

FILE NO. AA92-02-004

EMPLOYER: The Liquor Control Commission of Manitoba

UNION: Manitoba Government Employees Association

ARBITRATOR: B. Schwartz

APPEARANCES: Not stated

GRIEVOR: D. Trach

DECISION RENDERED: February 12, 1992

EXPEDITED ARBITRATION: Yes

**ISSUES:** ARBITRABILITY - Statutory expedited arbitration; GRIEVANCE PROCEDURE - Time limits - mandatory or directory - statutory relief; SKILL AND ABILITY - Use of seniority - relatively equal qualifications; SECTION 130(4) of The Labour Relations Act - The Grievor, who was a Sales Clerk II, applied for but was denied the position of Assistant Manager which was awarded to a junior candidate. The final decision on the promotion was based on the interview scores in which the successful candidate scored 5 points more. The Employer raised a preliminary objection to the Arbitrator's jurisdiction claiming that the Union was out of time for seeking expedited arbitration under Sec. 130(4) of The Labour Relations Act. The Union filed with the Manitoba Labour Board on December 19th, but the Employer argued the last day permitted under the collective agreement was December 16th.

**AWARD:** GRIEVANCE DENIED. The Arbitrator ruled that he had no discretion to grant relief against a late referral to expedited arbitration. The breach of time limits in the Section 130(4) is not the same as a breach of time limits set out in a collective agreement, which can be relieved under Section 121(2)(e) of the Act. Section 130(4) required that a referral must be within the time allowed in the collective agreement. However, arbitral jurisprudence did not establish that time limits under the collective agreement itself must be "strictly construed". He found that "shall" in the grievance article was not necessarily mandatory as the article contained provisions in which failure to observe a "shall" was excused or provided a way in which the process could continue. The Arbitrator found that as per past practice the parties treated time limits as guidelines. Based on a fair interpretation of the collective agreement the Union was not guilty of unreasonable delay. Therefore, he ruled that the Union still had the right to refer the matter to expedited arbitration.

As to the merits, the Arbitrator found that the collective agreement provided for a formula which placed predominant emphasis on qualifications despite the Union's attempts in past negotiations to have more reliance placed on seniority. He found that the heavy reliance on the job interview was reasonable for the position in question because the "interview" abilities were similar to the "job" abilities of an Assistant Manager. He found that the interview process was fair; a set of questions with proper responses was drawn up and the panel members acted reasonably in interpreting the results of the interviews. The Arbitrator ruled that the Employer acted reasonably in finding that the five point spread, or 7% margin, in the interview scores was a material difference so that it was not obliged to consider the candidates as being relatively equal. He noted that the Employer devoted considerable thought and effort to devising an interview process keyed to the qualifications of the job, and which was graded on a consistent, objective and reasonably well-documented basis.

RE  
LIQUOR COMMISSION OF MANITOBA  
and  
MANITOBA GOVERNMENT EMPLOYEES ASSOCIATION

Grievance concerning Mr. Don Trach,  
Job Bid,  
Gr. File No. 91-15840

RECEIVED

FEB 13 1992

MANITOBA LABOUR BOARD

AWARD

The first part of this award concerns a procedural issue that may be of considerable interest to those involved with expedited arbitration in Manitoba. The second part addresses the substantive issue, which arises from a job competition. The grievor contends that he was at least "relatively equal" in qualifications to the less senior employee who was promoted.

I. Preliminary Issue - Jurisdiction.- Implications of a "late" referral to expedited arbitration.

The grievor, Mr. Don Trach, entered a competition for promotion from Sales Clerk II to Assistant Manager. The employer used a test and performance evaluations to screen out most of the candidates. The top six were granted interviews. The final decision was made on the basis of who scored the best on the interview. The successful candidate was Mr. Ross Cahalin, who scored 65/72. Mr. Trach was second, with 60/65.

Mr. Trach contends that the employer violated the collective agreement by not promoting him. His union has sought expedited arbitration pursuant to s. 130(1) of the Manitoba Labour Relations Act.

There appears to be no problem with the adequacy of notice to third parties. Mr. Cahalin is a third party with a large stake in the outcome of the grievance. According to documents sent to me by the Labour Board, it couriered to him a notice of the time and place of the start of these proceedings. When the hearing began, I ascertained that Mr. Cahalin was present. He confirmed that he knew he had a right to participate in the proceedings and to the assistance of counsel. Mr. Cahalin chose not to actively intervene in the hearing.

The employer raised one objection to this board's jurisdiction: that the employee was out of time for seeking expedited arbitration. Under section 130(4) of the Labour Relations

RECEIVED

FEB 13 1992

-2-

Act, R.S.M., 1987, c. L-10:

MANITOBA LABOUR BOARD

130(4) No grievance under a collective agreement shall be referred to this board under this section where:

(a) [a party has already invoked the regular arbitration process under the collective agreement]; or

(b) the time, if any, stipulated in or permitted under the collective agreement for referring the grievance to arbitration has expired.

The employer contended that the clock had already run out on referring this matter to arbitration under the collective agreement. The union did not file with the Manitoba Labour Relations Board until December 19, 1991. The employer argued that the last day permitted under the collective agreement was December 16, 1991. According to the employer, the time limit for referring a matter to an arbitrator is mandatory. The parties intend that a referral will be done strictly within the time provided. If not, the party loses its contractual right to proceed to arbitration.

After the preliminary point was argued on the first morning of the hearing. I found it necessary to reserve judgment. I suggested, and the parties agreed, that we should proceed to hear witnesses on the merits of the case.

At the beginning of the third and final day of the hearing, I was able to make a ruling on the jurisdictional issue. I agreed with the employer that I had no jurisdiction to grant relief against a late referral to expedited arbitration. I found, however, that on a fair interpretation of the time limits in the collective agreement, the union was not beyond the time permitted for referring a grievance to arbitration. I indicated my general line of reasoning orally. What follows next is a more detailed explanation.

Does an "expedited arbitrator" have authority to grant relief against breach of mandatory time limits?

In a non-expedited case, an arbitrator would have statutory authority to relieve a party from the consequences of its tardiness. Section 121(2)(e) of the Labour Relations Act states that:

121(2) The arbitrator or arbitration board shall provide a final and conclusive settlement of the matter submitted to arbitration, and without restricting the generality of the foregoing, the arbitrator or arbitration board may:

(e) relieve, on just and equitable terms, against breaches of

FEB 13 1992

-3-

time limits or other procedural requirements set out in a collective agreement.

It might seem that section 121(2)(e) applies to an expedited arbitration, by virtue of section 130(14) of the Labour Relations Act:

All the provisions of this Act applicable to arbitrations, except subsection 125(1), apply to an arbitration under this section, with the modifications necessary to accommodate appointments and expedited processes under this section.

(Section 125(1) refers to the time frame in which a "non-expedited" arbitrator is expected to render a decision. Under the expedited procedure, the parties may jointly require an "expedited" arbitrator to render an oral decision within one day of the hearing, and a written judgment within ten days).

The employer contends, however, that sections 130(14) and 121(2)(e) only apply where an expedited arbitration has been validly established. In other words, an arbitrator who has no jurisdiction at all certainly has no authority to grant relief from delays. In support of its contention, the employer drew my attention to several Ontario cases.

The Ontario Labour Relations Act contains a s. 45, authorizing expedited arbitrations. With respect to timely referral, it contains the same phrase as the Manitoba statute:

...no [request for expedited arbitration] shall be made beyond the time, if any, stipulated in or permitted under the agreement for referring the grievance to arbitration.

The Ontario statute is similar to Manitoba's in another way. Section 44(6) of the Ontario statute grants an arbitrator (or arbitral board) the discretion to relieve a party of the consequences of its lateness. Section 44(6) is more restrictive, however, than its Manitoba counterpart; the Ontario section only addresses lateness in "grievance proceedings" rather than missed deadlines under the collective agreement in general.

The union argues that there are no precedents directly on point in Manitoba, and the Ontario precedents should not be followed because our statute is more liberal.

I agree with the employer that a failure to comply with the terms of s. 130(4) is fatal to the proceedings. If an expedited arbitration is referred beyond the time "stipulated or permitted" under the collective agreement, the arbitrator has no authority at all, including (obviously) no authority to grant discretionary relief under s. 121(2)(e) of the Manitoba Labour Relations Act.

