IN THE MATTER OF A GRIEVANCE ARBITRATION
PURSUANT TO THE CANADA LABOUR CODE – PART I
R.S.C., 1985, c. L-2

BETWEEN:

CANADIAN MUSEUM OF CIVILIZATION CORPORATION
("THE EMPLOYER" or "THE CORPORATION")

AND:

THE PUBLIC SERVICE ALLIANCE OF CANADA
("THE UNION")

Union's Grievances # 2010-01 and 2010-02
Interpretation - Article 48 Staffing

AWARD

Arbitration Board:	François Bastien Sole Arbitrator
Employer's Counsel	Mr. Morton G. Mitchnick Borden, Ladner Gervais LLP *Assisted by:* Mrs. Elizabeth Goger Vice President, HR, CMCC
Union's Counsel:	Mr. Amarkai Laryea Grievance and Adjudication Officer, PSAC *Assisted by:* Mr. Ghislain Roussel President, PSAC Local 70396
Date and place of hearing:	May 20, 2011, Ottawa, Ont.
Date of Award:	August 9, 2011

ANTEA INC.
1009-25-FED/X
S/A-89-11 (FED/X)

I
INTRODUCTION

[1] This deals with two (2) grievances filed on March 2nd, 2010 by Grievance Officer Stéphane Laurin on behalf of the Public Service Alliance of Canada ("*the Union*"). The Union claims that the Canadian Museum of Civilization Corporation ("*the Employer* or *the Corporation*") failed to apply the newly-negotiated clause to the the staffing of seven (7) positions whose titles are expressly designated in the clause. It submits that the effect of this clause is to override other clauses found in Article 48 on staffing.

[2] The nature of the first grievance that relates to two (2) positions of Animators, and the remedy it seeks are respectively as follows:

> *La smcc omet d'appliquer la clause 48.xx, négocié le 13 décembre 2009 et entériné le 14 décembre par l'adoption de la nouvelle convention collective, dans l'attribution des deux postes affichés d'animateurs. La clause 48.xx s'applique spécifiquement pour l'attribution de postes d'hôte et hôtesse, guides et animateurs et a donc préséance sur les clauses 48.01 à 48.06.*
>
> *-Stopper immédiatement le processus actuel de dotation.*
>
> *-Offrir les postes d'animateurs aux employées temporaires, temps partiel tel que stipulé dans l'article 48.xx.*
>
> *-Indemniser les employées à qui reviennent les postes de la date d'affichage (2010/02/10) jusqu'à leur date de nomination dans le poste, pour toutes les heures manquées.*
>
> *-Étant donné la nature du grief, que la vice-présidente, ressources humaines a déjà pris connaissance du dossier, nous voulons faire entendre le grief au troisième palier.*

[3] Mirroring exactly the same language, the second grievance identifies five (5) positions of *Host/Hostesses* that the Corporation posted and filled in like

manner, i.e by neglecting to apply the same clause covering the same group of employees.

[4] As per the Union's request, the Corporation heard grievance # 2010-01 at Step Three of the grievance procedure on May 17, 2010. On May 25, 2010, the Corporation denied the grievance. In his letter of May 25, 2010 to Union's President Ghislain Roussel, Administrative Director David Loye provides detailed reasons for the Corporation's decision.

[5] After summarizing the main points of the Union's arguments, he sets out as follows the context in which the staffing decision was made, and why the Corporation maintains it was made in accordance with both the collective agreement and its own staffing policy:

> *Les sept (7) nouveaux postes permanents à temps partiel (30 heures assignées par semaine) ont été créés et affichés aux fins de la dotation le 9 février 2010 dans les 60 jours suivant la ratification tel qu'il était stipulé dans la Lettre d'entente. Ces postes ont été affichés à l'intention du personnel interne seulement, conformément au processus normal de dotation de la Société, de nouveau tel qu'il est stipulé dans la Lettre d'entente. La Société affirme qu'aucune clause de la convention collective n'a préséance sur une autre, sauf si cela est spécifié comme tel, et qu'aucune clause n'a préséance sur une autre du fait du moment de l'adoption de l'entente.*
>
> *La Société affirme également que la section 6 (processus de dotation avec concours) de la politique sur la dotation de la SMCC établit une distinction entre un poste vacant et un poste nouvellement créé. Enfin, la Société affirme que la clause 48.08 (d) porte sur le « processus de dotation normal » et que ce processus est bien établi dans la dotation et l'affichage des postes prévu non seulement dans la Lettre d'entente, mais également à la clause 48.08 (d).*

[6] Parties asked me to act as Sole Arbitrator in this matter on September 20, 2011.

[7] I heard this matter in Ottawa on May 20, 2011. No objection was raised as to whether the grievances were properly filed, or whether the Board had the necessary authority to deal with any matter arising from their hearing.

II
EVIDENCE

[8] *Mr. Morgan Gay*. Mr. Morgan Gay was the Union's negotiator during the round that concluded with the signing of the present collective agreement. Hired as a negotiator by PSAC in November 2006, his bargaining experience extends to the negotiations of numerous agreements in many jurisdictions in Canada and the US.

[9] The unit he negotiated for in this case comprises some 420 employees at the employ of both the Canadian Museum of Civilization and the Canadian War Museum. He explains that the bargaining context was particularly difficult at the time. The recession was under way and public sector disputes were not likely to get much attention from a minority government.

[10] For the membership, parity with employees working at other arts-related institutions such as the NAC, job security and more stability were the broad issues. For the front line staff, the issues revolved mainly around permanent employment, protection against contracted-out work, and staffing.

