FILE NO. AA92-06-008

EMPLOYER: Maple Leaf Foods Inc.

UNION: United Food & Commercial Workers, Local 832

ARBITRATOR: B. Schwartz

APPEARANCES: D. Newman, for the Employer
D. Primeau, for the Union

GRIEVOR: W. McCallum

DECISION RENDERED: June 5, 1992

EXPEDITED ARBITRATION: Yes

ISSUES: BENEFITS - Severance Pay; EMPLOYEE STATUS - General; SECTION 80 of The Labour Relations Act discussed - The Union filed a grievance claiming that the Grievor, whose seniority dated back to 1958, should have been part of the group of employees who had the right to take a separation package upon the closure of the Food Services department. The Employer contended that the Grievor was not eligible for the severance package, because he was laid off from Food Services operation more than 30 days prior to the announced department closure, and was recalled to the beef cooler, which was part of the warehouse. The Employer also argued that the grievance was barred by the second paragraph of the separation agreement which stated that the Union agreed that no further grievances would be filed with respect to entitlement to the separation allowance.

AWARD: GRIEVANCE DENIED. The Arbitrator found that the Union had not intended to claim more than the agreement provided, but believed that on a proper interpretation of the agreement that the Grievor was a party it. The Arbitrator found from the extrinsic evidence that the Grievor was not specifically included in the Employer's calculation of the costs of the severance packages. It should have been clear to the Union before the agreement was signed that he was not included. Not having raised the issue during the negotiation stage the Union acquiesced to the Employer's assumption about the Grievor's status. Therefore, he ruled that the Grievor was not entitled to any separation allowance.

RE:

MAPLE LEAF FOODS INC.
-and-
UNITED FOOD AND COMMERCIAL WORKERS

Wilf McCallum - Unpaid Severance Pay
Case No. 265/92/LRA

Date of hearing:	Formally convened by phone on April 10, 1992, immediately adjourned; Full hearing on April 21 and May 4, 5.
Place of Hearing:	Place Louis Riel Hotel, Winnipeg, Manitoba.
Appearances:	Mr. Donald Primeau for the UFCW, Local 832; Mr. David Newman for Maple Leaf Foods Inc.
Arbitrator:	Dr. Bryan Schwartz.
Award Issued:	5 June, 1992.

AWARD

RE:

MAPLE LEAF FOODS Inc.
and
UNITED FOOD AND COMMERCIAL WORKERS

Wilf McCallum - Unpaid Severance Pay
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On January 30, 1991, the union and the employer signed a Memorandum of Agreement (the "January Agreement") to settle a dispute arising out of the closure of a department. The deal provided that a certain group of employees have the right to take a separation package, rather than being moved to another department or simply laid off. The issue here is whether Mr. Wilf McCallum, the grievor, belongs to that class.

The hearing lasted three long and often contentious days. Counsel for both sides presented their cases thoroughly and forcefully. There are conflicting recollections on many points. The official records presented are not as complete as they might be, and classify certain facts in ways that are unclear or controversial. To the maximum extent possible, I have tried to rest my decision on a reasonably solid base of facts. I have tried to distil a set of facts on which the documentary record is clear and reliable, or where the testimony of a witness has been credible in its own right and not contradicted by another witness or by the documentary record.

The terms of the January Agreement

The provisions of the January Agreement include the following:

Whereas the Union filed a grievance dated December 11, 1991 with respect to severance pay;

And whereas the parties hereto are desirous of resolving this matter;

Now therefore the parties agree to the following as full and

final settlement in this matter:

1. Notwithstanding the provisions of Article 26 of the Collective Agreement, employees whose jobs are discontinued as a result of the cessation of good service manufacturing on January 31, 1991, will be allowed to resign rather than displace junior employees elsewhere in the centre, and will be paid separation allowance in accordance with the provisions of Article 26.

2. The grievance dated December 11, 1991, is hereby withdrawn and the Union agrees that no further grievances will be filed by the Union or on behalf of other employees with respect to having no entitlement to a separation allowance as a result of the implementation of this Memorandum.

Background: the grievor's association with the Food Services over the years.

Mr. McCallum's seniority at Maple Leaf Foods dates back to January 13, 1958. At most plants, he would be among the very most long-serving employees. Maple Leaf Foods in Winnipeg, however, has an extraordinarily senior work force. It includes people who joined after they left school, and have stayed there for decades. In September, 1991, over thirty employees outranked Mr. McCallum in seniority. Of all the employees having any significant connection with Food Services during the years leading up to its closure, Mr. McCallum was the most junior.