4-

Wording of the Labour Relations Act

In finding that I have no discretion to grant relief against a late referral, my reasoning begins with the wording of the Manitoba statute. Section 130(4) plainly states that a referral must be within the time allowed by the collective agreement. The importance of time is reinforced by s. 130(5) of the Manitoba Labour Relations Act. It states that the Board may refer a grievance to an arbitrator where "a grievance is referred to the board within the time periods prescribed in this section".

Section 121(2)(e) authorizes an arbitrator to relieve against "breach of time limits or other procedural requirements set out in the collective agreement". The time limit in s. 130(4) is not a time limit that is set out in a collective agreement. It is enacted by statute. The time limit in s. 130(5) is not even a limit that applies to a party to a collective agreement. It is enacted by statute and addressed to the Manitoba Labour Board.

Section 130(14) does indeed state that "all the provisions of the Act applicable to arbitrations, except s. 125(1), apply to an arbitration under this section..." It is not possible, however, to find that section 130(14) makes s. 121(2)(e) applicable to an "expedited" arbitration that is referred too late. Section 130(1) addresses itself to "arbitrations under this section" (emphasis added). An arbitration cannot be said to be "under this section" if it is established in a way that flouts two express terms of the section.

Ontario Precedents

The conclusion I have reached from analyzing the statute is consistent with several Ontario precedents. These are not strictly binding, but are of some persuasive value. In Re Radio Shack, Tandy Electronics and U.S.W., 27 L.A.C. (2d) (Simmons), a grievance was referred to expedited arbitration after a mandatory time limit in the agreement was breached. The "expedited" arbitrator found he had no jurisdiction. He concluded with the following observation:

...my decision is in keeping with the intention of [the Ontario analogue of s. 130] which is to provide parties with an expedited arbitration process. The section is very clear. It states emphatically that no request for arbitration shall be made after a stipulated time-limit as contained in the collective agreement. Its purpose is to permit parties to come before arbitrators without delay to have their differences arbitrated. It was not intended to be a vehicle to provide an avenue of redress after the regular procedures in collective agreements have been exhausted.

The wording of s. 130(5) of the Manitoba statute is at least as "emphatic" with respect to timeliness as its Ontario

counterpart.

Legislative Purpose

In some respects, Manitoba's statute is stronger than Ontario's in directing arbitrators to deal with the real substance of a grievance, rather than ruling on the basis of legalistic technicalities. As already mentioned, Manitoba arbitrators have wider authority than their Ontario counterparts to relieve against missed deadlines or other procedural irregularities. There is no Ontario section paralleling this provision of the Manitoba statute:

s. 121(1) An arbitrator or arbitration board shall, in respect of any matter submitted to arbitration, have regard to the real substance of the matter in dispute between the parties and to all of the provisions of the collective agreement applicable to the matter, and the arbitrator or arbitration board is not bound by a strict legal interpretation of the matter in dispute.

In deciding that s. 130(4) must be strictly complied with, however, the legislature is not denying grievors the possibility of achieving substantive justice. The route of regular arbitration, under the collective agreement, remains available. That route includes the possibility of obtaining relief against missed deadlines.

Even a legislature that favours "substance-over-form" could reasonably consider that a party who has failed to honour the timeliness requirements under its collective agreement should be denied the right to insist on expedited arbitration. The Manitoba Legislature could have reasoned that a tardy party cannot insist on expedition. An additional point that should be kept in mind is that the expedited route is a statutory one that may supplant the procedures set out in a collective agreement. The Legislature might have considered it inappropriate to allow a party that has already failed to observe the regular, agreed-upon procedures to deny the innocent party the further benefits of those regular, agreed-upon procedures.

For the purposes of s. 130(4), is a party automatically beyond the time "stipulated in or permitted under" the collective agreement if it fails to strictly comply with any time lines specified? Or does the determination of breach turn on whether the limits are intended to be "mandatory" or merely "directory"?

Section 130(4) precludes arbitrations beyond the time "stipulated in or permitted under" the collective agreement.

In some collective agreements, time lines are intended by the parties to be "mandatory" and strict compliance is necessary. In others, time lines are "directory". They are to be treated as

FEB 18 1991

guidelines. In determining whether the "directory" time lines have been breached, the test is whether a party is guilty of "unreasonable delay"; see Palmer and Palmer, Collective Agreement Arbitration in Canada (3rd), at 198-199.

In my opinion, in applying s. 130(4), parties to the agreement and arbitrators should approach the mandatory/directory issue in light of the usual doctrines and the usual examination of the facts and practice under a particular collective agreement. There is no basis in the text of the Labour Relations Act, or in its overall logic, for concluding that the interpretation of a collective agreement changes simply because the availability of expedited arbitration is at issue.

At this point, it will be useful to consider an Ontario case, Re Giant Yellowknife Mines Ltd and U.S.W.A. Local. 4440, 10 L.A.C.(4d) 1990 (R.D. Joyce). The union referred the matter to expedited arbitration at least six weeks after the time permitted under the collective agreement. The arbitrator took the well-settled Ontario position (which for the purposes of this award I am extending to a Manitoba case) that an "expedited" arbitrator has no jurisdiction if the time "stipulated by or permitted under" the collective agreement has elapsed. The union contended that the time limits were directory only. The arbitral award does not appear to question that the "mandatory/directory" issue is relevant. The opinion immediately moves to a consideration of whether the time limits under that particular agreement actually were directory, and concludes that they were not.

Although the out-of-time grievance was dismissed for want of jurisdiction in Giant Yellowknife Mines, the arbitrator did conclude by offering some observations about circumstances in which even "mandatory" time limits need not be applied literally. The opinion notes (10 L.A.C. (4d) at 302):

The arbitral jurisprudence is clear that under s. 45 [of the Ontario Act] an arbitrator is without authority to extend the window of the grievance and arbitration procedures of the collective agreement. That window may, of course, be extended by mutual agreement of the parties and such an agreement would be respected by this arbitrator and would be considered within the parameters of s. 45(2). For example, if the arbitration provision of the collective agreement stipulated that the grievance must be processed to arbitration within 21 working days of receiving the last grievance step reply and the parties agreed that in a specific case 35 days would be permitted, I would most certainly find that the grievance was properly at arbitration if the grievance were processed within that 35 day period.

The point about the extendability of time through mutual

agreement is one that I would endorse without hesitation.

The arbitrator in Giant Yellowknife Mines goes on to consider a number of other hypotheticals in which time limits would not be considered as having expired. One hypothetical is where a plant is shut-down during the period allowed for referring a matter to arbitration. The arbitrator would, in such a case, consider the time limit to be extended by the length of the shut-down. "Surely any provision of a collective agreement must be reasonably capable of execution"; ibid. Another hypothetical considered by the arbitrator is where the plant is open, but the official primarily responsible for deciding about whether to proceed with an arbitration is on vacation. The arbitrator considers this hypothetical to be a difficult one; perhaps such an official should have delegated the decision before leaving. The possibility of considering the time limits as extended, however, is considered a real one.

The reasoning in Giant Yellowknife Mines may be used to defuse a possible objection to using the "mandatory/directory" distinction in the context of s. 130(4). The objection would be that for the sake of certainty, arbitrators should only look at the time limits stated on the face of the agreement and always consider them to be mandatory. As Great Yellowknife Mines demonstrates, recognizing the "mandatory/directory" distinction does not suddenly introduce an element of possible dispute where before there was only black-and-white clarity. Even if a time limit is mandatory, questions will arise about whether the parties have in fact agreed to extend it and whether plant closing or personal vacations have the effect of extending the limits as literally stated. Difficult legal and factual issues may also arise if a party claims that its adversary has, in a particular case, unilaterally waived a time limit through its words or deeds.

The employer referred me to Re Hotel Restaurant Employees and Royal York Hotel, 149 DLR (3rd) 268 (Ontario Divisional Court).

In Re Hotel, the employer, under the collective agreement procedures, referred a grievance to a three-person board. It nominated one member, and agreed to extend the time in which the union could nominate another member. The union, however, tried a different tack. It attempted to re-route proceedings to the expedited channel.