[11] An important source of frustration for them was the Corporation's practice to give jobs to outside candidates while ignoring their own experience. Wages mattered also greatly to them. He says that, through its Chief Operating Officer, the Corporation had admitted paying its employees less than other employers in the area.

[12] Nonetheless, this did not prevent the Union from achieving gains in some areas, underscores Mr. Gay. One is the new language on contracting out that provides some guarantee that an employee will not lose his job because of it. Another is the progress achieved on wages, albeit with a long way to go, he stresses.

[13] As well, there were additional postings for floor staff, a development that in the eyes of the Union relates to the language of clause 48.08. This is an issue raised right at the outset, he adds. The Union wanted better language on staffing than the one they got, namely more in line with that found in other employers' contracts.

[14] Contrary to what the Corporation suggests, the demographics of the floor staff do not include only students, contends Mr. Gay, In fact, some of the so-called temporary employees, whom he has met several times, are employees with many years of service (6 or 7 in some cases), and who are forced to interviews for jobs they have done for years.

[15] Further to its application under the Canada Labour Code, the Union commenced third-party assistance bargaining in August 2009. The mediator appointed remained of assistance until an agreement was reached, "*not an easy task*" concedes Mr. Gay. There was a strike vote, after which mediation resumed. Job action took place on September 21, 2009, and members of the bargaining unit went on strike for 86 days.

[16] Referring to the numerous exhibits filed on the proposals and counterproposals exchanged in the fall of 2009 between the parties on the wording of article 48 on staffing and the Memorandum of Understanding on the

creation of new positions, Mr. Gay testified as to the nature of the discussions on these issues during that period.

[17] On September 15, 2009, the Employer submitted a counterproposal in respect of additional part-time positions. As per the terms of a proposed LOU, it agreed to "*to create five (5) new permanent part-time positions with thirty (30) assigned hours per week within sixty (60) days of the ratification of the collective Agreement*". According to Mr. Gay, this was new language relative to that found in the old agreement couched in terms of thirty-two (32) assigned hours. In addition, the usual reference to the phrase "normal staffing will apply" had disappeared. The Union felt that the 30 hours were required for such a process to apply, but considered the latter redundant.

[18] In the same set of counterproposals, the Employer also suggested to remove the language of article 48.04, and to replace it with the following:

> *Should two or more internal candidates have an identical numerical rating following the staffing and selection process with respect to the selection criteria outlined in clause 48.03, preference shall be given to the candidate with the most service, whether continuous or discontinuous service, with the Corporation.*

[19] Albeit not proposed by the Union, the aim of these changes was clearly to address a number of staffing issues, namely to allow internal candidates to get first crack at job openings or get priority over external ones, and to recognize their seniority. This admits the negotiator, constituted movement on the part of the Employer.

[20] The Union's own counterproposals issued on that same date included a number of proposed changes to articles 48.01 (need to post vacant positions), 48.05 (need to give in a predetermined order, preferential consideration to

employees for vacant positions), and 48.07 ("*Unless subject to Article 41, bargaining unit positions that become vacant shall be posted and filled*"). According to Mr. Gay, the revised article 48.01 meant to define vacant positions as all those needing to be filled, including the newly-created ones. As for article 48.07, its aim was to deal with a contentious issue inherited from the previous round of negotiation. After initially posting and filling five (5) positions, the Employer had failed to fill them again. The Union grieved and lost at arbitration. Members were concerned that the Corporation would let positions lapse through attrition, and they wanted it to know that they wanted those positions filled.

[21] The Union also proposed revised language to the LOU, starting with the phrase that the Corporation "*will* ***create, post and fill a minimum of*** *five (5) additional, permanent part-time positions…*" (Note: key changes in bold character), and deleting the following reference to the "*normal staffing process*". Added as well was this new language: "***Unless subject to Article 41, the Corporation agrees to maintain these five (5) additional positions for the life of this Agreement***".

[22] In respect of article 41 that deals with lay-offs, the Union took the position that the Corporation can make such a decision, but should also make an effort to avoid them by maintaining the positions it offered to create.

[23] Mr. Gay indicates in cross-examination that the focus of the changes proposed was to clarify that the positions discussed would be new positions. He admits that while management agreed to add new positions, it made it clear that the normal staffing process would apply.

[24] In a "comprehensive package" tabled late in the afternoon on September 16, 2009, the Corporation introduced revised language for 48.04. Its effect

was, subject that she/he meets the basic requirements of the position or can acquire them "***within a three (3) month time***", to give ***"preferential consideration to an employee who has received notice of lay-off and who is working the notice period".*** The Union saw this as movement from the Employer's previous position.

[25] Two days later, the Union tabled a "Comprehensive Counter-Package" which included a substantive rewrite of article 48 and a revised LOU. It reflected a number of previously proposed changes but more significantly, included a new clause designed specifically for the group of employees here involved. It read as follows:

> *48.06 This clause applies to temporary Hosts, Guides and Animators:*
>
> *When a permanent position becomes available in the same job title as occupied by the employee, the following will occur:*
>
> *a) a temporary employee with at least one year of service, and with the most service, and who meets the basic requirements of the job title and has received a satisfactory performance evaluation, will be offered the position;*
> *b) if the temporary employee refuses the offer for the permanent position, then the employee will confirm his/her refusal in writing immediately to the respective Team Leader who will forward a copy to Human Resources;*
> *c) the position will then be offered to the next temporary employee as per a) above;*
> *d) in the event that no eligible temporary accepts the position, the normal staffing process shall apply.*

[26] This movement took place, explains Mr. Gay, in the context of discussions held before in the presence of the appointed mediator when the Employer had shown a willingness to consider changes to article 48. What had emerged from these discussions was the lack of opportunity members of this group had had to become permanent employees.

