

AMERICAN ARBITRATION ASSOCIATION  
VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration  
Between:  
Union,

**CASE: Lyons # 8**

-and-

, Employer.

Gr: Contract Interpretation

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**OPINION AND AWARD**

BACKGROUND /FACTS

This grievance presents an issue of contract interpretation. Specifically, the parties are in disagreement over the meaning and relationship of their Letter of Agreement #11 and the management's rights clause of the collective bargaining agreement as these provisions relate to the relocation of the University's Theatre Department and facilities in 2004. The Association claims that the Letter of Agreement #11 was violated when the University did not provide an on campus theatre and adequate set shop before relocating the Theatre Department to the University's Second campus. The University argues that the Letter of Agreement #11 was not violated, and further urges that the Arbitrator does not have the authority to order the remedy requested by the Association (i.e., order immediate construction of an on campus theatre). The operative facts underlying the Association's grievance are largely undisputed by the parties. Prior to 2002, the University operated the main campus

located on W. Main and another located on W. River. The University's Theatre Department had moved to the River campus in 1997. The River campus offered a larger performance space, and it had set and costume shops located close to the theatre for easy access. There was also ample teaching and office space for the Theatre Department at the River location.

Faced with some financial difficulties, in 2001 the University undertook a review of all of its departments and programs. In 2002 the Review Committee recommended that the University sell its River campus and relocate the programs housed there to the Second campus. It also recommended that some departments be consolidated as part of the relocation. A Consolidation Committee was formed to oversee the transition. Buildings at the Second campus were renovated to provide for new office and classroom space for the relocated departments in advance of the move, which was scheduled to take effect over a period of several years.

The first phase of the relocation apparently did not go as smoothly as planned. There was testimony that when the Education Department moved to the Second campus, some of the office equipment (phones, computers, etc.) was not yet hooked up or working, and not all of the office doors were equipped with locks. Because of concerns raised by faculty over these problems, the University and the Association negotiated Letter of Agreement #11 to address the faculty's concerns. The relevant portion of Letter of Agreement #11 provides:

The University and the Union acknowledge that it is the right of University Management to select, implement and manage its academic and non-academic operations and programs as outlined in Article IV of the Collective Bargaining Agreement subject to the express and specific terms contained therein . . . The parties also recognize, however, that changes in working conditions occur whenever academic units (departments, schools/college, programs) are created or consolidated, or faculty are relocated, and that the parties desire that such changes should be implemented in a manner which minimizes any impact on individual

bargaining unit members. The basic underlying principle toward which both parties strive is that individual bargaining unit members shall be in comparable or, ideally, more desirable working conditions after becoming a member of a consolidated or newly created academic unit, or after a physical relocation. . . . Toward this end, no member shall be moved before all facilities, including classes and offices in full working condition, are in place. It is agreed, therefore, that issues such as, but not limited to, telephones, computers (both hardware and software), office privacy and general surroundings, research and teaching support (including secretarial, laboratory, audio-visual and other classroom presentation equipment, library materials, graduate and technical assistants, research grants and travel opportunities) and work load issues (including release time, overload and summer teaching opportunities) shall be equitable within the newly formed or created academic units and comparable to what the bargaining unit member had available before any movement of faculty . . . (Joint Ex. 4).

Letter of Agreement #11 was later fully incorporated into the parties' collective bargaining agreement.

The Theatre Department expressed concern over the space it would occupy at the Second campus months before it was scheduled to move. As for office, classroom, and rehearsal space at the newly renovated Janet Hall on the Second campus, the Department was satisfied with the facilities. However, the Second campus did not have proper performance space. Theatre desired comparable or better facilities than it had enjoyed at the River campus. In particular, it wanted to have a "black box" performance space with set and costume shops located nearby. Beginning in the fall of 2002 and continuing through the end of 2003, the Consolidation Committee and the Theatre Department met on a number of occasions to discuss options for new performance facilities at the Second campus. One plan offered by Theatre involved converting the Student Center Ballroom into a black box theatre. The plan was considered by the University, but was ultimately rejected since the proposed renovations called for permanent adjustments to the space that precluded other uses for the Ballroom. (The Student Center Ballroom is the only large meeting/conference

facility at the Second campus. The University lost its large convention facilities with the sale of the River campus.)