The Ontario Labour Relations Board did appoint an "expedited" arbitrator. His jurisdiction was, however, challenged by the employer. The employer said that s. 45(2) of the Ontario statute only allows a referral to expedited arbitration if a matter is within the "time for referring the grievance" to arbitration under the collective agreement procedures. According to the employer, the statutory phrase means the time allowed under the agreement for initiating grievance proceedings - and that time had passed. The

"expedited arbitrator" disagreed. He adopted a more liberal interpretation of s. 45(2); he found that since the union still had the right to proceed with regular arbitration proceedings, it was not too late to apply for expedited arbitration.

The Divisional Court reversed the arbitrator. It held that the "plain meaning" of the statute was that the time for "referring" a matter to arbitration meant the time for initiating proceedings. The union was therefore too late to proceed under s. 45 of the Act. The arbitrator had no discretionary authority to grant relief against lateness under s. 45(2). The Divisional Court stated:

... the Legislature intended to provide strict time-limits in which a party might make the request provided for in s. 45. In contrast to s. 44(6) of the Act, which applies to extensions of time in grievance procedures, there is no provision for extension of the time-limits set out in s. 45(2). (Re Hotel, at p. 271).

The Court concluded:

This is new legislation. It is important that other arbitrators appointed under s. 45 be certain of the limits which give them jurisdiction. It may be, as contended by the respondent, that this is not an efficacious result in terms of practical labour relations. If this is so, then statutory amendment would appear to be the only solution. (Re Hotel, at p. 272).

In the course of setting aside the arbitral award, the Court noted that it did not owe "curial deference" to the arbitrator. The arbitrator was interpreting not only the collective agreement, but s. 45 of the Ontario statute.

I have already agreed that an "expedited" arbitrator has no discretionary authority to provide relief where an expedited referral is out of time under the terms of the Labour Relations Act. My decision in this regard amounts to an interpretation of the statute establishing my jurisdiction, rather than the collective agreement; Re Hotel may very well be correct in saying that a Court would owe me no "arbitral discretion" if my interpretation of the public statute were wrong.

Re Hotel does not establish, however, that time limits under the collective agreement itself must be "strictly construed", or that a Court is free to substitute its interpretation of the collective agreement for that of the arbitrator. In Re Hotel, the discussion about "strict" or "liberal" interpretation of time limits arose in the context of how to interpret s. 45 of the Ontario statute. The Court did not take issue with the arbitrator's interpretation of the collective agreement but with the way he applied the statute, given that interpretation.

FEB 19 1972

MANITOBA LABOUR BOARD

-9-

The next task before me, then is to determine whether, on a fair - neither "liberal" or "strict", but fair - interpretation of the collective agreement, the union was out of time for referring a matter to arbitration under the collective agreement.

The tests for determining whether time limits in an agreement are "directory" or "mandatory"

The arbitral jurisprudence on "mandatory/directory" is discussed in both Palmer and Palmer, Collective Agreement Arbitration in Canada (3rd) at 192 et seq, and Brown and Beatty, Canadian Labour Arbitration (3rd) at 2-62. The review of the jurisprudence in both texts seems to confirm that whether a time limit is mandatory or directory ultimately depends on the construction of each particular agreement.

The arbitral jurisprudence does point to some factors to be looked at. The word "shall" does not necessarily mean that a point on the time line is mandatory; time limits that "must" be obeyed, however, are very likely mandatory. Some awards indicate that if an agreement provides a penalty for non-compliance with time lines (e.g., the grievance shall be at an end) the time stipulations are likely to be interpreted as mandatory. One decision suggests that a finding of mandatory is more likely if the agreement expressly provides that the parties may extend the time limits by mutual agreement; Re Canadian Airlines Employees Association and Eastern Provincial Airways (1981), 49 N.S.R. (2d) 28, 129 D.L.R. (3rd) 426.

Even guidelines are not infinitely flexible. Excessive delay in observing directory time limits may end up costing a party the right to proceed.

Analysis of this particular collective agreement to determine whether the limits are directory or mandatory.

The union placed considerable emphasis on article 35:05. It states that "a grievance shall not be deemed to be invalid or defeated by reason of technical irregularity". The union's argument begs the question, however, of whether the time limits in the agreement should be considered "technical irregularities". There is case law holding that missing a mandatory time limit does not count as a "technical irregularity"; R v Weiler, ex parte Hoar Transport, [1967] 2 O.R. 554, 64 D.L.R. (2d) 400 (H.C); see also Union Carbide Canada (1967), 18 L.A.C. 74 (Weiler), aff'd 65 D.L.R. (2d) 417 (Ont. C.A.) rev'd 70 D.L.R. (2d) 33. If I am to find that the time limits here are directory, I would have to find other justifications.

Use of the word "shall" in this collective agreement.

The word "shall" is used throughout the grievance article. As mentioned earlier, the word "shall" may be either mandatory or

directory, depending on the context. In this collective agreement, "shall" is used to express almost all of the obligations in the contract. It cannot be concluded that every use of "shall" amounts to issuing an imperative which a party must strictly observe or else lose its rights to proceed further. "Shall" is used in the context of obligations that are technical and formal; under article 35:08 the union "shall" issue a signed and dated receipt for every reply it receives to a grievance; but forgetting to sign or date a receipt would hardly be fatal to further proceedings.

"Shall" is also used in several contexts in which the possibility of failure is contemplated and the remedies are spelled out. The remedies in the grievance article are consistently constructive; instead of putting an end to proceedings, ways are set out to enable them to continue. Article 35:13 provides that if the employer fails to respond to a grievance in time, the union may proceed to the next step to the process. Article 35:14(iv) provides that if the union and employer nominees to an arbitration panel cannot agree on a chair, or fail to do so in time, the Chief Justice of Manitoba may appoint one.

"Shall" is even used in contexts where it amounts to a permissive "may". Article 35:14 provides that where the employer's reply at step 3 is "unsatisfactory" to the union, the grievance "shall" be referred to an arbitration board. It would be absurd to suppose that whenever unsatisfied at step 3, the union is under a contractual obligation to proceed with a grievance.

I conclude, then, that "shall" in the grievance article is not necessarily "mandatory". On the contrary; the article contains a number of provisions in which failure to observe a "shall" is excused, or in which a way is provided in which the process can continue, rather than being terminated.

How the parties have interpreted the time limits in the past

The decisive considerations are provided by the testimony of Mr. Brian Havelock, a staff representative of the Manitoba Government Employees Association.

When the language of a collective agreement is capable of differing interpretation, the way in which it has been interpreted by the parties themselves is a factor that an arbitrator may take into account; see Brown and Beatty, supra, at 3:4430. Mr. Havelock testified that in his considerable experience concerning grievances between the parties, the time limits have always been treated as "guidelines, more than anything else". He said that breach of time limits had "never been an issue" before. There was a "fair amount of give and take" between the parties, although sometimes he found it necessary to encourage the other side to get moving along "a little quicker".

RECEIVED

20 10 1982

Mr. Roman Zubach, a human resources officer for the employer, denied that article 35:05 of the Agreement excuses breaches of time provisions, but he did not contradict Mr. Havelock's account of the general practice under the agreement. On cross-examination, Mr. Havelock admitted that he had very few prior experiences with expedited arbitrations. The concession does not undermine the union's case. The statutory test for "expedited" referral is whether it is too late to proceed under the arbitration procedures contemplated by collective agreement. Mr. Havelock's testimony supports the conclusion that limits under the latter are directory.

Comparison with the "Master Agreement".

Mr. Havelock made an observation that reinforced the conclusion I would have reached in any event. He contrasted the grievance article under this collective agreement with the "Master Agreement" between his union and the government of Manitoba. It covers a large number of government employees, although not those of the Liquor Control Commission. The parties to the "Master Agreement" are not strangers to this collective agreement. The bargaining agent for the employees is the same Manitoba Government Employees Association, the employer is the government of which the Liquor Control Commission is an agency. In negotiating and interpreting the collective agreement in this case, I would expect that like Mr. Havelock, officials on both sides would be attentive to similarities and differences with the Master Agreement.

Mr. Havelock drew my attention to the following provision of the Master Agreement:

If an employee or the Association fails to initiate or proceed with a grievance within the prescribed time limits, the grievance will be deemed to be abandoned and all rights of recourse to the Grievance Procedure for that particular grievance shall be at an end. (Article 43:05).

The parties to the collective agreement in this case have not included such a clause. The comparison supports the conclusion that the time limits in this case are directory only.