[27] Article 48.06 was therefore an attempt to move closer to a deal by including language that addressed the concerns of that particular group. In the Union's view, the expression "becomes available" meant whenever a position is created, or someone leaves. As well, the term "available" is one the Employer had used previously. As for the normal staffing process referred to in 48.06 d), it was "*outside the one defined here for Hosts or Animators*", says Mr. Gay, the idea being that parties would recognize the need for a different process for that specific group.

[28] Reverting to the discussions surrounding these particular issues, he indicates that the underlying idea was to identify ways in which these employees could become permanent. In the event positions became open, the Corporation would offer them the job, holding a competition only when they fail to show interest. They deemed unfair the fact that they had to compete for their own job, a source of constant frustration for these employees.

[29] On November 26, 2009, at the time Union members had been on strike for a couple of months, the Corporation tabled what it termed a "*Revised Final Offer of Settlement*". It contained a revised article 48 that incorporated, albeit with a partly modified second sentence, the Union's proposed article 48.06 reproduced above and renumbered 48.08. The second sentence had the Union's last part replaced with "*the Corporation may, based on operational requirements, staff the position as follows:*"

[30] For Mr. Gay, a "position available" still meant a vacancy, and clause 48.08 d) showed no wording change from the Union's 48.06 d). As for the LOU included in the same offer, its wording was the final one agreed to. However, he stresses that at that stage there was no agreement on article 48, and no official sign-off, although parties had agreed earlier to leave it unchanged.

[31] Despite judging redundant the reference to the normal staffing that remained in the text, he felt that he "could live with some redundancy" given the prospect of a settlement at this stage of the process. With reference to the exhibit titled List of renewals and new language agreed to by the parties as of 22-10-2009, he concedes in cross-examination that, indeed, the LOU was done with at that point. He stresses however that the normal staffing process, generally understood as a competition, means different things in the LOU and in clause 48.08. In the latter, it occurs only after the process envisaged has run its course.

[32] Further questioned on that point, he indicates that, how to fill the seven (7) positions, management had agreed to in September remained in dispute, and linked, as it would be, to discussions on article 48. The Union was all too aware of the fact that the Corporation had filled such positions in the past through the normal staffing process, a method it disagreed with. With staffing always having been a bone of contention, the Union thought it important to settle clause 48.08, one of the last issues to be resolved as it turned out. While other provisions in article 48 apply to everybody, the focus of 48.08 was on floor staff, a group made up of virtually all of the temporary part-time employees.

[33] Shown in cross-examination the colour-coded text from the list of agreed language just mentioned, Mr. Gay does not dispute that, except for the management submitted words (in red) "*on staff from the date of ratification*" in the first sentence, and "*part-time*" in the expression "permanent part-time position" used in the 2nd sentence and in section b), the language in what was to become clause 48.08 had been agreed to in September. The rest of article 48 was still in dispute but, from his perspective, the process defined in section a) of 48.08 is where the Union wanted to go.

[34] On December 13, 2009, during the course of a 4-day bargaining session in the presence of the mediator, the Employer modified slightly again, the wording of the top part of its own clause 48.08. As shown in the hand-written notes on the document, it dropped the operational requirements qualifier, and wrote: "the Corporation may **staff the vacant** position as follows…" According to the negotiator, the Union had backed off at that point from its original position that every position had to be filled, as the Employer remained adamant about retaining its right to decide to fill or not fill a position.

[35] Following this Union concession, the discussion centered on the process, or what happens after a position becomes open. How to fill any such position remained a concern for the Union, mindful as it was of what it had lost in arbitration the last time in making it subject to operational requirements. The Union wanted to ensure there was no management discretion in respect of the seven (7) new positions, while management insisted on having that prerogative in the future. As a result, both parties intended to find language that would prevent the filing of new grievances on that issue.

[36] A revised clause 48.08 by management on December 13 was the outcome of that discussion, says Mr. Gay, the disputed part of the sentence now reading: "*When the Corporation decides to fill a vacant permanent position, in the same job title as occupied by the employee, the following will occur:".* The change involved clarifying that the decision was "to fill a vacant permanent position", and formally removing the qualifier on operational requirements.

[37] In his view, what it did was ensure that the process outlined in the article would be followed, management having decided already to fill seven (7) new permanent positions. "Vacant" had replaced "available", but it simply meant a position to be filled including the new ones. Mr. Gay submits that, had the Corporation taken the position that this term was narrower than

"available", the Union would have said this was bargaining in bad faith as it was moving back.

[38] For the Union, either expression means the same. By agreeing to the proposed language of this clause, the Union understood that it would not grieve if management decided not to fill a position, but also that the seven (7) positions the LOU refers to were vacant, for they were not filled.

[39] Under clause 48.08, the "normal staffing process" would apply only after the process outlined therein had run its course, at which point there would be an open competition. Although not signed off on, agreement on the LOU was reached well in advance of this article, the last or second to last thing to be settled. According to Mr. Gay, he knew the expression found therein did not mean the same thing as that of clause 48.08. The Employer wanted the same language in the LOU, and the Union having settled clause 48.08 decided to leave it there even if it deemed it redundant. In his view, article 48 had changed to an extent that "the normal staffing process" was a new one, not the process used in the past.

[40] Parties signed off on the final text of clause 48.xx, later numbered 48.08, that same day. Crossing out "in the position" in the first sentence of paragraph a), and in reference to the requirement of "at least one year of service", was the only change made to the previous text.

[41] *Ms. Goger*. She is the Corporation's Vice-President HR, and its Chief Negotiator. Like her Union's counterpart, she has extensive bargaining experience, having held such a responsibility at the Museum for the last thirteen (13) years.