In December 2003 the University signed an agreement for the sale of the River campus with the County Community College. Closing occurred in April 2004, and all but one of the University's programs were scheduled to vacate the River campus by August 2004. At the time of the purchase agreement, the University and the Theatre Department still had not resolved the issue of performance space on the Second campus. In December 2003 and continuing through the spring of 2004, the University and Theatre Department representatives negotiated with Private College (Private) about the possibility of a "joint venture" or a similar arrangement that would allow the Theatre Department to stage its productions at the Private theatre while the University explored options for performance space on the Second campus. On February 5, 2004, the Association filed this grievance protesting that the University had violated Letter of Agreement #11 because comparable working conditions were not available to the Theatre Department at the Second campus when it moved.

The Theatre Department relocated to the Second campus in April 2004. The University had established classrooms, a costume shop, and faculty offices for Theatre in advance of the move. However, there was still no on campus performance space for the Theatre Department's productions. The University and Theatre Department representatives continued to negotiate with Private concerning the use of that school's performance space for the upcoming academic year. The University was simultaneously considering plans (funding, location, etc.) for a permanent theatre facility on the Second campus. Ultimately, in July 2004, the University and Private entered into an agreement for use of Private's theatre during the 2004/2005 school year (which was subsequently extended to cover the 2005-2006 school

year). In August, the University located the Theatre Department's set shop in the basement of the Architecture Building on campus. (This site was the original location of the set shop before Theatre moved to the River campus in 1997). Also in August the University adopted the location of a theatre on its Second campus as part of its Five Year Plan. The parties to this grievance continued to seriously discuss various options for building a black box theatre on the University's campus throughout this period.

The Five Year Plan required approval by the University's Board of Trustees and approval of necessary financing. According to the Employer, the Board of Trustees has not yet adopted the Five Year Plan because the University has not yet hired a Chief Financial Officer. The Employer maintains that a CFO is instrumental in obtaining the financing required to implement the plan. It is expected that the plan, including construction of a theatre facility on the Second campus, will be adopted once a CFO is in place.

The parties were unable to resolve the grievance at the various steps, and the Association filed a demand for arbitration on May 18, 2004. Three days of hearing on the grievance were held on May 4 and 23, and June 22, 2005 at the University. Twenty-one joint exhibits were admitted into evidence. Testifying for the Association were L Bird, Contract Maintenance Officer; Y Rose, Theatre Department Chair; and M Tree, Theatre faculty. S Knee, Assistant Vice President for Human Resources; B Foot, Provost and Vice President for Academic Affairs; G Toe, University President; and T Hand, Assistant Vice President for Facilities Management testified on behalf of the University. Both parties submitted comprehensive post-hearing briefs in support of their positions on August 17, 2005.

Association:

The Association urges that the clear and unambiguous language of Letter of Agreement #11 was violated because the University did not have a fully functioning, on campus theatre and comparable set shop for the Theatre Department before the Department was relocated to the Second campus in April, 2004. In other words, the Theatre Department was not provided with "comparable" facilities in advance of the move as required by Letter of Agreement #11. According to the Association, there is no dispute that the University still does not have an on campus theatre space, therefore it is clear that the relevant language of the Letter of Agreement was violated. Furthermore, the on campus scene shop and the theatre space leased from Private College are woefully inadequate, present many problems and inconveniences, and therefore cannot be considered "comparable working conditions" sufficient to satisfy the parties' agreement.

The Association also argues that management's rights to control its buildings, facilities, and properties as set forth in the collective bargaining agreement are limited by the more specific and express language of Letter of Agreement #11. That is, the University made an agreement with the Association to provide "comparable working conditions" prior to relocation of the Theatre Department to the Second campus which limited its general right to control property and buildings. The University must therefore comply with the specific terms of that agreement and construct a comparable or better theatre facility on the campus.