Conduct of the parties in this case

The conduct of the parties in this case is consistent with Mr. Havelock's testimony concerning the way the parties themselves treat time limits - that is, as "guidelines more than anything else". The following account is based on the recollections of Mr. Havelock, the union official, and Mr. Zubach and Ms. Lori Haverluck, officials of the employer. There are no significant contradictions in the recollections of the witnesses, and their testimony is supported by the correspondence that was formally entered into evidence before me.

RECEIVED

FEB 12 1982

First Stage

Mr. Trach filed his grievance June 7, 1991 and a receipt was issued by the employer the same day. The agreement refers to a fifteen working-days period for a reply. On June 27, Ms. Lori Haverluck wrote to the union's Mr. Havelock, asking that the union "waive the time limit defined in Article 35:10(b) due to the difficulty in finding a mutually convenient time to schedule a hearing". Mr. Havelock recalls that he received the letter and "did not disagree with it". He did not, apparently, feel it necessary to concur with the letter in writing or to ask just how much of an extension was being sought. A grievance hearing was held on July 11. The formal reply to the grievance was a letter that was not mailed until about 25 working days later, on August 16. Article 35:08 of the Collective Agreement appears to contemplate that the employer will personally present a reply to the grievor or to a union Representative, and obtain a signed and dated receipt for it. At no stage did either party bother with this formality.

Second Stage

Mr. Trach filed a second stage grievance on August 28, 1991. The employer sent a letter denying the grievance on September 26. The letter was stamped as received by the union on September 30. Exactly when the letter arrived is not clear, but counsel for the employer concedes that it might have arrived a few days outside of the time line set out in the collective agreement.

Third Stage

Mr. Trach filed a third stage grievance on October 11, 1991. It was the third time in a row he was strictly on time. On November 14, the employer sent a letter rejecting the grievance. It was sent through internal mail. Whether Mr. Trach received it within the time set out in the agreement depends on whether it arrived the same day; it may have, or it might have arrived the next day. Again, the employer did not obtain a signed and dated receipt from Mr. Trach or a union Representative. The union stamped the letter as received (in its office) on November 18.

The collective agreement says that the union "shall" refer the matter to arbitration within twenty days of a denial of a grievance at the third stage. Even if the third stage ended on November 18, the last of the twenty days was December 16. Mr. Havelock testified that on December 16, his union had a meeting at which it reviewed the merits of the Trach case, and decided to refer the matter to expedited arbitration. Mr. Havelock spoke to Mr. Zubach on December 17, and recalls that the latter understood that the union was intending to proceed with expedited arbitration. The actual referral form, however, was not signed until December 18, and it was not stamped as received by the Labour Board until December 19.

FEB 10 1991

On the referral form itself, there is a space for indicating when "the time stipulated by or permitted under the collective agreement for referring the grievance to arbitration" expires. Mr. Havelock obviously knew that the Labour Board would not receive the referral until after December 17. His intent in filling in the form was not to acknowledge that the union had lost the right to proceed with expedited arbitration. As he testified, he meant only to acknowledge that the twenty days had expired. He believed, however, that the twenty days were only guidelines - that is, that they were directory only.

Until the issue of expedited arbitration arose, then, both sides appear to have treated the time lines as guidelines. Both sides acted as though they felt an obligation to make a reasonable effort to comply, but did not regard the time lines under the collective agreement as rigid, with harsh consequences if they are breached.

There is no question that Mr. Zubach, on behalf of the employer, was prompt in objecting to the timeliness of the referral to expedited arbitration. Not long after Mr. Havelock called him on December 17, Mr. Zubach called back to say that the referral to expedited arbitration was too late.

I would point out again that the statutory test of whether it is too late to refer a matter to expedited arbitration is this: would the collective agreement still permit referral to "unexpedited" arbitration? The touchstone is the collective agreement, and the evidence is that in this case and others before it, both sides have treated the time lines as directory.

The union may have been as little as one day "late" in giving oral notice that it was proceeding with arbitration, and only three days "late" in completing the filing. The timing was not caused by any intent to delay proceedings or prejudice the employer; the slight "lateness" was largely attributable to the time frame in which the union met to complete its internal deliberations. The employer has not found it in any way more difficult or expensive to defend against this grievance merely because it was filed a few days late.

My conclusion, then, is that the time lines in the collective agreement are directory, rather than mandatory. Had it filed for arbitration under the collective agreement on December 19, the union would not have been guilty of anything approaching "unreasonable delay" with respect to the time lines. The time "stipulated by or permitted" under the collective agreement had not yet expired. The union still had the right, therefore, to refer the matter to expedited arbitration.

Summary

RECEIVED

FEB 15 1992

MANITOBA LABOUR BOARD

As this case may be of considerable interest to expedited arbitration practice, I will try to summarize my principal conclusions:

1. An expedited arbitration cannot take place if the matter has been referred to the Labour Board beyond the time permitted by s. 130(4) of the Labour Relations Act;

2. An "expedited" arbitrator has no discretion under s. 121(2)(e) of the Labour Relations Act to relieve against non-compliance with s. 130(4);

3. The test for timeliness under s. 130(4) is whether the collective agreement itself would permit the grievor to proceed with "regular" arbitration;

4. In making the determination under (3), it may be necessary to determine whether the time lines set out in the agreement are intended to be "mandatory" or "directory." If time limits are mandatory, strict compliance is expected, and non-compliance deprives the party of the right to proceed further. If the time limits are "directory", they are understood as guidelines only. A party may lose its right to proceed if, when measured against the guidelines, the party is guilty of unreasonable delay. Another factor is the way in which the parties themselves have interpreted and applied the time provisions.

5. Whether a particular time line is "mandatory" or "directory" turns on a fair - neither liberal or strict, but fair - interpretation of the particular collective agreement. Among the factors to be examined are the modal verb used; "must" generally suggests mandatory, "may" generally suggests directory, the interpretation of "shall" depends on context. Another important factor may be what the collective agreement has to say, if anything, about the consequences of non-compliance with time lines. In some cases, uncertainties may be resolved in light of the manner in which the parties themselves have interpreted the agreement in the past.

6. Even if a time line on the face of the agreement is mandatory, it cannot necessarily be applied literally to defeat a referral to expedited arbitration. The parties may extend the time by express agreement. I would think that a mandatory time limit also does not preclude an expedited referral if a party has waived compliance through its words or deeds.

## II. Merits

Analysis of the "promotions" clause in the collective

agreement.

The grievor, Mr. Trach, is relying on these provisions of the collective agreement:

16.01. The parties recognize that job opportunities should increase in proportion to length of service.

18.01. Bulletined positions whether they be vacancies resulting from promotions, demotions, transfers or new positions arising from expanded operations or vacancies as a result of an employee leaving the service for any reason shall be filled with the employee making application, who in the opinion of the Commission, is the most qualified. If no employees are qualified, the vacancies will be filled by external candidates.

18.07. If under 18:01 two or more internal candidates are considered by the Commission to be relatively equally qualified, seniority shall then become the determining factor. Full time seniority will supersede part time seniority.

Article 16.01 does not, in my view, change the meaning of Article 18.01. Article 16.01 states a general principle, and subsequent articles clearly and specifically explain how the principle applies to the specific case of promotions. For the purposes of promotions, "job opportunities" increase in proportion to seniority in the specific sense that seniority prevails where ability is relatively equal. A useful comparison is Article 31, which affirms the general principle that "job security should increase in proportion to length of service" and then clearly and specifically explains that lay-offs are in reverse order of seniority.

In ruling on a "seniority versus qualifications" case, an arbitrator must always ask these two questions about the promotions clause:

- what balance does it strike between seniority and qualifications?

-to what extent is the determination of qualifications left to the discretion of the employer?

The seniority/ability balance in this collective agreement

The type of clause that most favours seniority is a "threshold" (or "sufficient ability") clause. It provides that the most senior person will be promoted, as long as that person has the ability to perform the job. The senior candidate's right to promotion would prevail even over competitors who are far more qualified.

RECEIVED

FEB 18 1992

MANITOBA LABOUR BOARD 16-

There are various types of "hybrid clauses". In these, seniority counts as more than a "tiebreaker" but falls short of being the only decisive factor in choosing among qualified candidates.

In terms of the "seniority/qualifications" balance, the combination of Article 18:01 and 18:07 is a textbook case of a "competitive" (or "relative ability") clause. It is the type of clause that places the least weight on seniority. The latter only governs when there is no substantial difference in the qualifications of the top candidates.