[42] Front line staff, she notes, has been a continuing theme and recurring issue in bargaining during that period. As per the Letter of Understanding (LOU) signed on November 18, 2002, the Corporation had committed itself that year "*to create ten (10) new permanent part-time positions within the bargaining unit with a minimum of thirty-two (32) assigned hours per week*". It added the condition that "*these positions will be staffed according to the provisions of Article 48 of the Collective Agreement*".

[43] One such provision (48.01) stated is that "*the selection of any candidate for a position for which the Alliance is the bargaining agent shall be made in accordance with the merit principle and the Corporation's Staffing Policies*". These policies are detailed in the document titled Staffing Policy (370) - Policy Manual, Volume 1 (October 2001 update), and include definitions such as *Posting* and *Area of posting candidates*, as well as the process to be followed when staffing occurs with, or without competition. According to Ms. Goger, the Corporation staffed the new positions at that time based on these requirements, and it received no complaint.

[44] The same situation repeated itself in 2006, with the signing on March 13 of a new LOU whereby the Corporation agreed to "*increase by five (5) the permanent part-time positions*", and to apply the normal staffing process. Again, it received no complaint. The grievance referred to by Mr. Gay, notes Ms. Goger, did not pertain to those positions but to a couple of others left unfilled at the time.

[45] She testifies that, based on the terms of the present LOU whose language was agreed to by PSAC as early as September 18, 2009, the Corporation did what it did in years past, i.e. it posted the new positions. This is what led to the filing of the present grievances.

[46] The situation that clause 48.08 is meant to address is when the Corporation decides to fill a permanent position. In that case, the normal staffing process comes into play only at the end. The idea behind this article, explains Ms. Goger, was to address the issues of vacancies "*as we move forward*". She made it clear to her Union's colleague that the Corporation would staff the new positions through competition, in contrast with the situation moving forward. Wanting to avoid arbitration on this matter, she stresses that clause 48.08 and the LOU were two separate issues, and that as far as she is concerned Mr. Gay understood that.

[47] She specifies in cross-examination that clause 48.08, as discussed in November 2009, meant to apply to "existing vacant positions", which the new positions were not. For these positions, staffing would proceed along the a), b), and c) steps of the process as defined, failing which normal staffing would take place. In her view, "available" referred to a position already existing that became vacant, i.e. one that had an incumbent who resigned, left or applied to a different position.

[48] In that same context, parties discussed operational requirements but the language proposed in December 2009 addressed the Corporation's concerns as it maintained its right to decide to fill a vacant position. She cannot recall discussing with the Union the idea of a definition for "vacant position", but that of the right of management to decide when a position became vacant, certainly was. She adds that front line staff was the focus of these discussions, as some vacancies had occurred.

[49] She did not want any misunderstanding as to what the normal staffing process meant, namely a competition. This explains that article 48 and the LOU remained the subject of separate discussions. When she signed off on

clause 48.08, she had no doubt that the process therein defined meant to apply to the situation "*as we move forward*".

[50] The LOU meant something different, because it represented an addition to the Corporation's complement of positions, those of which needed to be created, posted and staffed in the normal fashion. She stresses that, when the organization creates new positions, it strives to use a process that reflects the value of fairness and transparency, and that allows all qualified people to apply for new positions. Consequently, an employee occupying a position that subsequently became vacant in the meaning of clause 48.08 because he retired, left or was promoted, would have gone initially through such a "normal" staffing process.

[51] Responding to questions from Counsel for the Union on the staffing policy manual, she concedes that it applies equally to vacant and new positions. However, she reiterates that, in the present bargaining context, a vacant position meant one that "became vacant" and, as such, different from one just created.

[52] The theme of the present LOU, she reiterates, is the same as that negotiated in the two rounds previous. The Corporation posted and staffed through a competition the positions that resulted from it. While recognizing that article 48 changed significantly from the text in use in the previous years, she notes that clause 48.08 is clear as to whom it applies, namely the front line staff.

[53] Asked in re-examination if the Corporation had acquiesced to treating distinctly vacant and newly created positions, she states it had, but strictly on a "going forward" basis, and when a vacancy arises and the Corporation

decides to fill that specific position. The attendant staffing would then be made in accordance with the process defined in clause 48.08.

III

RELEVANT COLLECTIVE AGREEMENT PROVISIONS

ARTICLE 2
INTERPRETATION AND DEFINITIONS

2.01 *For the purpose of this Agreement:*
(…)
i)

(i) "Permanent full-time employee" means an employee who is hired for an indeterminate period of time and who normally works either 37.5 or 40 hours per week as specified in Article 25 (Hours of Work);

(ii) "Permanent part-time employee" means an employee who is hired for an indeterminate period of time to work less than the normal hours of work (37.5 or 40 hours) per week than the full-time employee, as specified in Article 25 (Hours of Work);

(iii) "Temporary full-time employee" means an employee who is hired on a full time basis (i.e. to work 37.5 or 40 hours per week) for a specified period of time for the purpose of:

(a) replacing permanent employees who are on leave with or without pay;

or

(b) filling temporary vacancies;

or

(c) a special project or temporary assignment with budgetary and/or specified time limits;

or

(d) non-recurring work.