Finally, it is urged that the remedy requested in this case, i.e., order the University to immediately build a theatre on its Second campus, is neither unjust, unreasonable, nor unduly harsh. According to the Association, both parties fully

intended that the departments involved in the consolidation of campuses would have facilities available before the relocation. The University was aware of the requirements of Letter of Agreement #11 and the fact that it did not have a theatre facility in place at the Second campus. The University was able to make comparable accommodations for all of the other relocated departments, and the Theatre Department should not be treated differently. The remedy requested here is not unexpected under these circumstances, and by agreeing to provide comparable working conditions the University assumed the risk that a situation such as this could arise.

The Association requests that its grievance be granted and asks that the University be ordered to immediately construct a new theatre on its campus which is comparable or more desirable than the theatre at the former River location. The Association has asked for similar relief with respect to the set/scene shop, or to have the current set/scene shop moved to a more desirable and convenient location.

University:

The University argues that Letter of Agreement #11 is a kind of "maintenance of conditions" clause that remains subordinate to the management's rights provision of the collective bargaining agreement. According to the University, it has met its obligations under Letter of Agreement #11 by providing the Theatre Department with offices for faculty, suitable classrooms, comparable set and costume shops, and comparable leased theatre space in which the Department can stage productions until a permanent performance space is built on the Second campus. The Association has failed to meet its burden of proving that these conditions are not comparable such that Letter of Agreement #11 was violated. Letter of Agreement #11 did not require the

University to build a new theatre before the Department was relocated. Management retains exclusive control over its buildings and property.

The University also urges that Letter of Agreement #11 was intended to cover working conditions such as adequate faculty offices and equipment, sufficient classroom space, administrative support, etc. It was never intended, nor does the language suggest on its face, that the University ceded or limited its control over the building and maintenance of property and facilities. Nor is the language of Letter of Agreement #11 specific enough, as the Association urges, to control inherent managerial rights.

Finally, the University maintains that this arbitrator does not have the contractual authority to award the relief requested by the Association. In other words, the arbitrator does not have the power to substitute his judgment for that of management in this critical area of employer rights, and certainly cannot compel the University to embark on a multi-million dollar construction project. Only the Board of Trustees can make that decision. In addition, equitable considerations, such as the enormous financial burden the Association's requested remedy would place on the University, and the fact that the Theatre Department currently continues to operate as a viable academic department, compel the conclusion that the Association's grievance must be denied.

Additional facts and arguments will be discussed, as necessary, below.

### ISSUE

The parties have framed the issue in this case somewhat differently. According to the Association, the issue is, "Did the University violate Letter of Agreement #11 by failing to place bargaining unit members into comparable or, ideally, more desirable working conditions?" The University states the issue as whether it had the contractual



authority to provide for the use of a temporary theatre at Private College until it could build its own theatre, where bargaining unit members had otherwise comparable facilities on campus.

### RELEVANT CONTRACT PROVISIONS

#### Article IV: Management Rights and Responsibilities

4.1 University Management: The Employer has the legal responsibility and, subject to the express and specific terms of this Agreement, the right to select, implement and manage its academic and non-academic operations and programs. As part of these rights and responsibilities, the Employer shall have the right to:

(c) Determine the acquisition, location, relocation, installation, operation, maintenance, modification, retirement, and removal of its equipment and facilities.

(d) Control all Employer property.

The Employer's right, privilege and responsibility to carry out the ordinary and customary functions of managing its academic and non-academic operations which are not specifically curtailed by this Agreement shall continue in full force and effect. In the event that the specific terms of this Agreement conflict with such rights, privileges and responsibilities, then the specific terms of this Agreement shall be controlling to the extent necessary to resolve such conflict.

