FILE NO. AA93-02-008

EMPLOYER: Westfair Foods Limited

UNION: United Food & Commercial Union, Local 832

ARBITRATOR: Dr. B. Schwartz

APPEARANCES: G. Mitchell, for the Employer
R. Ziegler, for the Union

GRIEVOR: R. Dalkie

DECISION RENDERED: February 11, 1993

EXPEDITED ARBITRATION: Yes

ISSUES: ARBITRATORS - Jurisdiction - retention; DISCIPLINARY PENALTIES - Types of Penalty - transfer; suspension; multiple penalties: The Grievor had been discharged for an incident with a customer. In the initial award, the Grievor was reinstated and, as recommended by the Arbitrator, he was transferred to another store where he was scheduled for fewer hours and consequently earned less wages. The Union now grieved that the Employer's conduct violated the intent of the award and the transfer amounted to an additional penalty as the monetary effects exceeded the loss of pay from the two-week suspension which the Arbitrator specifically ordered. In the award, the Arbitrator stated the aim of the transfer was to accommodate the customer and not punish the Grievor, and for example, it would not be proper to transfer him to the store farthest from his residence. The Union submitted that the Arbitrator's caution about distant locations was an example and not the only constraint on management's discretion. The Employer argued that the Arbitrator was without jurisdiction as it had complied with the previous award and the earlier grievance had been resolved. It added that it had the general authority to transfer employees, even to a place where they were guaranteed fewer hours of work as per Article 19.18 of the collective agreement. If the Grievor has a problem with the transfer, it was properly the subject of a new grievance.

AWARD: GRIEVANCE ALLOWED IN PART. The Arbitrator found that he had authority to assess the transfer as per Section 121(4) of **The Labour Relations Act** which provided that the jurisdiction of an arbitrator would continue until every aspect of the matter had been determined. He noted the transfer was not an ordinary transfer but was based on his recommendation. Accordingly, he ruled the transfer was part of the matter over which he had jurisdiction. He concluded that the overall decision to transfer the Grievor was caused by a good faith desire by the Employer to follow through on the recommendation, but the effect on earnings was not considered. The Arbitrator would not say the transfer was an undue burden simply because the Grievor's hours were reduced as the collective agreement did not provide a guarantee of hours, even in the original store he was employed. However, he ruled that because it was unlikely that the Grievor would rise up in seniority at the location he was transferred to, the burden went beyond what could reasonably be expected in order to accommodate the customer. He noted that this conclusion was binding. So as to not limit management's discretion and to allow the parties, who were in the best position to determine if the transfer would cause more problems than it would resolve, he provided guiding principles rather than a specific resolution in determining the Grievor's work site.

Full text of award published in 34 L.A.C. (4th) 1994 at 395.

RE:

UNITED FOOD AND COMMERCIAL UNION, LOCAL 832
-and-
WESTFAIR FOODS LIMITED
(Remedies)

Re: dismissal of Mr. Robert Dalkie
Case No.769/92/LRA and 770/92/LRA.

Date of hearing:	January 13, 1993.
Place of Hearing:	UFCW's Board Room, Winnipeg, Manitoba.
Appearances:	Mr. Robert Ziegler for the UFCW, Local 832; Mr. Grant Mitchell for Westfair Foods Limited.
Arbitrator:	Dr. Bryan Schwartz.
Award Issued:	February 11, 1993