The employer's discretion in determining who is most qualified and whether candidates are relatively equal.

Articles 18:01 and 18:07 are also phrased in such a way as to clearly preserve management's discretion to determine who is the most "qualified person". Article 18:01 speaks of the "opinion of the Commission" about who is most qualified. Similarly subjective language is used in 18:07; it speaks of candidates who "are considered by the Commission" to be relatively equally qualified.

There has been some controversy about the standard of arbitral review when a promotions clause uses "objective language" - that is, when it does not in some way expressly leave the determination of who is qualified to the judgment of employer; see Canadian Food and Allied Workers Union v Great Atlantic and Pacific Co., (1976), 76 C.C.L.C. 14,056 (Ont. Div. Ct); cf. Re Manitoba Telephone System and C.W.C., 2 L.A.C. (4d) 136, at 141 (hereinafter referred to as Re M.T.S.). It is not necessary for me to enter into this controversy, as the language in the collective agreement in this case does plainly affirm management's discretion. The standard of review to be applied is whether the employer has acted reasonably and in good faith, not whether I agree with the specific result. I would apply the same standard as that suggested in Re M.T.S., ibid., where the board held that:

...an honest, fair and reasonable decision by management, arrived at after an appropriate selection procedure, ought not to be subjected to the reactions of arbitrators months later, in a different setting, when, as is usually the case, arbitrators cannot possibly exercise the same knowledge and appreciation of the actual circumstances of the job and the work place. Such an inquiry into the correctness of the promotion in question necessitates a minute scrutiny of all of the factors. It is one which, in our view, arbitrators ought not to undertake unless there is a flaw of a significant kind in the procedures followed, or some reasonable apprehension of unfairness, bias or the like, or, finally, the decision in question seems to be one which flies in the face of reason despite the apparent propriety of the method used to reach that decision.

Burden of proof in "relative equality" cases"; possibility of non-suit.

Before proceeding, I would like to make a few comments on a procedural issue which arose, but which did not have to be finally resolved. The union led evidence that unquestionably established that Mr. Trach had more seniority than Mr. Cahalin, the incumbent, and that Mr. Trach was qualified to do the job. The union led no evidence, however, about the relative abilities of Mr. Cahalin, the incumbent. There was no significant basis, on the evidence led to the point, for concluding that the employer had acted unreasonably or in bad faith in concluding that the successful candidate was materially superior.

After the union closed its case, counsel for the employer suggested she was considering a motion for non-suit, and requested some time to research and reflect on the matter. Consistent with the courteous and co-operative matter in which both sides conducted the hearing, the union representative did not object, and I adjourned proceedings until the next day. When we recommenced, counsel indicated she was not proceeding with a non-suit motion. She acknowledged that the normal "price" for proceeding with such a motion is that the employer must elect to call no evidence of its own. In any event, stated counsel, the employer had enough confidence in the integrity of the process to subject it to scrutiny.

In Re the Crown in Right of Ontario and OPSEU, *ibid.*, the Board noted that a successful motion for non-suit does "little to promote satisfactory labour-management relations"; *ibid.*, 416. The presentation of a case by the employer may allay the suspicion or sense of resentment that led to a grievance. In this case, counsel for the employer called all three members of the panel that decided on the promotion, and each presented frank and detailed information about the procedures involved and his or her own thought process. In presenting such a thorough and detailed case, I believe that the employer in this case has defused some of the uncertainty and scepticism on the employee side about the way the process operated.

The general principle followed by arbitrators is that the burden of proof is on the grievor. All the essential elements of a valid grievance must be proved. The current case is about a "relative ability" clause. To establish a valid grievance, the union must show that the grievor is qualified and has more seniority than the successful candidate. But that is not enough. An essential element of the grievance is that the employer acted unreasonably in comparing the qualifications of the grievor with those of the successful candidate. On the basis of the evidence initially led by the union, a reasonable arbitrator would not have been able to conclude that the process or the result was unreasonable.

If counsel for the employer had made a motion for non-suit, however, I would not necessarily have asked her to confirm she was closing her own case, and then dismissed the grievance. It would have been within my discretion to indicate to the union that it not established a prima facie case, and to offer it the opportunity to lead additional evidence; see Dominion Stores, 23 L.A.C. 71 (Penner, 1971).

I would also note that the arbitral jurisprudence includes some controversy about whether the general principle concerning burden of proof applies in a "relative ability" case.

In Re Right of Ontario and OPSEU, ibid., the Board observed that "most of the facts regarding the selection procedure used are peculiarly within the knowledge of the employer and not the grievor"; ibid. The Board continued:

...if we were convinced that counsel for the grievor had elicited all of the evidence reasonably within his grasp regarding the fairness of the selection procedure - and yet failed to establish a prima facie case - we would have been tempted to change the law of this board by shifting to the employer both components of the burden of proof - i.e., burden of producing evidence and burden of persuasion, on the issue of the fairness of the selection procedure established by the employer for filling the posted vacancy.

It has not proved necessary for me to decide whether the "relative equality" cases demand an exception to the usual rules about burden of proof. The employer did present testimony from all of those centrally involved in making the decision, and it has demonstrated that it acted in good faith throughout, and adopted reasonable procedures that lead to a reasonable conclusion.

#### Overview of the hiring procedures of the employer

The process used for hiring an Assistant Clerk consists of a screening stage, and then an interview in which the top scorer is offered the job.

First the vacancy and the qualifications for it are posted. A screening process then takes place. The applicants complete a written test. It covers such matters as knowledge of the collective agreement, operating procedures and product information. Only those who score within the top four are "shortlisted". (In this case, there were ties for the last of the four places, so six candidates were allowed to proceed). A potential "finalist" may be screened out, however, if there are some substantial problems with that candidate's performance evaluations. The latter are regular assessments by the employee's supervisor.

RECEIVED

FEB 13 1992

The candidates who survive the screening process are on a "level playing field" for the purposes of the hiring interview. The score on the written test and the performance evaluations are not factored into the score on the interview. A three-person panel is formed. It consists of a human resources officer, who participates in many different competition panels with a view to maintaining consistent procedures. Another member of the panel is usually the manager of the store that has a vacancy. The third member is an even more senior manager. The same set of questions is asked of each "finalist". At the end of the interview, the panellists compare notes on each question and agree on a consensus mark for it. They add up the total score. The winner of the competition is the person with the highest marks.

#### Posting of the Vacancy and Qualifications

An employer has some leeway to define the qualifications for a job as it sees fit, but the tests of good faith and reasonableness must be met. Bad faith is demonstrated if "the employer in bad faith manipulated the purported job qualifications in order to subvert the just claims of employees for job advancement under the collective agreement". Unreasonable behaviour would consist of choosing qualifications that have "no reasonable relation to the work to be done"; see Palmer and Palmer, Collective Agreement Arbitration in Canada (3rd), at 502.

When the Liquor Commission posted the opening for Assistant Store Manager, it listed the following qualifications:

- prior experience demonstrating "proficiency and ability" at management skills;
- "demonstrated ability as an Acting Assistant Manager";
- "considerable experience as a liquor store employee";
- "thorough product knowledge";
- "thorough knowledge of the collective agreement";
- "thorough knowledge" of government laws and policies on liquor sales.
- "demonstrated ability to establish and maintain an optimum level of customer satisfaction"
- "proven ability to receive, give and implement oral instructions";
- "proven public relations skills and abilities."

The grievor, Mr. Trach, has substantial experience as an acting Assistant Store Manager. He agreed that the qualifications listed by the employer were a fair description of the job.

#### The Written Test

The written test consists of some "recycled" questions from previous competitions and some new ones that are specially prepared. The particular test in this case was largely compiled by

Mr. Dunlop, the manager of the "hiring store" and later member of the interview panel. He alone did the marking using a previously prepared answer guide. The test was entered into evidence. It appears to be a rigorous test of knowledge about operating procedures, government laws and policies, and product knowledge. There was one question as well about the collective agreement.

From the evidence provided, the test questions were clearly related to the description of the job; almost all of the questions have answers that are objectively "right", either on the basis of science or official directives such as operating manuals, government laws or the collective agreement. All tests were graded by an informed and unbiased person, who used a previously prepared answer key.

