grievance and substituted a three month suspension.


E. KOSTYRA
NOMINEE OF THE ASSOCIATION

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