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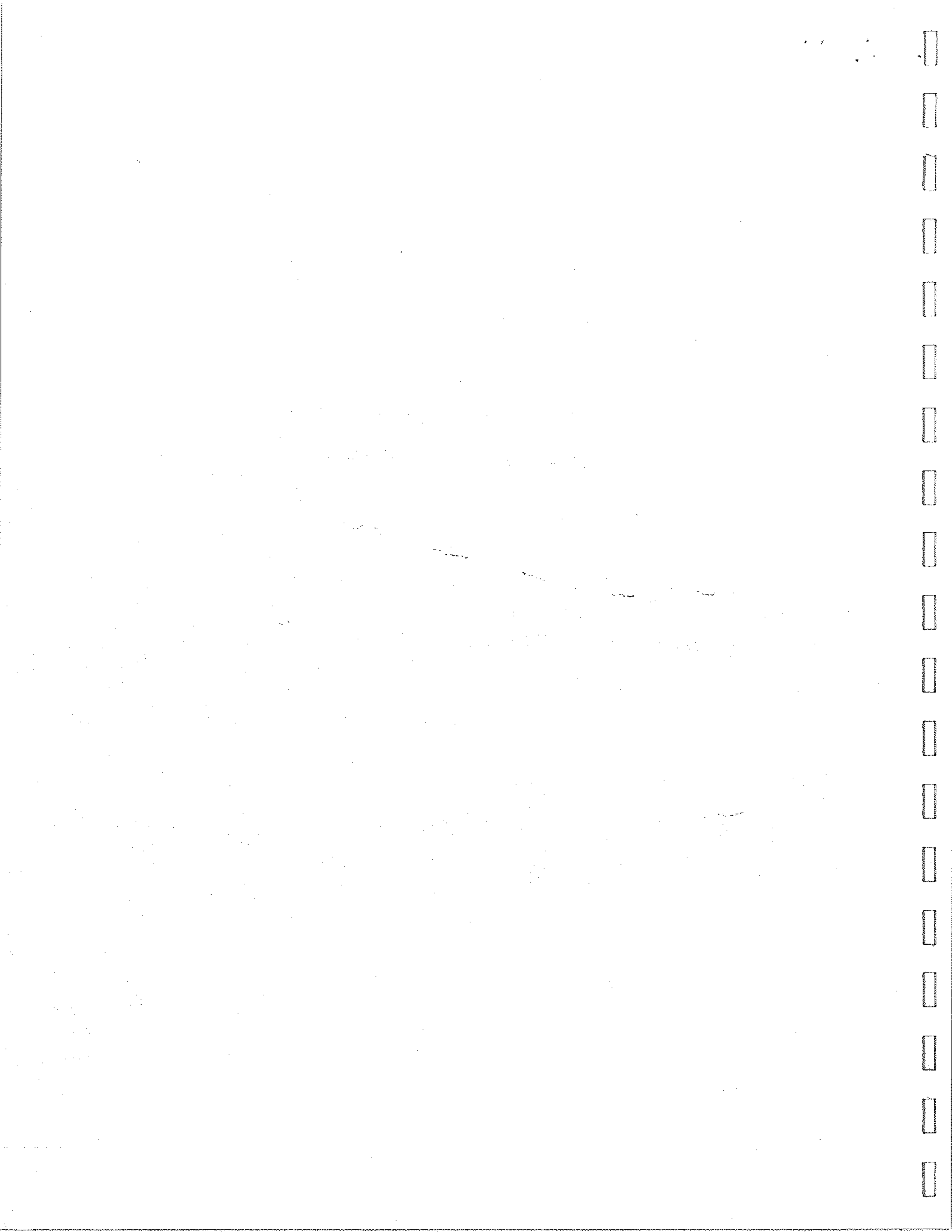

AWARD (Remedies)

Introduction

February 11, 1993

Last year, Mr. Dalkie was involved in an incident with a customer. As a result, the employer dismissed him. He brought a grievance. In light of my own view of the facts, I held as follows:

> Without pretending to any scientific precision, I believe that the facts proved originally warranted, and still warrant, suspending Mr. Dalkie without pay for two weeks.
>
> [The customer] mentioned she would not want to shop at the store if Mr. Dalkie were still there. While I do not interpret events in quite the way she does, I would still recommend, out of deference to her feelings, that Mr. Dalkie be transferred to another store. To be clear, I am presenting the employer with a suggestion, not a binding order. (I would also caution that the aim here is to accommodate [the customer], not to further punish Mr. Dalkie. For example, it would not be proper to select a new place of work for him on the basis that it is the farthest from his residence.)

After my award was issued, the employer transferred Mr. Dalkie from its Gateway store to its McPhillips store. The union is not complaining about the geographical location. It is true Gateway is closer to Mr. Dalkie's residence, and Article 19.26 of the Collective Agreement recommends that the employer try to assign employees work nearest their residence (unless there is a countervailing business reason). I did recommend a transfer, however, and the McPhillips store is not unreasonably far from Mr. Dalkie's home. After Gateway, it is among the two stores that are closest to Mr. Dalkie. Of the five Superstores in Winnipeg, two others are farther away.