(iv) Where the Corporation decides that the functions of the temporary full-time position are still required after twenty four (24) months, the employee shall be converted to an

indeterminate status, except where a temporary appointment pursuant to clause 2.01 (i) (iii) (a and c) above must be extended beyond the original termination date due to additional requirements. The individual in the temporary full-time position shall be granted non-probationary full-time status retroactive to the commencement date of the temporary full-time appointment;

(v) "Temporary part-time employee" means an employee who is hired on a part-time basis, i.e. to work less than 37.5 or 40 hours per week, for a specific period of time and who receives a premium in lieu of benefits;

(vi) Temporary full-time, temporary part-time and seasonal employees will be advised in writing of their termination date when hired. The Corporation may modify the termination date at its discretion due to unforeseen circumstances;

(vii) "Occasional employee" means an employee who has no scheduled hours and who is called in on short notice, or for unusual or unforeseen circumstances to fulfill the hours of a part-time or a fulltime employee.

ARTICLE 48
STAFFING

48.01 The Corporation agrees that the selection of any candidate for a position for which the Alliance is the bargaining agent shall be made in accordance with the merit principle and the Corporation's Staffing Policies.

48.02 The selection standards established by the Corporation for each position shall be reasonable in relation to the duties of the position being filled.

48.03 The selection criteria shall include the following elements: core competencies, experience, qualifications, knowledge, skills and abilities that are required to perform the duties of the position.

48.04 The Corporation shall give preferential consideration to an employee who has received notice of lay-off and who is working the notice period, and meets the basic requirements of the position

or where such basic requirements can be acquired within a four (4) month time period.

48.05 Should two or more internal candidates be considered equally qualified in terms of point ratings following the selection process with respect to the selection criteria outlined in clause 48.03, preference will be given to the candidate with the most service with the Corporation.

48.06 Should an internal and external candidate be considered equally qualified in terms of point ratings following the selection process with respect to the selection criteria outlined in clause 48.03, preference will be given to the internal candidate.

48.07 If an employee is offered a position, either on a permanent, temporary full-time or part-time basis further to the Notice of Lay-Off, and refuses the position, then the employee is deemed laid-off according to the provisions of Article 41- Lay-Off in the collective agreement and therefore not subject to further consideration as an internal candidate for future positions.

48.08 This clause applies to temporary part-time Hosts, Guides and Animators:

When the Corporation decides to fill a vacant permanent position, in the same job title as occupied by the employee, the following will occur:

a) A temporary employee, with at least one (1) year of service, and with the most service, and who meets the basic requirements of the job title and has received a satisfactory performance evaluation, will be offered the position;

b) If the temporary employee refuses the offer for the permanent position, then the employee will confirm his/her refusal in writing immediately to the respective Team Leader who will forward a copy to Human Resources;

c) The position will then be offered to the next temporary employee, as per (a) above;

d) In the event that no eligible temporary employee accepts the position, the normal staffing process will apply.

(…)

LETTER OF UNDERSTANDING
PART-TIME POSITIONS

The Corporation will create, post and fill seven (7) new permanent part-time positions with thirty (30) assigned hours per week within sixty (60) days of the ratification of the Collective Agreement. The posting of these positions will be done internally and the normal staffing process will apply.

IV

SUBMISSIONS

The Union

[54] According to Counsel, the question raised by these grievances is what staffing process the Employer should have used to fill the seven (7) newly created positions in order to comply with the LOU and the relevant provisions of the collective agreement? More specifically, is that process the one outlined in clause 48.08 of the collective agreement, or the one described in articles 48.01 and 48.07 of the same collective agreement?

[55] For the Union, the answer is the one designed in clause 48.08 of the collective agreement. There are many reasons. Firstly, its introductory sentence states that the clause applies to Hosts, Guides and Animators, while the other provisions of article 48 come under its general heading of Staffing.

[56] Secondly, few conditions exist for 48.08 to apply. They are the need for the Corporation to decide to fill the vacant position, and the requirement that the position bears the same job title, i.e. Host, Guide or Animator. Once these conditions are met, clause 48.08 will apply, submits Counsel. The use of "will"

in the phrase “the following will occur”, further illustrates that its application is mandatory once the stated conditions are met.

[57] The relevant facts are straightforward. The Corporation did decide to fill seven (7) vacant permanent positions, all of which bearing the identified job titles. The Employer argues that vacant has a different meaning whether it refers to a newly-created position, or an old one. The fact remains, however, that “vacant position” is a term defined nowhere in the collective agreement. In addition, the Staffing Policy provides no basis for treating distinctly these two types of positions.

[58] Going over the many definitions comprised in that policy, such as competition, staffing that includes all activities of this type, and merit, Counsel for the Union submits that the Employer intended “vacant” to capture newly created positions, as well as those that remained subject to competition and the merit principle. The Employer could have distinguished between the two but decided not to. Section 5.3 of the policy on the roles and responsibilities of the Corporations cadre of managers only refers to the need to fund the creation of new positions.

[59] The negotiating history on the definition and application of clause 48.08 supports the Union’s interpretation, Counsel argues. The terms of the staffing process changed on December 13, 2009 when parties reached a tentative agreement on its wording. As Mr. Gay made clear, the issue for the Employer was to avoid being forced to fill a position, while the Union insisted on an appropriate process to fill it. Understanding what a vacant position meant was not at issue. For Mr. Gay, available or vacant meant the same thing, and he left no doubt that, had the Employer tried to attach a narrower sense to vacant, the Union would have accused it to bargain in bad faith.

[60] The bargaining context matters greatly here. The strike lasted eighty-six (86) days with the key issues being job security and recognition of seniority. To think for a minute that, any time a new position of the same title is added, the Employer could circumvent clause 48.08, only agreed to after hard bargaining, is to call into question the very purpose of the clause.