In 1988, the employer closed its operations in St. Boniface, and moved to a new Food Distribution Centre. Before the move, and for some time afterwards, Mr. McCallum worked in the Food Services department. Mr. McCallum was often used as a "spare man". He was skilled and versatile enough to do anything that needed doing. He was a particularly adept "knife man", capable of preparing any cut of meat. He was often employed in training other employees at various tasks. At the hearing, the employer acknowledged that Mr. McCallum had every right to be proud of his special skills.

Where was Mr. McCallum working for the past four or five years? The documentary record is not a complete or entirely accurate guide to where an employee was at any given point in time. The line-up sheets prepared by the foremen were typed out several weeks in advance. As assignments were changed to adapt to actual circumstances, the foreman would sometimes amend the typed sheets in pen - and sometimes not. The pay stubs issued to employees are not a clear and consistent guide to the department in which a person actually worked. The accounting department may be many weeks behind in changing its classifications. Apparently, a foreman may manage several different departments, and for the sake of convenience, maintain records that treat employees as belonging to

the same one.

If there is a work shortage in a department, lay-offs are in reverse order of seniority; Collective Agreement, article 14. An employee laid off from one department may be able and willing to work in another department, in which case he or she may "bump" a more junior employee. The latter must find work in another department or go on lay-off. Mr. McCallum recalls that for some time prior to 1991, he would sometimes be transferred out of the core Food Services operation, usually to the beef cooler, but sometimes to the warehouse. As a result, there has been some dispute about the extent to which Mr. McCallum was a "Food Services" person prior to October, 1991.

Was the beef cooler part of Food Services?

One point of dispute is the status of the beef cooler where Mr. McCallum spent much of his time prior to its closure in early 1991. Was it part of the warehouse department or the Food Services department?

At the hearing, counsel for the employer contended that the beef cooler was part of the warehouse, rather than the Food Services department. Various witnesses for the employer testified they considered the beef cooler to be part of the warehouse; that Food Services was a last-minute "add-on" to the food distribution centre, and as such had a departmental identity distinct from the beef cooler; that for accounting purposes, beef cooler was supposed to be classified as department 003 (warehouse) rather than 002 Food Services.

In contrast, Mr. Hendricks, a union steward, said he understood that the beef cooler was part of Food Services. Mr. McCallum himself was not sure how the beef cooler should be classified. He viewed it as a distinct subdepartment, but was not sure whether it was classified as part of the Food Services or warehouse department. Mr. McCallum's testimony indicated that a single foreman might be responsible for more than one operation, and might move the employees around quite freely. During 1990, Mr. McCallum does usually appear under "beef cooler" in the line-up sheets; but it is possible that even when so listed, he actually spent much of his time working in the core Food Services operation.

The employer's record-keeping has considerably complicated the issue here. In 1990, for example, there are periods in which Mr. McCallum's pay stubs identify him as being part of "Food Services" even though the line-up sheet places him in the beef cooler. On the other hand, on one occasion when Mr. McCallum was working in the beef cooler, he asked why his pay stubs showed him as being in warehouse department; the response from management was that the categorization was for "convenience". It is no wonder that Mr. McCallum is, to this day, not sure of the department to which the

beef cooler subdepartment belonged. I am not entirely sure myself. Fortunately, I have found it possible to decide this case without resolving the point.

Mr. McCallum's work history in the year leading up to November, 1991.

Mr. McCallum is listed in the warehouse operation line-up for the first few months of 1991. He is then listed under "beef cooler" for a while. In May of 1991, however, he began a continuous summer stint in Food Services. On the employee's printed line-up sheets, he was classified as a replacement for various employees who were away for various reasons during the summer, including vacations. The employer's pay stubs indicate that he was in Food Services. Mr McCallum reliably recalls that he worked there throughout the summer.

In mid-October, 1991, while still assigned to the Food Services department, Mr. McCallum was laid off. It was the first time in a great many years that he found himself entirely without work anywhere in the plant.

At this point, Mr. Orvil Denhart enters the picture. He ordinarily works in the warehouse department. Although he has more seniority than Mr. McCallum, he is still one of the most junior persons in his home department. In mid-October, Mr. Denhart was assigned work in Food Services and bumped Mr. McCallum onto the lay-off list. In his testimony, Mr. McCallum agreed that Mr.Denhart was capable of performing the tasks assigned him in Food Services.

At the beginning of November, 1991, Mr. McCallum was recalled from the lay-off list. In the line-up for November 4-8, he is listed in the warehouse department. Mr. McCallum agrees that he actually did work there. Mr. Denhart continued to work in Food Services. Mr. McCallum and Mr. Denhart thus found themselves having "traded places"; each was in the department previously worked by the other.