In any event, distance from home is not a significant issue for Mr. Dalkie. He testified that his main concerns are the hours of work that he is guaranteed, and actually receives. The union argues that at McPhillips, Mr. Dalkie is substantially worse off with respect to hours of work in all respects. It says that the transfer amounts to an additional penalty for Mr. Dalkie, the monetary effects of which greatly exceeds his loss of pay from the two-week suspension. The employer's conduct, the union claims, violates the intent of my award. The union asks that I provide the parties with a list of acceptable alternatives, or else make clear what principles apply and leave it to the parties to find a proper location for Mr. Dalkie.

The employer argues as follows. It complied with the intent of the 6 November award. My comments about the farthest location were heeded. The employer has the general authority to transfer employees, even to a place where they are guaranteed fewer hours of work; Collective Agreement, Article 19.18. The transfer should not be seen as a punitive measure. If there is a problem with it, it is properly the subject of a fresh grievance. The fact that I earlier resolved a grievance with respect to Mr. Dalkie's dismissal does not make me the permanent overseer of his work life. I have no jurisdiction, says the employer, to intervene at this stage.

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How Hours of Work are Assigned at Superstores

The Collective Agreement sets out a system for scheduling the work of part-time employees.

Work is assigned on a weekly basis. At each store, preference is given to employees on the basis of seniority; Article 19.13. Each individual store does its own scheduling, and what counts is a part-timer's seniority at that particular store; Article 19.10. An employee might be only tenth in seniority at all Superstores, but still first at a particular location.

As well as seniority, scheduling takes into account the employee's availability. An employee can be either "unrestricted" (willing to accept work at any time) or "restricted" (available at certain times only - Article 19.14[f]). Three times a year, an employee can change his Declaration of Availability.

The Collective Agreement provides guarantees of work for the "Group" of unrestricted employees at each store. The "Group" consists, roughly, of the top third of the unrestricted employees. The Group is itself divided on the basis of seniority. The most senior third are guaranteed 24 hours; the middle third, 21 hours; the bottom third, 18 hours.

Again, membership in the Group is confined to unrestricted employees. A member of the Group may have his guarantee lowered, or lose it altogether, if a more senior employee at the store switches to "available status."

An employee may be assigned more than his guaranteed hours. At the Gateway store, Mr. Dalkie was the second-most senior unrestricted employee, and was guaranteed 21 hours/week. In 1992, prior to being dismissed, Mr. Dalkie actually averaged about 28 hours/week. At the McPhillips store, the supervisor is strict about not assigning an employee more than his guarantee. By doing so, the supervisor is able to cut costs. The work can be assigned to more junior employees, who are paid less.

With respect to hours beyond the guaranteed floor, then, an employee is vulnerable to changes in his supervisor's policies. Some supervisors might value experience and stability, and so prefer to keep senior employees on a bit more than the minimum. On the other hand, an employee never knows when the supervisor will try to cut overall salary costs by assigning the minimum and no more.

The Collective Agreement also provides a secondary floor, of 12 hours, for a certain percentage of part-time employees at each store. This lower floor has little impact on the controversy before me.

To summarize, Mr. Dalkie's practical prospects for earning money at any store depend primarily on the following factors:

-"Group seniority": An employee can be guaranteed up to 24 hours/week, depending on how senior he is among unrestricted employees. The size of the Group depends on the number of unrestricted employees. On the evidence, that number tends to reflect the size of the store, and is fairly stable;

-"store seniority": To the extent that he is outranked by restricted employees, an employee is liable to be demoted or bumped off the Group altogether;

-"Routine hours": Different stores have different approaches to assigning an employee more hours than his guarantee. These policies can be changed, largely at the employer's discretion.

