



ONTARIO
CROWN EMPLOYEES

EMPLOYÉS DE LA COURONNE
DE L'ONTARIO

GRIEVANCE
SETTLEMENT
BOARD

COMMISSION DE
RÈGLEMENT
DES GRIEFS

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GSB # 2776/96
OPSEU # 97B282

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Kerhanovich, Behrsin)

Grievor

- and -

The Crown in Right of Ontario
(Ministry of Transportation)

Employer

BEFORE

Owen V. Gray Vice Chair

**FOR THE
GRIEVOR**

Eric O'Brien, Janet Black
Counsel
Eliot Smith
Barristers & Solicitors

**FOR THE
EMPLOYER**

Kelly Burke
Counsel
Legal Services Branch
Management Board Secretariat

HEARING

January 19, 20, 2000
April 17, 2000

DECISION

[1] George Kerhanovich and Harold Behrsin worked for the Ministry of Transportation in Sault Ste. Marie (“the Sault”) for a number of years as purchasing agents. On or about November 26, 1996, they each received formal notice that

As a result of workforce reductions in the Ministry of Transportation, your position of Purchasing Agent will be declared surplus effective December 3, 1996. This letter provides you with notice of lay-off as required by Article 24.2.1.

On December 16 and 30, 1996, respectively, Messrs. Behrsin and Kerhanovich filed grievances alleging that “I have been improperly surplussed in violation of the redeployment articles and Article A of the Collective Agreement.”

[2] The union alleges that the decision to surplus the grievors’ positions (and not those of other, more junior, purchasing agents in Thunder Bay) was a breach of either Article 20.1.2 or Appendix 13 of the collective agreement, and also violated Article 3 (formerly Article A) because it was motivated by the grievors’ union activities. Mr. Kerhanovich has been the local union president in Sault Ste. Marie since 1970, and was union staff representative for a year in the early 1990s. Until his retirement in early 1997, Mr. Behrsin assisted Mr. Kerhanovich in carrying out his union activities. They had both filed and won personal classification grievances during the course of their employment with the ministry.

[3] The ministry is organized into five Regions. Sault Ste. Marie is in the Northwest Region. The regional headquarters for the Northwest Region is located in Thunder Bay. The Region is divided into two Districts: Sault Ste. Marie and Thunder Bay. Prior to 1996, the ministry maintained a garage and warehouse at each of three locations in the Region: Sault Ste. Marie, Thunder Bay and Kenora. The garages serviced ministry-owned vehicles. The warehouses received, stored and distributed goods used in or by ministry operations. Associated with each warehouse was a purchasing function performed by purchasing

agents and clerks. The garage and warehouse and associated purchasing function in Sault Ste. Marie serviced the needs of the ministry in the Sault Ste. Marie District.

[4] The most recent Position Specification for the grievors' Purchasing Agent position was dated January 10, 1990. It stated that the position's "Branch and Section" was "Dist. 18 – Sault Ste. Marie." The general purpose of the position was "[t]o provide services relative to the procurement of a wide variety of materials, supplies and services, consistent with the District's operating needs and Work Programs." The duties of the position consisted largely of receiving requests for materials, supplies or services, vetting the requests for completeness, determining the most appropriate process to satisfy each request (whether from inventory or through requests for oral or written quotes or a formal tender process), and carrying out or arranging the carrying out of that procurement process. Expediting delivery of goods and services purchased was also a significant function of the position.

[5] The Position Specification for the Purchasing Agent position said that the duties of the position were to be performed "under the general supervision of the District Purchasing & Supply Supervisor." That was true until late 1994, when the grievors received the following memo dated December 14, 1994 from R. S. Miller in Thunder Bay:

TO: All Purchasing & Warehouse Staff DATE: December 14, 1994
Sault Ste Marie

Attn: H. Behrsin Purchasing Officer

Effective immediately the Sault Ste Marie Purchasing and Supply operation will become a self-directed work team reporting directly to myself in Thunder Bay.