Mr. McCallum found the situation disturbing. Mr. McCallum recalls a conversation about the issue. It took place in the cafeteria, while he was waiting to start a shift in the warehouse department. Mr. McCallum encountered one of the foremen, Mr. Robert Normand. Mr. McCallum said he wanted to go back to Food Services. Mr. Normand said "you belong to the warehouse". The facility manager, Mr. Harley Jonasson came along. Mr. McCallum asked him "Harley, what department do I belong to?" Mr. Jonasson did not say anything. He went to the operations room. Mr. McCallum pursued his inquiries. Mr. Jonasson then said "here's the reason why" - and handed Mr. McCallum a lay-off notice.

Mr. Jonasson testified, and recalls giving Mr. McCallum a more thorough explanation. He said that Mr. McCallum, who is usually a

quiet person, was upset. He wanted to know why Mr. Denhart was in Food Services. Mr. Jonasson explained that Mr. Denhart had been working day shifts in Food Services, that Mr. McCallum himself was only going to be needed for a week or two, and it was not desirable to play "musical chairs". Mr. Jonasson said that Mr. McCallum did not continue the discussion, and "seemed to accept" the decision. At the hearing, Mr. Jonasson explained that he had discussed the situation with one of the foremen, who felt it would be too hard on Mr. Denhart to move him from his day shift in Food Services to a night shift in Warehouse.

Did Mr. McCallum have a right to return to Food Services at the beginning of November, 1991? - the implications of article 15.3.

Under article 14 of the Collective Agreement, lay-offs are in reverse order of seniority. So are recalls, "regardless of the department in which they were previously employed, provided that they can perform the required work satisfactorily". The employer unquestionably acted properly in initially recalling Mr. Denhart to Food Services. But the union argues that the employer violated Article 15.3 of the Collective Agreement by not recalling Mr. McCallum to Food Services. Article 15.3 appears in a series of sections concerning "transfers"; they include the following provisions:

> 15.1. Subject to seniority, the requirements of the business and the qualifications of employees for the work required, employees may be transferred from one department to another. If during three months' trial an employee with seniority is dissatisfied with the transfer, he/she may register his/her objection in writing, in which case a reasonable effort will be made to reinstate him/her in his/her previous department, or to place him/her in some other department provided the employee possesses suitable qualifications for the job....
>
> 15.2. Basis for Temporary Transfer. In temporary transfers from one department to another, the company will give consideration to seniority, subject to the requirements of the business and qualifications of employees to do the work required.
>
> An employee, who because of previous experience in a department is temporarily transferred to that department on a repetitive basis, may register his/her objection to such repetitive transfers, in which case the Company shall, subject to seniority, make a reasonable effort to obtain a replacement who can perform the work satisfactorily or to train another employee who possesses suitable qualifications and can qualify reasonably quickly for such temporary transfers.
>
> 15.3 Return to Regular Department. Employees with seniority

who are transferred from their department due to a reduction in staff, shall have the right to request a return to their regular department when the staff is being increased. Such requests will be granted as soon as a satisfactory replacement can be found to take his/her place and provided that the employee possesses suitable qualifications for the job....

(b) Where an employee is transferred on a staff reduction to a department, where a more senior employee has an application for transfer on file, the employee transferred on a staff reduction will return to his/her regular department when staff is being increased and he/she is eligible to do so, provided that:

(a) The employee returning to his/her department possesses suitable qualifications for the job.

(b) The request for a transfer is still outstanding.

Applications for transfer filed subsequent to the staff reduction will not affect the employee's right to remain in the department to which he/she was transferred on a staff reduction.

I am unable to conclude that the specific terms of article 15.3 required the employer to move Mr. Denhart into warehouse in mid-October.

Article 15.3 addresses "transfers" due to "staff reductions." In this case, Mr. McCallum ended up in warehouse in mid-October due to a lay-off and recall, rather than a direct transfer. I will assume, without actually deciding, that s. 15.3 can apply when an employee ends up out of his "regular" department due to a chain of lay-offs and recalls.

Section 15.3 specifically refers to situations were "staff is being increased". The obvious application of s. 15.3 is a case where a "new position" is created in a department, and a "returnee" does not have to displace any of the existing staff. There is no evidence that Food Services staff was being increased in mid-October. It appears that in the autumn of 1991, the department was actually getting by with fewer employees than it deployed during the summer. Mr. Denhart was called in to replace a regular staff member who was away. However far s.15.3 can be stretched, it cannot be directly applied to a case where a department is merely looking for a very temporary replacement for one of its regular staff members.

The implications of Article 80(1) of the Labour Relations Act.

Article 80(1) of the Labour Relations Act provides that:

> Every collective agreement shall contain a provision obliging the employer, in administering the collective agreement, to act reasonably, fairly, in good faith, and in a manner consistent with the collective agreement as a whole.

Article 80(2) provides that every collective agreement that does not contain the provision set out in 80(1) shall be deemed to contain it.