The Effect of the Transfer on Mr. Dalkie's Income-Earning Potential

At the latest hearing, the union presented tables showing the seniority and hours worked for employees at each of the stores. Based on the information in these tables, the following summary can be constructed[1]

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Store	Seniority if Dalkie worked there store/Group	Hrs/Week guaranteed as Group member	Hrs/Week routinely worked by Dalkie* (or by employee he would supplant)				
				Reinstatement period		1992	1991
Charleswood	1/1	24	(Meni)	(23)		(25)	(23)
Gateway	3/2	21	(Nickel)	(26)		*28	*28
St. Anne's	4/3	18	(Moed)	(22)		(21)	(20)
McPhillips	6/4	-		*19	(Bn)	(14)	(9)
Grant	5/5	-	(Gajdosik)	15		(19)	(18)

[1]Here is an example of how to read this table. Reading across the McPhillips line: Mr. Dalkie, at the time of the hearing, was 6 in store seniority, 4 in Group seniority. He was not eligible for any of the Group guarantees. During the reinstatement period - the time since he returned to work after the 6 November award - he has been averaging about 19 hours/week. (The last figure is based on data for the last six weeks of 1992, and presented by the union in exhibit #4.) If Mr. Dalkie were not there, Mr. Rocco Boniello would be 4 in Group seniority. In 1992, Mr. Boniello averaged about 14 hours/week. In 1991, he averaged about 9. (The last two figures are calculated from exhibit #5, also presented by the union.)

The table is intended only to give a general picture, not exhaustive or absolutely precise detail. I have not overlooked that Mr. Dalkie was 3 in Group seniority when first transferred to McPhillips. I am aware as well that various employees were not necessarily in exactly the same seniority position in 1992 or 1991 as they are at present.

It will be seen from this chart that Mr. Dalkie's earning prospects are much reduced at McPhillips from what they were at Gateway. Specifically, his seniority has dropped from 3/2 to 6/4. His guarantee of 21 hours is gone. The hours routinely assigned have gone from 28 to 18.

As I understand it, when Mr. Dalkie was first assigned to McPhillips, his Group seniority was 3. Between then and the hearing, a more senior employee switched to unrestricted availability, and so bumped Mr. Dalkie down to the 4 spot.

The Employer's Reasons for Switching Mr. Dalkie to McPhillips

The employer has consistently adopted a very strict policy of not transferring part-timers - even between departments, let alone stores. At the first hearing, Mr. Dudrak, a middle manager, stated that "we don't transfer problems." Witnesses from both sides concur on this point: the only cases they can ever recall of a part-timer being transferred occurred after an arbitrator specifically recommended it.

After hearing of my 6 November award, managers for the employer discussed where Mr. Dalkie should be transferred. They were aware of some reference in the award to distance from Mr. Dalkie's residence, so they took location into account. They placed considerable emphasis on who Mr. Dalkie's supervisor would be. They avoided the St. Anne's store, because Mr. Dalkie and the local supervisor had not gotten along well in the past. They avoided another store where the manager was inexperienced; in his testimony, Mr. Dudrak suggested that sending Mr. Dalkie there might somehow add to the strain on a new manager. The manager at McPhillips was felt to be experienced, and particularly skilled at correcting difficulties with an employee's performance.

Jurisdiction of Arbitrator

On the evidence, I would conclude that the overall decision to transfer Mr. Dalkie was primarily caused by a good faith desire by the employer to follow through on a recommendation by an arbitrator. Even if I had no authority to actually interfere with the transfer, I would think the employer would be interested in my response to the manner in which it has interpreted and applied my recommendation.

I believe, however, that I have authority to assess, and if necessary, correct a transfer of Mr. Dalkie. In my initial award, I used the usual language about retaining jurisdiction over matters arising from the interpretation or implementation of my award. An arbitrator cannot, of course, unilaterally extend his jurisdiction beyond its statutory limits. The terms of the Manitoba Labour Relations Act, however, strongly support my retaining jurisdiction. Section 121(4) states:

> The jurisdiction of an arbitrator or arbitration board with respect to a matter continues <u>until the arbitrator or arbitration board has determined every aspect of the matter,</u> notwithstanding that

(a) the arbitrator or arbitration board has not expressly retained jurisdiction in any interim or other decision;
(b) one or more of the parties to an arbitration do not agree that the arbitrator or arbitral board retains jurisdiction. (Emphasis added.)