Harold Behrsin, Purchasing Officer, will be the self-directed team leader, as per our discussions of Dec 12/94, and will direct all information and correspondence to me. He has agreed to be the liaison between the Sault Ste Marie team and the team in Thunder Bay. Please note that this does not preclude other team members contacting the Thunder Bay operation for information and assistance.

I look forward to working with you to make this operation a success.

Thank you.

R.S. Miller, Coordinator
Materials Management/Accounts Payable
Northwestern Region

The self-directed team of which Mr. Behrsin became team leader consisted of himself, Mr. Kerhanovich and the five employees in the warehouse at Sault Ste. Marie: a warehousing supervisor, 3 clerks and a driver. Members of the team dealt with Mr. Miller in Thunder Bay (either directly or through Mr. Behrsin) in matters relating to their material handling and purchasing duties. They continued to deal with the District Engineer in Sault Ste. Marie concerning the local aspects of their employment, such as the condition of the workplace, availability of equipment, health and safety and local training.

[6] During 1996 the ministry initiated a number of changes in what it does and how it does it. Highway maintenance work previously performed by ministry employees was to be contracted out to a greater extent than it had previously been. Regions were to “consolidate” district fleet management and equipment repair operations at regional headquarters, including Thunder Bay — District garages, including the ones in Sault Ste. Marie and Kenora, were to close. Concurrent with the regional consolidation of equipment repair operations, warehouse services were to be “consolidated” into four regional locations, including Thunder Bay. Ministry employees were given purchasing cards with which to acquire needed goods locally, thus reducing the amount of purchasing and warehousing that had to be performed as a separate function. The remaining regional warehouses were to focus on the supply to employees and operations in the region of products not available in the local marketplace. For the Northwest Region, this meant the warehouses in Sault Ste. Marie and Kenora would also be closed.

[7] These initiatives reduced but did not eliminate either the ministry’s operations in the Sault Ste. Marie District or the need for purchasing in relation to those operations as a distinct function. The grievors testified that, apart from the garage and highway maintenance operations, there were several other ministry departments with purchasing needs that remained in the District after effect

was given to the changes announced in 1996. Indeed, the contracting out of highway maintenance, which had been a District purchasing function, was to increase as a result of the changes.

[8] Larry Lambert was the Regional Director for the Northwest Region in 1996, and still is. He testified about the initiatives to which I have already referred. The closing of garages and warehouses was announced in mid year, and related surplusings took place in July. When the July surplusings were planned, management did not know how many affected employees would leave their employment immediately and how many would work out their notice periods, so they did not know how quickly the purchasing function would be impacted. The grievor's positions were addressed in a second round of surplusings on November 26, 1996. Mr. Lambert testified that when making that surplusings decision, management estimated that the closures and introduction of the purchasing card would reduce the work of purchasing agents in the Northwest Region by about 50 percent. He said that estimate had been used to determine the number of purchasing positions in the Region that would be declared surplus.

[9] At that point the Region had 6 purchasing agents — 3 in Thunder Bay, two in Sault Ste. Marie and one in Kenora — and 2 clerks — one in Thunder Bay and one in Kenora. Mr. Lambert recommended to the executive committee that they surplus the purchasing agent and clerk positions in Sault Ste. Marie and Kenora in order to achieve a 50 percent reduction in purchasing positions. He testified that his recommendation was in no way motivated by the grievors' union activity.

[10] Mr. Lambert testified that after the surplusings of purchasing positions in Sault Ste. Marie and Kenora took place, all purchasing for the Northwest Region (that is, purchasing as a distinct function, as opposed to local purchasing using purchasing cards) was done from Thunder Bay. He said that the purchasing thereafter was handled "in part" by the complement of three purchasing agents and one clerk that existed in Thunder Bay at the time the grievors were surplusings. He explained that on some occasions since 1996 the volume and com-

plexity of the purchasing work had been too great for that complement, and that unspecified additional help had been provided. At the time of the hearing, he said, that complement of three purchasing agents and one clerk was able to handle the current purchasing work for the Region. In that connection, he observed that there had been further reductions and more shared services introduced since 1996.