I would venture a few general comments about section 80 of the Labour Relations Act. First of all, the language it prescribes - "in administering the collective agreement, the employer shall act reasonably, fairly and in good faith..." - must be considered a full and legitimate aspect of every collective agreement in Manitoba. It must be given full force and effect by employers, and by arbitrators. It is often said that arbitrators must interpret the collective agreements as written, and not the agreement they would prefer to see. Just as arbitrators should not "supplement" collective agreements with provisions of their own invention, arbitrators should not diminish agreements by dismissing provisions that properly belong.

The second point I would make is that s. 80 should not be viewed as calling for "justice in a vacuum". It speaks of fair play in administering a particular collective agreement; it specifically calls upon employers to take account of the terms of the collective agreement as a whole. The terms of s.80 are an integral part of a collective agreement, and just like any part, they must be read with the others.

The Collective Agreement as a whole requires the employer to give a very high value to seniority, and substantial value to accommodating the wishes of specific employees. The Collective Agreement also recognizes that the employer can legitimately take into account its business needs and the varying qualifications of different employees. In looking at the facts of this case, I would conclude that the employer acted in a manner consistent with the general system of values and priorities set out in the collective agreement. It felt that it would be harsh on Mr. Denhart, the more senior employee, to move him from day shift to a night shift. It expected Mr. McCallum to be laid off again in the near future. Within the context of the Collective Agreement as a whole, including the very high value it assigns to seniority, the decision was reasonable.

The duty of reasonable, fair and good faith administration, as set out in Article 80 of the Labour Relations Act, might require the employer to accommodate an employee in certain situations not specifically addressed by any article of the agreement. Consider this hypothetical: what if Mr. Denhart had wished to return to warehouse, just as Mr. McCallum wanted to go back to Food Services? Mr. Normand, a foreman for the employer, was actually asked this

question; he replied without hesitation that he would have accommodated both Mr. Denhart and Mr. McCallum; each would have been returned to his usual department. It may be that doing otherwise would have constituted a violation of the duty of fair, reasonable and good faith administration of the overall agreement between the parties.

Turning back from hypotheticals to the actual facts of this case, however, there is no evidence that Mr. Denhart wanted to switch back to night shifts in the warehouse. I cannot find any other facts in this case that warrant a conclusion that the employer acted unfairly or unreasonably in recalling Mr. McCallum to the warehouse in mid-October.

Interpretation of the Severance Package Agreement without reference to negotiation history.

The union has urged that I enforce the plain meaning of the January Agreement. During the hearing, counsel for the union cited the parole evidence rule, and urged that I not even admit evidence about the negotiating history.

At the hearing, I allowed the evidence of negotiating history to be presented, and reserved a ruling on what weight it should be given, if any. As will be discussed shortly, I have found that it would be proper to give considerable weight to discussions leading to the January Agreement.

I should like first, however, to explain the result I would reach if I were strictly confined to considering agreements that are in writing.

The January Agreement contains an express reference to another provision in writing, Article 26 of the Collective Agreement. The latter provides for separation allowances to be paid when a plant, or a substantial part of a plant, is closed.

Under Article 26, there are several restrictions on eligibility for a separation package. An employer who is transferred to another plant, or offered a suitable job elsewhere in the employer's business, is ineligible; articles 26(c),(d),(f). Thus, when part of a plant is closed, the more senior employees may be offered a chance to "bump" more junior ones in other departments, and only the latter will have the right to a separation package.

Article 26 does not extend rights to all employees who are adversely affected by a partial plant closure. There is a cut-off in terms of time. The crucial date is when the closure is announced. Article 26 only applies if an employee is "actively employed with the Company and accumulating seniority or [has] been laid off within the thirty day period preceding the date of notice

of closing."

The reference to 30 days appears in another signed agreement. A memorandum of agreement between the parties, dated November 8, 1991, addresses what would happen if the Food Distribution Centre is closed during the term of the Agreement. Employees who have been laid off more than thirty days before the announcement of the closure have the right to half of the separation allowance set out in the Article 36.

The first clause of the January Agreement in some ways excludes the terms of Article 26, in some ways invokes them. The union argues that "notwithstanding Article 26" means that senior employees can elect to take a separation package, even if they could find work elsewhere with the employer. Otherwise, the union contends, the January Agreement applies with its usual force and extends to people associated with the Food Services department. In particular, the "30-day rule" is applicable; it is not necessary that an employee actually be employed in Food Services when it closed on January 30, 1991. It is sufficient that the employee has worked there within thirty days of the announcement of closure, which was on December 11, 1991.

The union acknowledges that Mr. McCallum was actually laid-off from Food Services in mid-October, and never returned there. But the union contends that on a proper interpretation and application of the Collective Agreement, Mr. McCallum should still have been working in Food Services within thirty days of the announced closing. An employee who has been wrongfully excluded from a department should be deemed to be there.