#### Letter of Agreement #11

ADJUSTMENTS IN WORKING CONDITIONS FOR CONSOLIDATED, NEWLY CREATED OR RELOCATED ACADEMIC UNITS AND FACULTY. The University () and the University Professors' Union (PU) acknowledge that it is the right of University Management to select, implement and manage its academic and non-academic operations and programs as outlined in Article IV of the Collective Bargaining Agreement subject to the express and specific terms contained therein. . . The parties also recognize, however, that changes in working conditions occur whenever academic units (departments, schools/colleges, programs) are created or consolidated or faculty are relocated, and that the parties desire that such changes should be implemented in a manner which minimizes any impact on individual bargaining unit members. The basic underlying principle toward which both parties strive is that individual bargaining unit members shall be in

comparable or, ideally, more desirable working conditions after becoming a member of a consolidated or newly created academic unit or after a physical relocation. . . . Toward this end, no member shall be moved before all facilities, including classes and offices in full working condition, are in place. It is agreed, therefore, that issues such as, but not limited to, telephones, computers (both hardware and software), office privacy and general surroundings, research and teaching support (including secretarial, laboratory, audio-visual and other classroom presentation equipment, library materials, graduate and technical assistants, research grants and travel opportunities) and work load issues (including release time, overload and summer teaching opportunities) shall be equitable within the newly formed or created academic units and comparable to what the bargaining unit member had available before any movement of faculty. . . . (Joint Ex. 4).

### DISCUSSION

As noted previously, this is a contract interpretation case involving the relationship between Letter of Agreement #11 and the management's rights clause of the collective bargaining agreement. The Association's basic position is that Letter of Agreement #11 is clear and unambiguous on its face, and was violated when the University relocated the Theatre Department without first having built a performance space on its Second campus. The University's position is that Letter of Agreement #11 does not supersede management's right to control its buildings and property, and in any event, the relief requested by the Association cannot be awarded by the arbitrator. This case presents important issues for both sides, namely, employee working conditions and the scope of management's authority.

The parties' collective bargaining agreement gives the University the broad and exclusive authority to control its property. However, management's rights, even if broad, are not absolute. As the Association has argued, management's rights may be limited by express and specific terms contained elsewhere in the parties' contract. When called upon to consider contractual limitations to management's rights, arbitrators will typically strictly construe limiting provisions. At the same time, an

arbitrator called upon to interpret a provision of the parties' agreement must construe the agreement as a whole in order to give full effect to the parties' intent, and so as not to negate or render void any negotiated provision of the agreement. The collective bargaining agreement is unlike the formal contract in that it is a living agreement that governs the parties' day-to-day working relationship. Consequently, giving full effect to the intent of the parties also includes consideration of how the parties have in fact put their agreement into effect through practice. In all cases involving management authority, an employer is not permitted to exercise its authority in an arbitrary, capricious, or discriminatory manner, as such behavior is contrary to the principles underlying all collective bargaining relationships.

I am not convinced by the Association's argument that the term "comparable working conditions" used in Letter of Agreement #11 is clear on its face. Professor Bird, witness for the Association, testified that "comparable working conditions" meant not exact, but virtually unchanged working conditions. He went on to describe his understanding of comparability, using a chemistry lab as an example. There is a lot of grey area and ambiguity in Professor Bird's description. For instance, an office could be much smaller, and still be comparable. So long as faculty was "not locked out" from access to equipment, working conditions could be deemed comparable. Teachers and resources should be available "at the same level of effectiveness." If members are able to do their jobs at a new location working conditions would be comparable. Reasonable persons could argue over whether working conditions are comparable or not based on Professor Bird's description. That the lack of an on campus theatre space constitutes a violation of Letter of Agreement #11 is not a foregone conclusion.