[11] After their positions had been declared surplus, the grievors were told that Steve MacGregor, a purchasing agent in Thunder Bay, would thenceforth be handling purchasing for the Sault Ste. Marie area. They were instructed to refer all purchasing inquiries to him. During his notice period, Mr. Behrsin was instructed to, and did, pack up their purchasing records and lists of local suppliers and ship them to Thunder Bay. All of the records and information with which he had been working were shipped to Thunder Bay. The only tools of his former work that were not transferred to Thunder Bay during that time were some blank forms and a desktop computer. At one point during Mr. Behrsin's notice period, Mr. MacGregor travelled to Sault Ste. Marie for familiarization. During that trip he met with Mr. Behrsin, who introduced him to local suppliers and provided him with paperwork and other information.

[12] Mr. Behrsin estimated that over the course of 1996, prior to the date he received the formal surplus notice, there was a reduction in the volume of his work of about 10 percent. The closing of the garage had little effect on his workload, he said, because very little of his purchasing work was related to the garage — he noted that Mr. Kerhanovich had been doing the equipment purchasing. Mr. Behrsin was not performing purchasing work for very long after he received his surplus notice. He testified that the introduction of the purchasing card (said by Mr. Lambert to have begun in July 1996) did not seem to have substantially affected his workload before the purchasing work was taken away from him.

[13] Mr. Kerhanovich testified that in early 1996 about 30 percent of his work related to the District garage and warehouse. Other activities eliminated in the

reorganization — maintenance patrols and construction — accounted for 10 to 15 percent of his work, he said. In examination in chief he did not describe in percentage terms the portion of his work that was for District operations unaffected by the reorganization. He merely identified, as Mr. Behrsin had, the ministry operations that remained in the Sault Ste. Marie District after the reorganization. He failed to answer direct questions about this in cross-examination. The only other estimate he provided during cross-examination was that 15 to 20 percent of his time had been spent on “general purchasing duties”, by which he meant maintaining a library and keeping a purchasing history — all of which, he acknowledged, would have reduced in volume as his other work reduced.

[14] Each of the grievors testified that he would have been willing to relocate to Thunder Bay. The position both grievors take in this matter is that they ought to have been transferred to Thunder Bay, not surplus. When they were surplus, they had the option to bump beyond 40 kilometres from their headquarters. They testified that the exercise of that option would not have taken them to a job in Thunder Bay. The scheme of Article 20 of the collective agreement was that the most senior displaced employee could bump the most junior employee in the same classification and the same ministry. Mr. Kerhanovich was the most senior purchasing agent in the province. He gave unchallenged testimony that exercising his right to bump would have taken him to Kingston. Likewise, Mr. Behrsin gave unchallenged testimony that when he learned he would be surplus (prior to receiving the formal notice) and asked management about the prospect of getting to Thunder Bay by bumping, he was told that a bump would most likely take him elsewhere.

[15] Shortly after receiving his surplus notice, Mr. Kerhanovich elected to reopen his Factor 80 and retire as of December 31, 1996. Mr. Behrsin elected to retire effective May 14, 1997 with an unreduced Factor 80 pension. Both say they would have continued to work if relocated to Thunder Bay, and would have retired later than they had. They claim compensation for lost earnings as well as the reduction in the value of their pension that flows from their having retired earlier than they would have chosen. They understand, or were made to under-

stand during the course of the hearing, that their claim is subject to offset by the amount that they earned or could have earned from employment through efforts to mitigate their earnings loss, and is also subject to offset by the value of the pension benefits received during the period in which they say their employment with the ministry should have continued. By agreement of the parties, resolution of issues relating only to the calculation of the net compensation (if any) for which the employer may be liable if found to have breached the collective agreement has been deferred until after the Board determines whether there was such a breach.

The Alleged Breach of Article 3

[16] Article 3.2 of the relevant collective agreement prohibits discrimination by the employer on the basis of an employee's union activity.

[17] The claim that the grievors were discriminated against by reason of their past union activity is based on the fact the grievors had engaged in such activity prior to the decision to surplus their positions. Mr. Kerhanovich was asked by union counsel whether there had been any adverse reaction by management to his union activity during his employment. He said that his supervisor had once said "maybe you should cut back on your union activities," to which he had replied "why don't you go tell the government that." The context in which these remarks were made is not entirely clear. Asked if he could give other instances of the employer's having reacted negatively to his union activity, Mr. Kerhanovich said he "would rather not." That is the sum total of the evidence of the employer's reaction to the grievors' union activity prior to November 1996, Mr. Behrsin having offered none.