Neither side entered evidence of Mr. Trach's score or Mr. Cahalin's. Mr. Trach understood, on the basis of "word of mouth", that he had finished "near the top". I have no way of knowing how he did in comparison to Mr. Cahalin, the eventually successful candidate. Even if the employer were required to use the test to differentiate among finalists, as opposed to merely screening out the rest of the field, there would be no basis for showing that Mr. Trach had been done an injustice in this case.

In any event, the employer's decision to use the test as a screening device only, and not a "differentiator", is well within the range of reasonable procedures. All of the qualifications explored on the written exam were explored at the final interview stage. There may be good reasons for not making fine distinctions among finalists on the basis of their earlier test scores. For example, it may be considered desirable to avoid the mathematical complexities involved in trying to blend written scores with the interview; or there may be concern about making too much about a test that is graded by only one person, as opposed to the three who sit on the interview panel.

The union led evidence, to which the employer did not object, about a process of consultation concerning promotions prior to the last round of collective bargaining. The officials involved were empowered to explore issues and search for agreement, but did not have authority to immediately bind their principals. During these consultations, the union sought, unsuccessfully, to persuade the employer to give more weight to seniority in its promotion decisions. It is interesting to note that the proposals from the union side would, in essence, have continued to use the written test as a screen. All of those scoring above a certain level on the test, regardless of their exact grade, would receive the same twenty-five marks towards determining their position on an "eligibility list" for promotion. I would have arrived at exactly the same conclusion even without considering the evidence about the discussions; it is reassuring, however, to note that knowledgeable and interested representatives of the union considered it

RECEIVED

FEB 13 1992

-21-  
MANITOBA LABOUR BOARD

reasonable to continue using the tests in a limited way.

Performance Evaluations

The performance evaluations of both the grievor and the successful candidate were entered into evidence. The two candidates both had recent evaluations of their work as store clerks that were completed by their supervisors. The evaluations rate performance in over 30 different respects, including such matters as accuracy at the cash register and skill at handling customer complaints. Both candidates have impressive evaluations. Mr. Trach's performance was rated as being fully satisfactory in all departments, and as exceeding requirements in two respects: theft prevention and customer service. Mr. Cahalin was fully satisfactory in all respects, and exceeded requirements in three respects: cash register accuracy, working with other people and punctuality. If we were to assume that the areas of performance are equal in importance, the tiniest edge was actually held by Mr. Cahalin.

What if the performance evaluations had been factored into the final score, rather than being used only as a screen? The results of the promotion process and this arbitration could well have been the same. Depending on the system used to combine performance and interview scores, Mr. Cahalin's "margin of victory" might have been a smaller percentage of the total points available; the employer might still have found the margin to be significant, and an arbitrator might still have sustained its decision to promote Mr. Cahalin.

In any event, my conclusion is that the employer has not been shown to have acted unreasonably in using the performance evaluations as a screening device only. While there are arguments for putting greater weight on performance at a candidate's existing job, a reasonable employer might not wish to do so.

In his testimony, Mr. Dunlop mentioned the difficulty of devising a scoring system for performance evaluations. He did not elaborate, but I suppose one problem would be in trying to assign weights to different areas of performance. Another obstacle might be the difficulty of ensuring that supervisors in different stores are consistent in their scoring; it would appear to be easier to maintain consistency in a short series of interviews conducted by the same panel of three persons.

Another reason for limiting the use of performance evaluations is that they relate to a different job than the posted one. A good foot soldier might make a poor general - and vice versa. Mr. Dunlop testified that the interview was designed to determine whether the candidate had the special qualities required of an Assistant Manager. The very first question asked on the interview invited candidates to cite any past experience and training that qualifies the candidate for the job being sought.

FEB 18 1978

MANITOBA LABOUR BOARD

-22-

In the case before me, both candidates actually did have substantial experience in performing the posted job in an acting capacity. They both spent most of their time as store clerks, however, and the performance evaluations would presumably relate primarily to their work as clerks. Furthermore, "evaluation of performance at a given time or for a given period may not tell the employer nearly as much about the potential for future development and improvement as a discussion such as was conducted in these interviews, posing hypothetical but possible problems, and seeking to explore the candidate's capacity for growth"; Re M.T.S., supra, at 143.

I would think that even from a union's point of view, greater use of performance evaluations would not be an unmixed blessing. Under the system used by the employer, an employee's chances of advancement are not inordinately dependent on the favourable - and perhaps somewhat subjective - opinion of his current manager. It is not necessary to go to extraordinary lengths, such as regularly showing up early for work, to move on up the ladder. As long as an employee has performed reasonably well at the current level, the employee is able to enter a competition on an equal basis with others at the same rank.

As mentioned earlier, the union led evidence that it had urged the employer to revise its promotion system. It is clear that the union wanted seniority to be given more weight in differentiating among candidates. On the other hand, the union did not have a firm position on precisely how performance evaluations should be used; it was open to the possibility of allotting the same number of points to all candidates who met or exceeded a certain level. The approach taken by the union representatives again merely provides some reassurance with respect to a conclusion I would have arrived at anyway: that the limited use of performance evaluations by the employer is within the range of reasonable procedures.

#### Greater Reliance on Seniority

The union led evidence that at various times it had sought to persuade the employer to place greater reliance on seniority to differentiate among candidates. The union submitted that it was unreasonable for the employer to disregard the union's position in this regard. The union might have preferred an eligibility list in which the most senior person is awarded something like 25 points, the next senior 20, and so on.

I would note that if such a system had been used in this case, and all other things were the same, neither Mr. Cahalin or Mr. Trach would have received the job. It would have been awarded to the third-place finisher, who had more seniority than Mr. Trach, and was only 4 points behind in the interview matrix.

Reasonable people, both among managers and employees, can have

different views on where the appropriate balance between seniority and ability ought to lie. The collective agreement in this case very specifically addresses the issue, and adopts a standard formula that places predominant emphasis on qualifications. The appropriate channels for arriving at any new approach would be further discussions and negotiations between the employer and the employee, not grievance arbitration.

#### The Interview Procedure

The employer devoted considerable attention to trying to develop an interview system that would be relevant to the job qualifications, which would maintain the same "playing field" for all candidates, and which would be scored in a reasonably objective fashion.

The eighteen questions directly covered almost all of the stipulated job qualifications. There were questions about product knowledge, applicable laws and operating procedures, customer service and staff relations. There was no question directly on the details of the collective agreement, but such a question had already been included at the screening stage, and the questions about staff relations would have permitted a candidate to refer to features of the collective agreement. Some of the questions were about factual matters that clearly have a "right" or "wrong" answer. Some were questions about how the candidate would react in a difficult hypothetical situation - such as dealing with an employee whose performance is being impaired by serious personal problems. An answer key was prepared prior to the test; it provided the "correct" answers on the factual questions and some guidance about what would constitute a good answer to the more open-ended questions.

The same three-person interview panel interviewed all of the candidates on the same day. The panel consisted of: Ms. Haverluck, the human resources officer, Mr. Dunlop, the Store Manager where the position was available, and Mr. Crackston, a very experienced senior manager. Each interview took about an hour. As the candidate answered a question, the panel members made detailed notes. Ms. Haverluck and Mr. Crackston entered tentative scores as the interview proceeded; Mr. Dunlop made notes, but waited until the discussions with his fellow members of the panel before entering specific scores. As each interview concluded, the members of the panel reviewed the questions, one by one, and arrived at a consensus on how each should be scored. They then added up the totals. All three panel members testified that they did not discuss their overall impressions of the candidate until after the numerical scoring process was completed. All three testified that they would have awarded the promotion to whoever scored the highest, regardless of what their overall impression was. Mr. Crackston indicated he would only have counted seniority in case of an actual tie; Mr. Dunlop and Ms. Haverluck both said they might

have used seniority if the point spread had been only a point or two.

The heavy reliance on the interview used in this process might be unreasonable with respect to some other kinds of job. The process placed the candidates under pressure, presented them with a number of oral questions that were new and difficult, and demanded that they provide quick but articulate and thorough responses. With respect to some jobs, the abilities required to perform the actual duties may have little to do with the ability required to demonstrate those abilities in an interview. In this case, however, there is a reasonable connection between "interview" abilities and "job" abilities. The qualifications for Assistant Store Manager include such abilities as being able to understand and give instructions and to maintain good customer and staff relations. The hypothetical questions indicate that an Assistant Manger may be faced with challenging situations in which there is a premium on quick thinking and effective communication.