The employer's position is that the only part of Article 26 that applies to the Food Services closure is the schedule of benefits. The 30-day rule in Article 26 has no application to a person like Mr. McCallum; he could only benefit if he was working there on January 30, 1991.

Even if I accept the union's theoretical position on the "30-day rule", I would still have to rule against it on the facts. I have found that Mr. McCallum was not wrongfully excluded from the Food Services department in November, 1991. Mr. McCallum was laid off from Food Services, never to return, in mid-October - and thus considerably more than thirty days prior to the announcement of its closure, on December 11, 1991.

Thus, if I had to decide this case without any extrinsic evidence about the meaning of the January Agreement, I would have to deny the grievance.

Interpretation of the January Agreement in light of its negotiating history; in light of the Negotiating History; the parol evidence rule does not apply.

The employer led evidence of the negotiating history of the January Agreement, in an attempt to show that Mr. McCallum's grievance was barred by the second clause of the January agreement.

As mentioned earlier, counsel for the union objected to the use of extrinsic evidence to vary the meaning of the Memorandum of Agreement. I have found the evidence to be both admissible and important.

To begin with, I believe the evidence shows that neither side intended the January Agreement to be an exhaustive statement of their bargain.

For example, Mr. Parkinson, who negotiated the deal for the employer, mentioned an additional aspect of the deal. He promised that for every Food Services person who refused a separation package, a package would be offered to a person laid off from another department. Such a chain of events almost took place. One of the Food Services employees initially decided to turn down the package, and transfer to another department. The employee "bumped" onto lay-off was offered a separation package. What if the employer had failed to do so? If the case had come before me, I would probably have ordered the employer to keep its word. I would have held that the January Agreement must be interpreted in light of the statements made when it was negotiated.

Here is another example. There is some evidence that Mr. Parkinson indicated to Mr. Trigwell that the employer would offer packages to employees on workers' compensation if they could demonstrate fitness to return to the Food Services Department. As things actually developed, two such employees did indeed obtain packages on this basis. What if Mr. Parkinson had made such a promise, but the employer had failed to follow through on it? If the case had come before me, I expect I would have required the employer to live up to all of its commitments.

Mr. Parkinson, who drafted the agreement, testified that he borrowed language from a previous settlement. He never ran it past a lawyer. Mr. Trigwell, the union negotiator, simply signed the document passed to him by the employer. Both sides were under time pressure; the Food Services department was shut down at the end of January, and negotiations began and concluded in the last two weeks of that month. In signing the January Agreement, the parties were formalizing their commitment to honour a bargain they had arrived at and defined orally; the January Agreement sets out the basic features of the agreement, but was not intended to include every last detail and clarification.

The underlying purpose of the parol evidence rule is to protect the certainty and finality of written agreements. The rule should not be applied where the parties did not intend the written words to be the exhaustive statement of their bargain.

The parol evidence rule should also not be applied where extrinsic evidence can provide a reliable basis for understanding terms that would otherwise be vague or ambiguous. The agreement here does not provide much guidance on the boundaries of a crucial category - "employees whose jobs are discontinued as a result of the cessation of food service manufacturing on January 31, 1992". As I say, if I had to define this category without reference to extrinsic evidence, I would have to conclude that it does not include Mr. McCallum. By referring to the extrinsic evidence, however, I have been able to assure myself that this result is consistent with what the parties expected, or at least reasonably should have expected.

Concerns about privileged communications

The Memorandum of Agreement was negotiated in the context of a settlement of an earlier grievance between the parties. Counsel for the union did not object that the evidence was part of a privileged discussion, and I would not have upheld such an objection.

Granted, it is important to protect the openness and candour of discussions aimed at producing a settlement. Parties should not be reluctant to make admissions or concessions during such discussions, for fear of prejudicing or embarrassing their case if it ends up going on to arbitration. In this case, I refused to hear evidence about discussions that took place during the current grievance. I did not see how it could be of significant help in understanding the January Agreement that emerged from the earlier grievance.

It is also important, however, to properly interpret and enforce settlements that are achieved. In some cases, it may be necessary and proper to admit evidence that shows that settlement has been reached and to establish its terms. I believe this is such a case.

The origins of the January Agreement

In interpreting the January Agreement, it is useful to put it in the broad context of the separation policies of the employer.

Mr. Parkinson, a senior human resources officer for the employer, mentioned that he has never seen a work place where people were so eager to be laid off and given separation packages, rather than transferred to other departments. The explanation probably has much to do with the length of service already

contributed by most employees, and an understandable desire after such extensive service to move on to something else. Be that as it may, the Collective Agreement between the parties does not include an across-the-board early retirement policy. An employee cannot simply decide it is time for voluntary early retirement, and claim certain benefits. Even an employee who is laid off from a department that has been "home" for many years usually cannot claim a separation package; the employee must usually choose between accepting a job in another department, or going on lay-off.