[61] In support of the Union's position, Mr. Laryea refers to following decisions or text contained in his Book of Authorities: *Re Oil, Chemical & Atomic Workers, Local 9-599, and Tidewater Oil Co., (Canada) Ltd.* 14 L.A.C. 233; 1963 CLB 876 (Reville); [November 11, 1963]; *Re Horton Steel Work Ltd. and United Steelworkers Local 3598*, 3 L.A.C. (2d) 54, Ontario (Rayner); [April 11, 1973]; *Re F.A. Tucker (Atlantic) Ltd. and International Brotherhood of Electrical Workers, Local 1928,* 20 L.A.C. (3d) 33; 1985 CLB 8084, Nova Scotia (Outhouse); [April 18 1985]; Brown and Beatty Canadian Labour Arbitration - Labour Arbitration, Cases - Canadian Labour Law Library -- Internet Version Paragraph 4:2110; *Canadian Bank Note Co. and Graphic Communications Union, Local 41M*, 81 L.A.C. (4th) 107; 1999 CLB 12524, Ontario (Brown); [April 26 1999]; Brown and Beatty Canadian Labour Arbitration - Labour Arbitration Cases - Canadian Labour Law Library -- Internet Version — Paragraph 4:2240; Brown and Beatty Canadian Labour Arbitration - Labour Arbitration Cases - Canadian Labour Law Library -- Internet Version — Paragraph 4:2100; *University College of the Cariboo and C.U.P.E., Local 900,* 108 L.A.C. (4th) 218; 2002 CLB 12908, British Columbia (Gordon); [April 29, 2002]; *Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.* 15 L.A.C. 161;1964 CLB 740 (Reville); [July 7, 1964]; *Leitch Gold Mines Ltd. et al v. Texas Gulf Sulphur Co. (Incorporated) et al.* 3 DLR (3d) 161; 1968 CLB 241 (Ontario High Court); [November 29, 1968].

[62] As in *Re Oil, Chemical & Atomic Workers*, a vacant position is one that, in addition to being empty, requires evidence of adequate work to fill it in the

opinion of the Company. Here, once the Corporation posts the newly created positions, they are manifestly vacant, for the collective agreement nowhere defines, as does Ms. Goger, vacant as meaning to have had a previous incumbent. For the Union, when as required by 48.08 the Corporation "decided" to create the new positions and to post them with the same titles of Hosts and Animators, vacancies were the result. With the stated conditions met, the multi-step process envisaged under 48.08 had then to apply.

[63] Acknowledging that the wording of the LOU can create a conflicting situation, the Union submits that the "normal staffing process" it refers to, must be read in the context of the collective agreement, namely with reference to Section 48 in general which also includes 48.08. Again, there is no definition of this expression in the agreement, and its meaning in previous LOUs was something different in the absence of a clause such as 48.08.

[64] In the view of Counsel citing Brown and Beatty on the "normal and ordinary meaning" of words in interpretation, supra, Paragraph 4:2110, one should not assume that like terms receive the same meaning throughout different collective agreements. The staffing process under article 48 that various LOUs refer is a changed one with the advent of clause 48.08. In the result, the present LOU captures article 48 as a whole and revised as it was in this round of bargaining.

[65] Based on the evidence of Mr. Gay, parties were at odds on that staffing provisions of article 48 when the language of the LOU was agreed on September 18, 2009. Yet, to get full agreement required knowing what the staffing process under 48 would look like. This means, submits the Union, that there was no agreement that the normal staffing process under the LOU would exclude clause 48.08, its own interpretation being that all section 48 applies.

[66] In addition, this interpretation is the only one that does not create anomalies or conflict with the collective agreement. Inversely, the Employer's position implies that, through the LOU, it can circumvent clause 48.08, or that the former should take precedence over it. If such were the case, it would need to be clearly stated, which it is not. The Union's interpretation keeps the integrity of the collective agreement as a whole, with no provision superseding another or creating an anomaly.

[67] As articulated by Brown & Beatty, supra, Paragraph 4:2100, if you cannot harmonize two linguistically permissible interpretations, the arbitrator should be "*guided by the purpose of the particular provision*". Accepting the Employer's interpretation that the effect of the LOU is to negate that clause 48.08 applies to newly created positions, is the same as saying that in tabling its proposal the Union bargained away the job security and seniority of the front line staff it was most concerned with, and went on strike for. It would mean that the Corporation could create new positions in these titles and never follow 48.08.

[68] As recognized by the case law and stressed by the Board in Re United Electrical Workers, supra, p. 162, seniority is one of the most important benefits secured by the labour movement for its members, and should be affected only by clear language in the agreement, and interpreted "with the utmost strictness" by arbitrators.

[69] The Union requests therefore that the provisions at issue here be construed in like fashion, that the grievances be allowed, and that the Employer be ordered to staff the grieved positions in accordance with the requirements of clause 48.08, and to award successful candidates compensation for loss of wages during the relevant period. It asks finally for the

Board to retain jurisdiction over any matter from the application of the preceding order.

The Corporation

[70] For Counsel, one cannot make assumptions regarding a deal parties made and the wording afterward. The so-called anomalies do not exist, and the facts of the case do not prove anything. The meaning of vacancy is clear in the present context, and in no need of the all general case law cited by his colleague.

[71] What should be noted according to Mr. Mitchnick, is that the Union achieved a breakthrough in this negotiation, given the public service context in which the Corporation manages staffing. Based on the standard operating procedure, positions are staffed in accordance with the principles of transparency, and accessibility of the positions posted to qualified candidates. As it turned out, the Corporation responded to the concerns expressed by front line staff with a major move.

[72] Vacancy is here the issue, and its meaning as it relates to the particular context involved. The relevant documents are simple and straightforward. The LOU is part of the bargaining history between the parties. At the outset of the last round of bargaining, there were a number of issues affecting that staff that were of concern to the Union. A major one was the difficulty of designing a process that would give these employees a fair and equitable chance of attaining, through competition, regular part-time positions for which they were qualified.