Related sections of the Act further convey a desire by the legislators that the arbitrator will conclusively settle a dispute, and not be held back unduly by technical arguments about the legal nature of the dispute or the scope of the arbitrator's legal authority.

Section 121(1) directs arbitrators to "have regard to the real substance of the matter in dispute between the parties" and states that the arbitrator is not bound by "a strict legal interpretation of the matter in dispute";

Section 121(2) states that the arbitrator "shall provide a final and conclusive settlement of the matter submitted to arbitration" and sets out a broad, and non-exhaustive, list of remedies available to an arbitrator;

Section 121(4) provides that:

> Where an arbitrator or arbitration board determines that an employee has been dismissed or otherwise disciplined by an employer for cause, if the collective agreement under which the arbitration arose does not provide a penalty or remedy for the cause of the dismissal or discipline which is the subject of the determination, the arbitrator or arbitration board may substitute for the dismissal or discipline such other penalty or remedy as the arbitrator or arbitration board deems just and advisable in the circumstances.

The management rights clause in the Collective Agreement here expressly includes the authority to transfer employees; Collective Agreement, Article 12.01. When an ordinary transfer is made, a part-timer is guaranteed no "loss of hours" for six weeks - and no more. If this were an ordinary transfer of Mr. Dalkie, the mere fact that I once reinstated him would give me no jurisdiction. If the union objected, it would have to bring a fresh grievance, perhaps invoking s.80 of the Labour Relations Act (management discretion must be exercised "reasonably, fairly and in good faith").

The present case is no ordinary transfer. Counsel for the employer, who presented his case with his usual clarity and force, himself argued that the "six-week" guarantee in Article 19 does not apply, because this was no ordinary transfer; it was based on my recommendation resulting from employee misconduct. The transfer here is a response to a specific episode of employee misconduct. Accordingly, I believe that the transfer is part of the matter over which I have jurisdiction.

Even if the transfer here were characterized as non-disciplinary, it would still be part of the "matter" which I am charged with settling. As the union pointed out, even a non-disciplinary transfer must conform to the standards of reasonable, fair and good faith administration of the Collective Agreement. An arbitrator has broad remedial authority in disciplinary cases, under

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s. 121(3) of the Labour Relations Act; but a similar broad authority exists in the general run of cases, under s. 121(2).

I do think, however, that the transfer here should be characterized as a disciplinary one. The transfer was the employer's response to a specific episode of employee misconduct. (The nature of the response was influenced, of course, by its interpretation of my award.) It had a seriously detrimental effect on Mr. Dalkie's employment situation. For these reasons, it should be treated as a disciplinary measure.

It is true that the employer did not transfer Mr. Dalkie out of any ill-will with intent to injure. It did not consider the effect on Mr. Dalkie's earnings at all. To characterize the transfer as non-disciplinary due to "absence of malice," however, would not make legal or practical sense. It would greatly complicate, confuse and protract cases like this if the state of mind of the employer - its "punitive intent" - became a key issue.

The Intent of the Original Award

The union points out that the negative impact of the transfer on Mr. Dalkie will, in dollar terms, drastically exceed the impact of a two-week suspension without pay - the penalty I specifically ordered. The loss of even 3 hours of work per week amounts to over 150 hours in a year - or well over $2,000 in income. That is over three times the hours and wages lost due to the suspension without pay. The union points to my reference to "not punishing Mr. Dalkie further," and argues that the practical effect of the transfer was to do so. It stresses that my specific caution about distant locations was merely an example, and not the only constraint on management's discretion.

I agree with the union's analysis of my earlier award. If I was not sufficiently detailed and precise the first time, let me extend my genuine apologies to both sides, and try to do better this time. At the follow-up hearing, both sides presented a full and sharp exploration of the practical implications of a transfer. The added information should be helpful to me in trying to provide further direction for the parties.

At the same time, I am reluctant to dictate a specific resolution here, as opposed to providing some guiding principles. Some possible solutions would be consistent with the provisions of the Collective Agreement, and so may be chosen at management's discretion. (In exercising its discretion, it might, of course, choose to consult the union.) Other possible solutions might conflict with the normal operation of the Agreement, and so would have to be agreed to by both sides.