Under the Collective Agreement in this case, an employee can only claim a separation package when the employer and the union have made specific provision for it. Prior to the "Food Services" Memorandum of Agreement, the parties had agreed to separation packages under two special and restricted circumstances; they are set out in Article 26 of the Collective Agreement and in the November 8, 1991 Memorandum of Agreement. Lines have been drawn. An employee who has rendered long and worthy service may find himself just outside the line. Under Article 26, for example, an employee who was laid off thirty-one days prior to the announced closure has no rights to a separation package. An arbitrator must try to ascertain where the parties have drawn the lines; he cannot redraw them in light of his own sense of where they ought to be. The question I must decide is where the parties drew the boundaries in the January Agreement, where they defined a third set of circumstances that entitle an employee to a separation package.

For a number of years, Maple Leaf Foods has been reducing the number of its employees in the Winnipeg Area. On a series of occasions (Shurgain, Chicken and Pork Production, Fresh Beef Operation, Thunder Bay Depot) operations have been scaled down or eliminated, and some employees have been laid-off as a result. The employer maintained in each case that the number of jobs lost were not enough to qualify as a "substantial closing", and employees therefore had no rights under Article 26. The union was unsure of whether it would succeed if it went to arbitration, and so did not pursue grievances. The loss of jobs was a major concern of the union in the last round of collective bargaining. The 8 November 1991 Memorandum of Agreement defined a second set of circumstances, beyond Article 26, in which employees could obtain a separation package.

On December 11, 1991, Maple Leaf Foods formally announced that it was closing down its food manufacturing services in other parts of western Canada, including Winnipeg, and centralizing them in Edmonton. Maple Leaf Foods did not initially expect there to be job losses when it closed its Winnipeg Food Services department. It expected to gain new Winnipeg jobs in distribution, as a result of a joint venture with a competitor. Unfortunately, those discussions were later suspended. In January 1992, both Maple Leaf Foods and the union expected that the closure of Food Services would result in a significant net loss of jobs.

The union filed a grievance on December 11, 1991, the same day as the announced closure. The position taken by the union was that Article 26 should now be applied to all of the people who had lost jobs due to closures over the past few years, and all those who would now lose their jobs in Food Services. The union's point was this: even if none of the individual closings were "substantial" enough to trigger Article 26, the overall series was.

In January, in a series of phone calls, the union and employer negotiated a settlement of the grievance. The parties had agreed that the final stages of grievances could be negotiated directly between the representative of the local union and Toronto head office. The union's negotiator was Mr. Colin Trigwell; management's was Mr. Mark Parkinson.

Ordinarily, the results of closing Food Services would be as follows. The employees in Food Service, who were all very senior, would be offered jobs in other parts of the plant. Under the terms of Article 26, they would therefore have no right to claim separation packages. Instead, they would probably move to other departments, and "bump" more junior employees out of their jobs. It is these "bumpees" who would probably have had the right to a separation package under Article 26. (The closure of Food Services, with the accompanying elimination of 20% of the jobs at the plant, could well have been sufficient in itself to count as a "substantial" plant closing, and thus trigger the operation of Article 26.)

Mr, Parkinson took the position that he was not prepared to make any concessions to employees laid off on earlier occasions. He considered that the just-completed round of collective bargaining, including the 8 November 1991 Letter of Understanding, had already dealt with those people.

There was some discussion of whether separation packages might be offered to the most senior employees in the plant, as opposed to the junior employees who would be displaced. (For convenience, I will refer to the latter group as the "potential bumpees"). Mr. Parkinson rejected this idea. It would be too costly to give packages to the group of most senior employees; the amount of a separation package, as set out in Article 26, rises sharply with the seniority of the employee. Furthermore, noted Mr. Parkinson, the most senior employees at the plant would not necessarily be affected in any way by the closure of Food Services.

Mr. Parkinson and Mr. Trigwell did agree on the same basic concept: separation packages would be offered to all of the Food Services people. They would be able to terminate their employment, rather than having to move to other departments and displace junior employees. From the union point of view, the deal benefitted both the Food Services people and the "potential bumpees". The Food Services people, who were very senior, might generally prefer to

accept a sizeable separation allowance rather than move to another department. The "potential bumpees" would likely have preferred to keep their jobs, as opposed to taking the smaller separation package available to junior employees under Article 26.

From management's point of view, it was considerably more expensive to offer packages to Food Services people than to "potential bumpees". Mr. Parkinson consulted with Winnipeg managers, and concluded that the extra cost would help to ensure a more contented work place. Food Services people who migrated to other departments might not like the work there, which could include night shifts. The workers in other departments might feel disrupted by the influx of Food Services people and the loss of junior employees.