[73] To that end, the Corporation committed itself to creating new positions, the only stipulation being that there would be a quid pro quo: the positions

would be posted internally, and the normal staffing process would apply. This was, in no way, a new concept or the use of new language. The previous agreements contained the same language aimed at the standard requirements of a federal government related staffing process, or a "normal" one, such as transparency and access.

[74] In reference to the issue framed initially by his colleague as to the staffing process to be used for the new positions, Mr. Mitchnick submits that the Corporation did provide an answer to the question, insisting that they be staffed through internal posting and the normal staffing process. This, says Counsel, is why Mr. Gay was at pain during cross-examination to explain the meaning of the normal staffing process in the LOU relative to that of article 48.

[75] Despite efforts by the Union to sell its interpretation, the facts of the case to take into account remained the signing of a new LOU, and the introduction of new language in the form of clause 48.08 aimed at a particular group of employees. Both sets of provisions exist side by side and, as Mr. Gay knows all too well, normal staffing process means a competition. For Counsel, the problem with the latter's explanation of the new meaning of normal staffing process under article 48 is that, when you go to clause 48.08, it itself reverts to the same expression.

[76] The Corporation in good faith, states Counsel, conceded a new process to apply when people left, allowing for the streamlining of the employees in front line occupations (Hosts, Guides and Animators). When there is still no one qualified after running through the other specified steps, the process it sets out goes back to the normal staffing one. As explained, the new process is one that deals with vacancies arising in the future.

[77] To answer the question of how to fill the positions the Museum has agreed to create, there is no need to go beyond the LOU. This is, as well, what the Arbitrator should focus on, suggests Mr. Mitchnick. The only real issue that 48.08 could possibly raise is about situations involving the creation of new positions. However, under 48.08, the commitment to create new positions would prove a rather "poor fit" as the decision to do so rests entirely on the Corporation. This said, the thing to note is that the clause makes it clear that every time a vacancy is created in that employment category, employees who qualify will be slotted in as per the terms of that clause.

[78] In any event, the view of Counsel is that nothing "takes me to article 48". This case only deals with the LOU and the process it defines. The definition of the normal staffing process is an issue for another round.

V
ANALYSIS AND DECISION

[79] As implied by this last remark from Counsel for the Employer, questioning the need for any interpretation regarding the provisions contained in both the LOU and article 48 and its clause 48.08 provides a useful starting point for our analysis of the issues raised by the two instant grievances.

[80] As the doctrine and the case law make clear, extrinsic evidence, especially that consisting of bargaining history, is something adjudicators will resort to only when confronted with ambiguities, or lack of clarity found in the language of a contract or that of a collective agreement. As captured by Morton Mitchnick and Brian Etherington, Leading Cases on Labour Arbitration, Part 3. Contract Interpretation, Lancaster House, Online Edition, **16.4.1**, under the heading of *Parole Evidence Rule*, the point is the following:

> *At common law, evidence extrinsic to a written agreement, or "parole evidence", is generally inadmissible to contradict, vary, add to or subtract from the terms of the agreement. Where the terms of the written agreement are ambiguous, however, extrinsic evidence, such as past practice or negotiating history, may be admissible as an aid to interpretation in order to resolve the ambiguity. […] arbitrators tend to pay heed to these common law principles, even where the applicable labour relations legislation affords a broad discretion to admit evidence which would be inadmissible in a court of law.*

[81] Such is also the case in a federal context where paragraph 16 c) of the Canada Labour Code – Part I gives the arbitrator or the arbitration board the power to receive evidence it sees fit, "*whether admissible in a court of law or not*". This said, the need to pay heed to the stated common law principles remains, as the Ontario Court of Appeal in *R. v. Barber* (1968), 68 D.L.R. (2d) 682 reminded us when it quashed the award of a board of arbitration which made use of extrinsic evidence to interpret a collective agreement whose language was clear and unambiguous.

[82] Citing this case in the remainder of the preceding passage, the same authors point out:

> *The Court observed that the provision of Ontario's Labour Relations Act (now S.O. 1995, c. 1, Sch. A) granting arbitrators latitude with respect to the admissibility of evidence does not relieve them from ultimately acting only upon the basis of evidence having "cogency in law".*

[83] This obligation flows from the very nature of the task that awaits the arbitrator when asked to interpret the terms of a collective agreement, namely to discover what it is that the parties really intended when they agreed to that language. Here, the task starts with the language of the LOU.

[84] The first thing to note is that the language it uses is neither new nor elaborate. In fact, it mirrors precisely the one discussed and agreed to in the two previous negotiating rounds. The way parties went about giving it effect also makes it clear that the "normal staffing process" to be applied was that of a competition in a federal government sense. Based on the "plain meaning" rule of construction, whereby terms in a contract should be understood in their primary and ordinary sense, the language used does not appear, on its own, to present any real ambiguity.

[85] Nonetheless, as we saw, this is not crux of the Union's argument with regard to the LOU. As I understand it, it states that the primary meaning of the expression is no longer what it used to be under the previous agreements. By virtue of the change introduced in clause 48.08 on the staffing of front line staff positions, goes the argument, the normal staffing process to which the LOU refers this time has changed to an extent that it now includes the "vacant positions" created by, and resulting from this same LOU.

[86] How well founded is this argument? A key reason invoked in support is the anomalies or incoherence in the application of the new collective agreement that would result from the staffing process used in February 2010 by the Corporation to staff the new positions it had committed itself to create and fill with the signing of the LOU. In the Union's view, this would have a deleterious effect on the application of clause 48.08, for it would deprive it of the very meaning a long strike and tough negotiations had finally managed to achieve.

