

“The Employer, on the other hand, submits that the Houlden amendments brought about a fundamental change under which it would henceforth be permitted to permanently or temporarily reassign for reasons of patient care without regard to the job posting provision and without triggering a layoff. While arbitrator Houlden did not give reasons, the other two members of the board did express themselves in writing. I can say with absolute certainty that if the intention of the Houlden Board had been to effect fundamental change of the type that the Employer maintains that it did, both of the parties' nominees would have confirmed this to have been the case. Neither one did. Arbitrator Mayne, appointed by the union, made no reference in his addendum to the board having given to each and every one of the 175 participating hospitals covered by the award the right to reassign without regard to the job posting provisions and without triggering a layoff, when previously any reassignment, even for less than one shift, triggered a layoff. Indeed, if this type of change had been intended, it is safe to assume that arbitrator Mayne would have written a strong dissent, not just an addendum. Arbitrator Fillion, appointed by the hospitals, in his partial dissent, does address the changes to the layoff language. He states: It must be acknowledged that the Hospitals did achieve significant gains in this area particularly in the streamlining of the lay-off process by reducing multiple bumping and the removal of single or partial shift reassignments from the definition of layoff. (emphasis added)

It is clear from the foregoing that the intention was to make the operationally significant, yet incremental change acknowledged by the union and not the fundamental change sought by the hospital in this case.

No changes to the layoff definition were subsequently made in the Keller interest award dated September 8, 2005. In the subsequent Albertyn interest arbitration, each party, in the face of conflicting rights awards, sought to have the agreement amended to reflect in clear and unambiguous language the positions that have been advanced here. The award, dated March 5, 2007, maintained the status quo. Finally, the current collective agreement, which was the result of a two-party voluntary settlement, continued the Houlden language without amendment. In the final analysis, if there remained any doubt on a reading of the language, the addendum of arbitrator Mayne and the partial dissent of arbitrator Fillion, as members of the 1998 Houlden Board, establish that there was no intention to make the fundamental change from the predecessor language as is argued by the Employer in this case.

Having regard to all of the foregoing, I hereby declare that the reassignment of these nurses constituted a layoff within the meaning of article 10.08(a) of the collective agreement.”

I remain seized in the event of any difficulty with respect to remedy.

Dated on this 28th day of July 2009 in the City of Toronto.

Kevin Burkett