Before entering into the deal, Mr. Parkinson had to sell the idea to his own senior managers. He had to convince them that the extra cost was justified. In conducting the negotiations Mr. Parkinson based his cost estimates on lists of personnel in Food Services that were supplied to him by Mr. Kozub, a local manager. The lists never included Mr. McCallum. They did include several employees who were on workers' compensation. Mr. Parkinson took steps to enable them to demonstrate their fitness for work, and obtain separation packages. As a result, he arranged for ten packages to be offered, even though his impression earlier in January was that only about eight people would be involved.

Mr. Parkinson believes that before the agreement was signed on January 30, he discussed the number of people involved with Mr. Trigwell. The latter has no such recollection. Mr. Parkinson believes he discussed at least one specific name - that of an employee who was on worker's compensation. Mr. Trigwell again has no such recollection. It may be that Mr. Parkinson's recollection is indeed more complete; he had to figure out the costs and do the paperwork involved, whereas Mr. Trigwell was focusing on the basic concept. As a result, it may be that Mr. Parkinson paid more attention to details that came up during the conversation, and remembers them better. In any event, I do not find it necessary to choose between Mr. Parkinson's and Mr. Trigwell's recollections about whether names and numbers were discussed.

Mr. Parkinson and Mr. Trigwell agreed that the concept that they had agreed to was based on the "Marion Street" model. In 1988, when the employer closed down its Marion Street plant, and moved to the new Food Distribution Centre, it offered employees the option of taking separation packages rather than moving. Mr. Parkinson obtained a copy of the Marion Street Memorandum of Understanding, made minimal changes to adapt it to Food Services, signed it, and sent it to Winnipeg for signature by Mr. Trigwell.

On January 30, 1991, Mr. Trigwell and Mr. Hendricks went to the office of the local manager, Mr. Kozub, to sign the agreement

on behalf of the union. Mr. Hendricks recalls being angry at the fact that the sign-up date had been moved-up, and things were being done in so rushed a fashion. I believe that any "rush" on the part of management was due to the fact that the Food Services department was about to close. Mr. Kozub believes that after the union official signed, he gave Mr. Trigwell a photocopied list of the names of the ten Food Services people who would be offered separation packages. Mr. Trigwell denies receiving any list. He does recall that Mr. Kozub read him a list of the people involved. Whatever happened, neither Mr. Trigwell or Mr. Hendricks asked about Mr. McCallum's status or noted his omission.

Over the next week or so, separation agreements were signed by ten Food Services employees. Mr. Trigwell had asked Mr. Kozub to set up meetings at which the affected employees would be informed of their options, and this was done. Mr. Trigwell also arranged for an information meeting, at which the deal was explained to members of the union. At some point, after the Memorandum of Agreement was signed but before the last of the ten individual separation agreements was completed, Mr. McCallum became aware that he was not being offered a separation package. He contacted both Mr. Kozub and his local union officials. He told the latter that he was a Food Services person. The union officials thought Mr. McCallum had at least a strong claim to a separation package under the January Agreement, and prepared a formal grievance, which was forwarded to the employer on the same day as the last of the ten signed a separation agreement.

I view matters as follows. The employer's subjective understanding when it negotiated the January Agreement was clearly that Mr. McCallum was not included. The employer calculated the cost of possible deals on this basis. The employer's assumption that the deal did not extend to Mr. McCallum was a reasonable one. It had laid-off Mr. McCallum from Food Services in mid-October, 1991, and never returned him there. In very early November, it had assigned Mr. McCallum work in the warehouse, made it clear that he could not expect to return to Food Services anytime soon, and began issuing pay stubs showing him as a member of the warehouse department.

The union had never grieved the employer's decision to recall Mr. McCallum to the warehouse department. At no point during the negotiation of the January Agreement did it ever suggest to the employer that Mr. McCallum ought to be included.

What if the employer's view of Mr. McCallum was based on a mistaken interpretation of the Collective Agreement? I do no think it was; but suppose that Mr. McCallum should have been temporarily returned to Food Services at the beginning of November, 1991. As I see things, the employer would, at worst, have made a good faith mistake on an arguable point. In view of the union's silence on the matter during the January negotiations, it was reasonable for the

employer to assume that its view of Mr. McCallum's situation was the operative one for both sides.

The January Agreement should be construed in a manner consistent with the expectations that the employer reasonably held and relied upon in negotiating its terms. Had the employer known that the union wanted to include Mr. McCallum, it would not necessarily have signed the same settlement - or any settlement at all. The employer might have been concerned about the precedential effect of including someone in Mr. McCallum's position. It might have found the overall package too costly. It might have taken a less co-operative attitude towards including employees who were on worker's compensation.