On these facts and circumstances, and using the Association's own descriptive testimony as a guide, it is reasonable to conclude that the facilities the University had in

place for the Theatre Department at the Second campus constituted "comparable working conditions" for the purposes of Letter of Agreement #11. The Theatre Department still has access to a proscenium theatre to put on its productions. The construction of the floor and the lighting apparatus may be more difficult to work with, and the location may not be ideal, but the Theatre Department is not prevented from presenting quality productions. The Department has ready access to the facilities and equipment necessary to stage performances. While constructing and moving sets from the scene shop's current location may be less convenient than at River, there has been no demonstration that the scene shop cannot produce sets at the same level of effectiveness. Emails from Association representatives show that other facilities available to the Theatre Department (classrooms, faculty offices, etc.) are more than satisfactory. The Association's grievance seems based less on comparability of working conditions than on personal convenience for faculty.

In a similar vein, I don't believe from the evidence and testimony presented by both parties that the language of Letter of Agreement #11 was ever intended to force the University to construct buildings so that Association members could have identical or more desirable working conditions. Control over University buildings and property is a fundamental management right, and is spelled out explicitly in the contract. It is highly improbable that the University would cede this fundamental right, particularly to such a degree that the Association could mandate the construction of facilities. More importantly, in order for Letter of Agreement #11 to "trump" management's rights, the limiting language must be express and specific, and will be construed narrowly. In describing examples of working conditions Letter of Agreement #11 uses examples such as telephones, computers, office privacy and "general surroundings," classroom equipment, library facilities, research grants and support staff. Standing alone, this

language is not specific enough to limit the express terms of Section 4.1 of the collective bargaining agreement. Additionally, the examples used describe office equipment and teaching staff. Construction of new buildings or facilities is not mentioned. There was uncontroverted testimony that this was the intended purpose of Letter of Agreement #11 - to ensure that faculty is provided with the necessary resources to teach (offices, computers, door locks), after the first phase of the transition proved that some teachers did not have these resources before the move. The language simply cannot be reasonably read to require the University to build entirely new facilities.

The critical issue in this case, however, is the matter of remedy if a violation were to be found. The Association has asked for the immediate construction of a black box theatre on the University's Second campus. Even if the Employer violated Letter of Agreement #11, the writer does not possess the authority, contractually or otherwise, to award the relief requested by the Association. The Arbitrator's authority is limited by Section 8.8 of the parties' collective bargaining agreement:

[T]he arbitrator will have no authority to . . . (ii) substitute his/her discretion or judgment for the Employer's judgment with respect to any matter this Agreement consigns to the Employer's discretion or judgment

As noted previously, Section 4.1 of the parties' agreement clearly vests the University with the right to control its property, including the location, installation, and modification of its facilities. To order the University to immediately construct a theatre on its Second campus would amount to substituting the arbitrator's judgment for that of the Employer, an act well beyond the scope of the contractual authority cited above.

Practically speaking, the Association's requested remedy is also unrealistic. Construction of an on campus theatre is an enormous and expensive undertaking that cannot be accomplished immediately. Millions of dollars must be raised through

financing or other means; a location must be selected; plans designed; contractors and builders will need to be hired; it is also possible that demolition will occur and that students, faculty, parking, etc. will need to be relocated during the construction. If the necessary funding could not be immediately obtained in order to comply with the requested remedy, funds might have to be diverted from other equally important University functions.

Although the Theatre Department is frustrated with the current situation, several points should be remembered. First, while the conditions may be less convenient than before the relocation, the Department does have the facilities necessary to continue operating a quality program for its students. There are classrooms, faculty offices, rehearsal areas, set and scene shops. A proscenium theatre similar to the theatre at the River campus is available at nearby Private College. Second, the University fully intends to build the desired black box theatre space desired by the Association. Architects have been contacted, the project has been evaluated for cost, a tentative location has been selected, and the project has been given a high priority in the University's Five Year Plan. Additionally, the University has shown that it is very supportive of the Department and its programs. It has acted in good faith by engaging in continuous dialogue with the Theatre Department over the construction of what appears will ultimately be a performance space that meets all of the Department's ideally desired specifications.

AWARD

For the reasons discussed above, I find that the University did not violate the parties' Letter of Agreement #11. Moreover, the relief requested by the Association is beyond the scope of my authority. Accordingly, the Association's grievance is denied.

Respectfully submitted,

  
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Dated: September 27, 2005