As it happened, the "global impression" of the panel about who would make the best Assistant Manager coincided with the results of the test score. I asked Mr. Dunlop about what would happen if his subjective impression differed from the test results. He agreed that this could happen, and it would trouble him, but it had not happened in the four interviews he had conducted so far. I would think that it would generally be reasonable for the employer to abide with the results of the test scores even if the panel members had a different "overall impression". The latter may reflect valuable intuition, but they may also be distorted by irrelevant considerations and prejudices. The use of the scoring system helps to ensure employees that there is a reasonably objective basis for decisions.

At the hearing, the union representative conducted an admirably searching examination of the score sheets turned in by the three members of the panel.

Ms. Haverluck's scoresheet for Mr. Cahalin disclosed seven questions on which she revised her initial score upwards. Only one question was revised downwards. There were no changes with respect to Mr. Trach's scores. Ms. Haverluck could not recall exactly when specific changes were made. She thought some were made while the questions was being answered, others during the consensus discussions. If Ms. Haverluck had not changed any of Mr. Cahalin's scores, Mr. Trach actually would have finished ahead of him.

Mr. Crackston also made some changes on Mr. Cahalin's sheet. The tendency is in the opposite direction. He lowered four scores, and raised one.

Mr. Dunlop waited until the consensus discussion to fill in his own scores. They do not in any respect differ from the

"consensus" score.

The detailed notes taken by all three members of the panel are consistent with each other. They provided the panel with objective data for their consensus discussions. From the notes, it is possible to closely compare the answers of Mr. Cahalin and Mr. Trach.

I have compared answers between the two candidates on all questions. My objective was not to determine how I would have scored the responses, but to see if there was a documented basis on which a reasonable employer could have concluded that there was a substantial difference in the qualifications of the two candidates. My notes on the relative scores of Mr. Cahalin (C) and Mr. Trach (T) are as follows:

Q1. Past experience: 4 points each. T had ten years at the employer, lots of experience as an acting Assistant Manager; C was retail sales manager at Bata Shoes for six years and had some experience as acting Assistant Manager with the current employer.

Q2. Customer service: 4:3 for C, perhaps because his answer referred generally to all aspects of customer service and then specifically mentioned courtesy and implementing store policies, whereas T focused more narrowly on greeting customers, informing them about products and helping them to find them.

Q3. Inventory control: 4:3 for T, whose answer was more detailed.

Q4. Activity recap: 3:2 for T. C failed to discuss the use to which the information can be put.

Q5. Difficult situations in past: 4:3 for T. According to notes by Mr. Crackston, C's answer focused more on general store practice than on how C personally dealt with a specific situation.

Q6 permit changes: 4:3 for C. T forgot to mention the use of a particular yellow form. The score sheets raise some question of whether C remembered the necessity to use red ink, but Mr. Dunlop testified that C in fact did so.

Q7. expected new duties as assistant manager: 4:3 for C, whose answer appears to express a slightly broader sense of the ways in which an Assistant Manager can help the Store Manager, including helping with administrative tasks generally and making suggestions on how to improve the store.

Q8: troubled employee: 4:3 for C, who unlike T, mentioned the

RECEIVED

FEB 18 1992

MANITOBA LABOUR BOARD -26-

possibility of referring the employee to a Human Resources Officer of the Employee Assistance plan.

Q9. past experience in dealing with a difficult employee: 4:3 for T: the difference in the quality of answers is not clear to me, but according to notes by Mr. Crackston, C's answer somewhat "avoided specifics".

Q10. replacing broken case of beer: 4:3 for C; T apparently forgot to mention need to "process a return".

Q11: past ideas about improving store: 4 points each.

Q12: how to deal with slow shift: 4:3 for C. Each mentioned some activities the other did not. Among the activities unique to C's list were looking for ways to improve the store and reading up on products.

Q13: dealing with large orders: 4 points each.

Q14: delegating to employees: 4:2 for C. The difference appears to be that C explained more thoroughly the significance of varying abilities among individuals. C suggested that during peak times, a manager might put individuals in the areas they are best at, and at other times would look for opportunities to provide training.

Q15: dealing with conflicting customer demands: 3 points each.

Q16. dealing with threatening customer: 4:3 for C, who unlike T, mentioned the importance of communicating with the customer and gauging his responses.

Q17. what additional training a new Assistant manager should seek: 4:3 for C. T has a more limited list and noted that he already had lots of experience as assistant manager. Notes by Ms. Haverluck suggest T may have appeared somewhat "inflexible".

Q18. personal strengths to bring to job: 4:3 for C, who emphasized his past experience as acting manager, retail sales manager, and on his "people skills". T stressed his qualities as a motivator and communicator and at training staff. T's concluding remark was that the only disadvantage of the job was having to manage an extra set of keys; the comment is circled on several score sheets, and perhaps the panel members thought an observation on such a peripheral matter was inappropriate.

On reviewing the notes and the scores, I have concluded that the final scores are results that could emerge from an employer acting in good faith and exercising reasonable judgment. Whether

FEB 13 1992

MANITOBA LABOUR BOARD

-27-

the scores are absolutely "correct" is not for me to decide.

The revisions to the scores of Mr. Crackston and Ms. Haverluck do not destroy the credibility of the result in this case.

Mr. Crackston and Ms. Haverluck do not recall when they revised the scores they marked on Mr. Cahalin's sheet. They think some changes could have been made unilaterally during the question-and-answer session, others during the consensus discussions. Mr. Crackston recalled that Mr. Cahalin took more time than Mr. Trach to answer the questions, and on occasion Mr. Crackston may have marked a tentative score before the end of an answer and then raised it when Mr. Cahalin added some additional observations. It is possible that Ms. Haverluck did the same.

Even if I assume all the changes were made during the consensus discussions, however, the revisions to the initial scores of Ms. Haverluck would not negate the validity of the final result. The holding of "consensus" discussions assumes that consultation will help everyone to arrive at a more reliable judgment. It is normal that the lowest marker would raise her score and the highest marker would move the opposite way.

There are no individual questions on which Ms. Haverluck and Mr. Crackston revised their scores for Mr. Cahalin in opposite directions. There are no questions, in other words, on which Ms. Haverluck and Mr. Crackston could have even started more than a point apart. In marking Mr. Trach, Ms. Haverluck, Mr. Crackston and Mr. Dunlop seem to have arrived at exactly the same score every time. Mr. Trach was the last person of six to be interviewed, whereas Mr. Cahalin was only the third; perhaps by the end of the day, having heard a variety of answers and engaged in a number of "consensus" discussions, the three panel members were able to properly evaluate an answer more quickly.

#### Good faith of the panel members

Mr. Dunlop testified that he felt "let down" by Mr. Trach's performance. He recalls feeling that Mr. Trach had conducted himself as though it was "his turn" to be promoted and that he had been "going through the motions". After hearing Mr. Dunlop, however, I accept his testimony that he takes "people's futures" very seriously and that his marking of particular questions was not influenced by his disappointment in Mr. Trach's overall approach to the interview. After the interview was over, Mr. Dunlop telephoned Mr. Trach to inform him of the results, and offered to talk things over - with a view, I believe, to helping Mr. Trach learn how to better approach the next interview.

Mr. Dunlop pointed out that Mr. Trach received good scores, and he did. He was second in the competition. He lost out to a candidate who had less experience with the employer, but six years

experience as a retail sales manager in the private sector. On looking over the scores, I notice that Mr. Trach and Mr. Cahalin were actually tied in score up until the last five questions. As Mr. Trach had seniority, he was actually ahead until question fourteen. It is hard to believe that a panel biased against Mr. Trach would have placed him in winning position after two-thirds of the scores were entered.

Were the test scores close enough that a reasonable employer was obliged to consider the candidates as being "relatively equal?"

The collective agreement asks whether employees are "relatively equal" in the opinion of the employer. Both sides have agreed that the test I must apply is not whether the employer acted reasonably and in good faith in finding that the five point spread between the employees was a substantial difference.