The reasons for my leaving the details to the parties are as follows. First, I do not want to limit management's discretion more than is necessary. Second, the best solution here might turn out to involve making an exception to the usual operation of the Collective Agreement. The parties, not I, would be in the best position to determine whether a special arrangement would cause more problems than it would resolve. Third, some solutions might have deleterious effects on other employees. I am reluctant to impose burdens on third parties without knowing what the actual impact might be. The parties themselves are in a better position to know.

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Let me then try to spell out the principles that should apply in determining Mr. Dalkie's work site.

In my view, the proper measure of discipline for Mr. Dalkie is a two-week suspension without pay. In all the circumstances - including the five months Mr. Dalkie spent out of work, not knowing whether his dismissal would be upheld - it would not be reasonable or fair to effect a transfer that added unduly to those negative consequences.

In assessing whether a transfer has undue impact, it is necessary to weigh the employer's legitimate interests and the nature of the disadvantage to Mr. Dalkie.

I would not say that the transfer to McPhillips is an undue burden on Mr. Dalkie merely because his "routine hours" have dropped. He had little assurance, in practice or under the Collective Agreement, that he would be assigned any more than his guaranteed hours. On the other hand, Mr. Dalkie was in a very good seniority position at Gateway. He was second in Group seniority, third in store seniority. He was guaranteed 21 hours at the time he was transferred away. There was always a chance that a more senior employee, Mr. Kiriluk, would change to unrestricted availability, and bump Mr. Dalkie down to eighteen hours. But there was also a chance that Mr. Durighellow would be promoted or leave, and that Mr. Dalkie would rise to a guarantee of 24 hours.

The transfer to McPhillips has left Mr. Dalkie in a much worse position with respect to both Group and store seniority. At Gateway, he had a solid expectation of receiving at least 21 hours a week, and a "worst case" assurance of at least 18 hours a week. When first transferred to McPhillips, he immediately dropped in both Group and store seniority. His initial guarantee was only 18 hours, and he soon lost that. His lower store seniority leaves him vulnerable to a further erosion of his position.

It is not impossible that Mr. Dalkie will actually rise up to a Gateway-like seniority at McPhillips. It is not likely to happen any time soon. Several more senior employees would have to move out of the way; others would have to refrain from returning to unrestricted availability, and thereby supplanting Mr. Dalkie. In all the circumstances of this case, I would conclude that the burden on Mr. Dalkie goes beyond what can reasonably be exacted in order to satisfy the store's interest in accommodating the offended customer. My conclusion in this respect is intended to be binding.

On a relatively minor point, I would also rule that Mr. Dalkie should be compensated for hours of work lost due to his transfer to McPhillips. The amount should be based on the difference between 21 hours/week and the hours he has been routinely assigned. The "six week" limit does not apply, because the transfer has been an undue addition to Mr. Dalkie's penalty, rather than an ordinary transfer.

If the employer wishes to be done with this matter, one legitimate option is to return Mr. Dalkie to the Gateway store. It could be explained to the customer that Mr. Dalkie has been substantially penalized for his misconduct and that it proved impractical to re-assign him to another store.

A possibility that the parties might wish to consider is to transfer Mr. Dalkie to a Superstore where his seniority would not suffer in relation to Gateway. Another thought that might be worth exploring is the possibility that there is a position in the Economart chain that would be satisfactory to both the employer and the union.

The employer might wish to discuss other options with the union. It might consider some ad hoc exception to the usual Superstore arrangements; e.g., guaranteeing Mr. Dalkie 21 hours/week until he rises again to a seniority position comparable to the one he held at Gateway. The hours might be worked at one store, or Mr. Dalkie might be assigned work at a second store a few times each month.

There may be further, even better options. I hope that an arrangement can be reached which does not provoke further legal disputes. If, however, there is any further disagreement about the implications of my earlier award or this one, I expressly retain jurisdiction to settle it. The parties may be assured that if a further question does arise, I will make every effort to hear and rule on it as quickly as possible.

Dr. Bryan Schwartz
Arbitrator