The union does not appear to have specifically considered the issue of Mr. McCallum during the negotiation of the Memorandum of Agreement. By the beginning of November, 1991, it should have been clear to the union that the employer did not consider Mr. McCallum to be an ongoing member of the Food Services department. The union should have expected that the employer would rely on that assumption in costing and negotiating the January Agreement. Not having raised the issue during the negotiation of the January Agreement, it must be deemed to have acquiesced in the employer's assumption about Mr. McCallum's status.

A note on Article 12.4 of the Collective Agreement.

Article 12.4 of the Collective Agreement obliges the employer maintain a "seniority list for all employees in every department." The list should be accessible to the Chief Steward of the plant, and delivered to him at quarterly intervals "or as otherwise agreed". The evidence suggests that both sides accepted that lists would be issued only at the request of the union, which would usually be more often than quarterly. There is no indication at all that the employer has ever failed to comply.

But assume for a moment that the employer was somehow remiss in providing such a list during the period leading to the January Agreement. The fact would remain that by various means, including conversations with Mr. McCallum, work assignments, pay records and Daily Labour Reports, the employer made its views on Mr. McCallum's status reasonably clear. By the first week of November, 1991, the employer did not view Mr. McCallum as being an ongoing member of the Food Services department.

Concluding observations

For the reasons set out, this grievance is denied.

I am aware that parties to a collective agreement sometimes

regret, even resent, comments by arbitrators that go beyond what is strictly necessary to explain their decision. Arbitrators may not be familiar with the whole web of personal, political and legal relationships at a work place, and "extra" comments may be both ill-founded and disruptive. I have tried to avoid deciding any more about the legal meaning of the Collective Agreement than is necessary. Prudently or not, however, I will offer a few general comments about the conduct of the parties in this case. I do so because I am concerned that some hard feelings have emerged between the two sides as a result of some misunderstandings, rather than any bad faith that is attributable to anyone.

During the hearing, union officials such as Mr. Trigwell indicated how important it is to their effective functioning that discussions with management be conducted in an atmosphere of trust. It is clear that some operations of Maple Leaf Foods are undergoing major downsizing, and in such difficult times, it seems especially desirable that the parties be able to co-operate in developing constructive and humane solutions. Mr. Trigwell mentioned appreciatively that Maple Leaf Foods had, in the past, worked with the union to try to save jobs where possible.

Mr. Parkinson commented during the hearing that he felt the credibility of the union had sustained serious damage as a result of the McCallum grievance. He felt that the employer had been "railroaded".

I can appreciate some of Mr. Parkinson's sense of unfair surprise. He had to sell his own superiors on a settlement that was relatively expensive; part of the deal was that no further grievances would be brought; and one suddenly emerged.

In my view, however, the union had no improper motives at all in bringing this grievance. The union has not acted with the intention of claiming more than the January Agreement promised. It simply believes that on a proper interpretation of the January Agreement, Mr. McCallum is among its beneficiaries.

The union believes it had to pay a substantial "price" for the benefits of the January Agreement. The union had to permanently surrender the grievances of those who had been laid-off during earlier cutbacks. The union also had to promise not to launch any grievances on behalf of "potential bumpees". In bringing forward the McCallum grievance, the union has not acted with the intention of bringing forward a grievance that it had promised to forego. It was not trying to to "sneak in" a "potential bumpee". Union officials sincerely believed that Mr. McCallum has at least a reasonable claim to be considered as one of the "Food Services" persons contemplated by the Memorandum of Agreement. As a matter of legal interpretation, it happens that I unable to uphold the grievance; but I see no reason whatever to doubt the good faith of either Mr. McCallum or the union officials who have acted on his

behalf.

During the hearing, counsel for the employer explored the possibility that union officials deliberately waited until the tenth person accepted a separation package before filing the McCallum grievance. I am certain that the union had no such devious intentions. The timing of the McCallum grievance relates to the fact that it was some time before Mr. McCallum brought the matter to the attention of union officials. Consistently with routine practice, the union gave Mr. Kozub several days notice before filing a written grievance. I accept entirely the testimony of both Mr. Trigwell and Mr. Hendricks that they had no ulterior motives whatever in filing the McCallum grievance when they did.

No one in this case has questioned Mr. McCallum's good faith in the slightest. His skill and years of dedicated service in the Food Services department have led him to identify himself strongly with it. I think everyone involved here understands and respects his feelings. My role, however, is confined to give a fair interpretation to the deal the employer and the union have made concerning separation packages. The parties have established certain conditions for eligibility. As the most junior person to have any significant association with Food Services over the years, Mr. McCallum was vulnerable to being moved around; to his misfortune, he did not end up being in "the right place at the right time".

As far as I can see, the January Agreement emerged from the efforts of both sides to find a creative and constructive resolution to a difficult situation affecting a large number of employees. It would appear to be in the interest of both sides that they continue such efforts in the future.

Bryan Schwartz,
Arbitrator,
June 5, 1992.