In Re Manitoba Telephone System and C.W.C., supra, an issue was whether candidates were "equally rated". The grievor trailed the successful applicant by 5.5 points out of a possible 90. The board concluded:

...we agree with [counsel for the union] Mr. Myers that absolute equality is unlikely to be achieved, and that any matrix of test scores, possibly coloured by the subjectivity inherent in the personal reaction of the interviewers, may well demonstrate relative equality without resulting in a tied total score. "Equally rated" as used in [the collective agreement] is perhaps narrower than "relatively equal" but it remains necessarily capable of some expansion from what may be the artificiality of simple mathematical equality.

It is possible to imagine, very easily, a situation where one candidate with a markedly better performance evaluation than another might fall short by one or two points of that other on the selection matrix and lose the job. Such a situation could lead to a finding that the result was unreasonable and could not be sustained. [The employer] and the company might well be advised to review and reconsider the process.

In the instant case, however, we cannot reach such a conclusion. The performance appraisals showed relative equality. The selection matrix difference of 5.5 points...out of a possible 90 points is sufficient to compel us to reject any suggestion that all were "equally rated".

In several important respects, Re M.T.S. is similar to the current case. In both cases, the candidates have approximately equal performance evaluations. The "margin of victory" in Re M.T.S. was about 6% of the maximum score, whereas it is about 7% in this case.

There are some subtle differences between this case and Re M.T.S. but I do not think they would justify any difference in the result.

In several respects, the contract language here, compared to that in Re M.T.S., might be slightly more favourable to the union. The Re M.T.S. arbitral board mentions that the phrase used here, "relatively equal", is "perhaps" more favourable to a second-place finisher than is the Re M.T.S. phrase "rated equally". It may be, on the other hand, that the distinction amounts to nothing at all; even where collective agreements use the phrase "equal", arbitrators generally interpret them as meaning "relatively equal"; Palmer and Palmer, Collective Agreement Arbitration in Canada (3rd), 494.

It is also true that in Re M.T.S., the seniority was a factor in arriving at the scores, and had already been counted in favour of the second-place finisher. Here, seniority was given no weight at all in the scoring, so it might be that the employer was under a slightly greater obligation to give seniority some weight in determining whether the top two contenders were "relatively equal". Be that as it may, the board in Re M.T.S. does not appear to have regarded the 7% difference as being even close to being "close enough".

In one respect, the contract language here is actually more favourable to the employer than it was in Re M.T.S. Here, unlike Re M.T.S., the collective agreement very explicitly reserves management's authority to assess the qualifications of candidates and to determine whether they are relatively equal. Again, the difference between the cases should not be exaggerated; even in Re M.T.S., the arbitral board did end up adopting a reasonably deferential approach to judgment calls by the employer.

Quite apart from any precedent, I am satisfied that it was reasonable for the employer to conclude that the 5-point margin between the top two candidates was a material difference.

The members of the panel had differing views on what relative equality would mean. Mr. Crackston, the senior manager, thought that "relatively equal" probably meant an exact tie on the interview matrix; even a one point difference would be decisive. Ms. Haverluck and Mr. Dunlop were not entirely sure where the line is drawn, but they thought that seniority might be decisive if the spread were only a point or two. None of the panel members had any doubt, however, that 5 points was a significant difference.

I do not think arbitrators should simply stare at a mathematical figure - such as 5 points or 7% - and announce whether it looks big enough. It is necessary to look at a variety of factors, including the mathematical features of the scoring system used, its objectivity and its capacity to make precise

RECEIVED

MAY 13 1972

MANITOBA LABOUR BOARD 30-

distinctions.

It is easy to "lie with statistics", but the scale used by the employer does not have the purpose or effect of inflating the percentage difference between candidates. The testing procedure used in this case requires the employer to score each answer either a one, two, three or four. There is no such thing as a zero. The lowest score that can be awarded is one. The scoring sheet says that a "one" means "totally wrong". Even "a limited understanding of the area" is worth a "two". The matrix here could just as easily have used "zero" for "totally wrong" and "three" for an excellent answer. In that case, the difference between Mr. Cahalin and Mr. Trach would have been 5 points out of a maximum of 54 - which is about 9%, rather than the 7% actually registered.

An attempt should be made to give a down-to-earth interpretation of the difference between the scores, rather than simply playing around with numbers. All of the questions are on matters of substantial importance and relevance to performing the job of Assistant Manager. A difference of even two points on a final score could for example mean the difference between a candidate with a great deal of relevant experience and training, and one with very little; see Q1. It could amount to the difference between a manager who has a limited idea of how to deal with a troubled employee, and someone who is well-versed on how to proceed; see Q8. If the test scores were a completely reliable indicator of ability in the areas tested, there would be no question that a spread of five points is material.

There are, to be sure, some elements of less-than-perfect reliability in the system. There will be random variations in how a candidate will perform on a test. During the course of a long interview, a candidate could easily forget to mention a point or two that would generally come to mind. Missing five points, however, could reasonably be regarded as adding up to something more than chance variation.

Another limitation in the test is that grading sometimes involves some very fine judgment calls; a different panel could well have scored several questions differently. Even the panel that actually does the scoring might reach a slightly different result on a different day. If the marking is unbiased, however, random variations in scoring will tend to roughly cancel each other out. In looking at the scores assigned to Mr. Cahalin and Mr. Trach I cannot see any pattern of giving either one the benefit of the doubt. There may a question or two on which Mr. Trach might have reasonably been given a better score, but the same could be said for Mr. Cahalin; for example, I am not entirely sure why Mr. Cahalin's answer to question nine was considered significantly "less specific" than Mr. Trach's answer.

The system does not employ fractions or "plus or minus"

FEB 13 1972

MANITOBA LABOUR 8312

scores; an answer that barely makes it into "three" territory would count just as much as one that is almost a "four". Over the course of eighteen questions, the "no fraction" feature of the scoring should tend to produce little net advantage or disadvantage to any given candidate. The general tendency is well illustrated by the scoring matrix in this case. The panel noted, although it did not formally count, those questions on which it thought an answer was on the low or high side of a grade. Mr. Trach had a "plus" and three "minuses"; a fractional system might have moved his score down a point or two. Mr. Cahalin had two "pluses" and two "minuses", so even under a fractional system, his score would have remained about the same.

In passing, I would note that the panel members had no pre-agreed position on what to do if the margin between first and second is very small - one or two points. In the future, the employer might wish to consider adopting an official policy in this regard. While my opinion in this regard is tentative, and binding on no one, I very much doubt I would have been able to sustain a distinction between a first and second place finisher based on a one-point margin, and a two point margin might have been found to be insufficient as well. The employer might decide in advance, for example, that the most senior employee within two points of the top-place finisher would be awarded the job.

#### Concluding comments

Mr. Trach's performance evaluations show that he has been a very capable employee. In many respects, such as the knowledge tested on the written exam and his experience with the employer, Mr. Trach's credentials are very impressive. The evidence suggests that Mr. Trach has entered a number of competitions in the past, and has become frustrated recently in not being able to advance. From the evidence, it appears that either impatience or anxiety at going through the process yet again may have affected his interview performance.

On most previous occasions, Mr. Trach had finished behind a candidate with more seniority. I can appreciate Mr. Trach's initial disappointment and scepticism about a process that led to his coming second to an employee with much less seniority.

The process has now been subjected to a thorough examination, however, and it seems to me that the employer in this case has actually devoted considerable thought and effort to devising a system that is keyed to the qualifications of the job, and which is graded on a consistent, objective and reasonably well-documented basis. It recognized Mr. Trach's qualities to the extent that he finished ahead of twenty-one other candidates. The only candidate who scored ahead of did have less experience with the employer, but he also had very extensive experience as the manager of a retail sales store. The process appears to be fair, and (to recall the

phrase from Re M.T.S.) the result does not "fly in the face of reason".

The employer has made several offers to Mr. Trach to discuss his performance at the interview and suggest how he might perform even better next time. It may be that some useful direction has already been provided through the testimony of the interview panel members at this hearing, but I am sure that the offer to Mr. Trach remains open.

Finally, while my conclusion has been that the system here was reasonable, fair and consistent with the express terms of the collective agreement currently in force, this award should not be interpreted as suggesting that the current system is the only reasonable way to proceed. The union is free, of course, to seek revisions to the system through further discussions and negotiations with the employer.

The grievance is denied.

*Bryan Schwartz*

Dr. Bryan Schwartz  
Arbitrator

12 February 1992

RECEIVED

FEB 18 1992

MANITOBA LABOUR BOARD