[87] On close reading of the clause, the Board finds it hard to see how it would do such thing. Measured against the goal the Union had set for itself in respect of front line staff at the start of the negotiations, and from the standpoint of the scope of its application, the clause certainly falls short. However, the detailed procedure it envisages, short of the last step looping it

back to the normal staffing process, effectively guarantees that group of employees a fast track to permanent temporary employment. As rightly emphasized by Counsel for the Employer, this is an accomplishment of real significance given the difficult negotiating environment the chief negotiators both found themselves in.

[88] As well, it is important to keep in mind that what a negotiating party sets for itself as a goal, and what the language ultimately agreed to says about the outcome of the actual negotiation, are two very different things. Now, there is little debate as to what matters most when the need to discover the real intention of the parties presents itself. As noted in *Halsbury's Laws of England*, and whose quote is cited in Brown & Beatty, supra, 4:2100, p. 4-40:

> *But the intention must be gathered from the written instrument. The function of the Court is to ascertain what the parties meant by the words they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention.*

[89] As seen, a good deal of Mr. Gay's testimony centered on how important for the Union was the goal of securing an agreement that would spare members of this group of employees the need to compete for their own jobs. Yet, what his evidence also shows is that the Corporation successfully opposed his attempts to discard, as a redundancy, the "normal staffing will apply" expression from the current LOU. In the result, the language was practically unchanged from that of the previous LOUs, whose application by the Corporation went unchallenged.

[90] Again, apart from the clarity of, or lack of ambiguity in the expression itself, the LOU is just as clear when it comes to the specific actions the Corporation must undertake after the agreement goes into effect. Indeed, it commits itself to *"create, post and fill seven (7) new permanent part-time*

positions with thirty (30) assigned hours per week within sixty (60) days of the ratification of the Collective Agreement". In the same breath, it sets out how it will give effect to its commitment, namely through internal posting and the application of the normal staffing process.

[91] As self-contained as this provision is, it becomes difficult to identify or pinpoint any element likely to give rise to questions about what it means or what its application should be. This observation includes reference to the normal staffing process whose past, primary meaning seems to me little changed, even in the context of a revised article 48.

[92] When read in the context of the entire article, clause 48.08, by far the most significant change to the article, does not appear to alter the usual meaning of the expression. On the contrary, keeping it as the last step in the newly designed, group-specific process, illustrates how different it remains from the design of the new one, and how it still is the dominant process applicable to most of the regular staffing activities the Corporation engages in.

[93] In respect of the Union's argument, it is worth noting that the substantial change introduced in article 48 in the form of clause 48.08 certainly modified the staffing process in a generic sense, but it did so without affecting the nature or definition of the "normal" staffing process, as its use in the same clause demonstrates.

[94] In fact, the clear effect of that change was to add an additional, dedicated staffing track, not meant to be confused with, or to replace the normal one, except to be sure when front line staff positions become vacant. At that stage, the Corporation offers those positions to part-time Hosts, Guides and Animators who express an interest and meet the stated conditions. In my view, there is little in the extrinsic evidence presented that suggests that the two

negotiators were unaware that they were dealing with two distinct, separate processes. As we know, they settled the LOU early into their talks, and their subsequent and difficult negotiations of clause 48.08 provide no indication that coupling, or bridging the two was part of the mix.

[95] In any event, the critical point to remember for our purpose is that the expression "*the normal staffing process will apply*" finds itself in two separate parts of the agreement, with no real indication of a different meaning in one and the other. As observed in Brown & Beatty, supra, 4:2120, p. 4-46, citing abundant case law to that effect:

> *Another related general guide to interpretation is that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning, and that they were not intended to be in conflict. However, if the only permissible construction leads to that result, resolution of the resulting conflict may be made by applying the following presumptions: special or specific provisions will prevail over general provisions; where a definition conflicts with an operative provision, the operative provision prevails; where the same word is used twice it is presumed to have the same meaning; where two different words are used, they are intended to have different meanings; [..] and finally, in the case of conflict between an earlier and later clause, there is some authority to the effect that "the part of the contract which is written first overrides that which is written later, and it is only otherwise when the later clause clearly spells out the overriding effect intended", although the better view would seem to be that effect should be given to that part which best carries out the real intention of the parties.*

[96] It is worth noting that the specific cases they refer to on the use of the same word twice are: *Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Reville); *Calgary (City)* (2010), 196 L.A.C. (4th) 110 (Wallace) (probationary period); *Jacobs Catalytic Ltd. v. I.B.E.W., Local 353* (2009), 188 L.A.C. (4th) 193 (Ont. C.A.), at para. 39. Irrespective of the pertinent presumptions invoked here,

and assuming the expression would require an interpretation, the fact remains that the one proposed by the Union is up against far more hurdles than that applied by the Corporation when it filled the newly created positions in February 2010.

[97] In view of the above, the Board does not deem necessary to address the issues surrounding the proper definition of vacant and new positions. As noted by Counsel for the Union, the collective agreement or, for that matter, the Staffing Policy leave those terms essentially undefined. Still and all, as we just saw, the LOU is as explicit as it is clear on how to staff the newly created positions. Even when compared to its subsequent use in clause 48.08, the normal staffing process it refers to still carries with it the notion of a competition, as it did under previous LOUs.

[98] For all the above-mentioned reasons, the Board *dismisses* both these grievances.

François Bastien, Arbitrator.

Signed and issued in Gatineau on August 9, 2011

ANTEA INC.
1009-25-FED/X
S/A-89-11 (FED/X)