[18] Mr. Lambert testified that he recommended the action ultimately taken with respect to the surplus of the grievors' purchasing agent positions in the Northwest region. As I have already noted, he said his recommendation was in no way motivated by the grievors' union activity. He was not cross-examined on that or any other aspect of his testimony.

[19] Discrimination on the basis of union activity will not necessarily be susceptible of direct proof. Someone who has acted on that basis may be unwilling to admit it. It may be necessary to draw inferences from surrounding facts. One may have to consider, for example, whether the explanation given for the impugned conduct makes sense in the absence of improper motivation. Here, management was acting in response to the same conditions and directives in other regions of the province. There is no suggestion that similar circumstances were dealt with in any significantly different way in those other regions. The decision taken for the Northwest Region gave effect to a recommendation made by Mr. Lambert. He described his reasons for that recommendation in his testimony. There was no challenge to Mr. Lambert's assertion that the grievors' union activity played no part in the formulation of his recommendation, nor, more importantly, to the plausibility of the claim that the reasons he gave for the recommendation were his, and the employer's, real reasons. The fact that improper motivation might not be admitted does not relieve the party alleging such motivation of the obligation to challenge in cross-examination a witness who plausibly denies the allegation in examination-in-chief.

[20] I find there is no merit whatsoever to the claim that the employer discriminated against the grievors by reason of their union activity. In that respect, these grievances are dismissed.

The Alleged Breach of Article 20.1.2

[21] Article 20.1.2 provides that

Where a lay-off may occur for any reason, the identification of a surplus employee in an administrative district or unit, institution or other such work area and the subsequent displacement, redeployment, lay-off or recall shall be in accordance with seniority subject to the conditions set out in this article.

The union takes the position that the relevant "administrative district or unit, institution or other such work area" for purposes of determining which purchasing agents to lay off in the Northwest Region in 1996 was the entire Northwest

Region, because all six of the purchasing agents in the region were then supervised by the same supervisor.

[22] In support of its position the union cited the Board's decision in *Parayankuzhiyil*, 2385/95 (October 28, 1997, Verity). The grievor there was one of 8 building contract administrators working for the Ontario Realty Corporation in its Kingston office. In 1995 the employer decided to reduce the number of building contract administrators in its Kingston office to five, and to reduce the number of building contract administrators in its Kemptville office from six to five. It laid off the three most junior building contract administrators in its Kingston office, including the grievor, and the most junior building contract administrator in its Kemptville office. The grievor had more seniority than two of the remaining building contract administrators in the Kemptville office. It appears that the two offices operated separately and served distinct geographical areas, but the building contract administrators in both offices had the same supervisor. The union took the position that the Kingston and Kemptville offices should have been considered a single "administrative district or unit, institution or other such work area" for purposes of Article 24.1 of the collective agreement then in effect, which had the same wording as Article 20.1.2 here.

[23] After noting that the parties had advised him that there had been no other decisions interpreting the language in question, the Vice-Chair in *Parayankuzhiyil* made these observations at pages 7, 8 and 9 of his decision:

In my view, the language chosen by the parties is sufficiently broad to encompass a wide variation of organizational structure. In this case, the Property Support Services Branch has chosen to divide the Province of Ontario for purposes of administration into various regions. I read Article 24.1 in the belief that the employer adopted the regional administrative district as the work area for purposes of identification of a surplus employee. To my mind, the use of the words "administrative district or unit" strongly suggests that the parties had in mind an area which was part of the Province of Ontario but larger than an office.

...

I am persuaded by the union's contention that an individual office i.e. the Kingston office, is too small an area to support any form of meaningful recognition of the principle of seniority for purposes of lay-off. My conclusion is supported by the circumstances of Larry Cryderman who is the only building contract administrator in the Lindsay office while at the same time being the

second most senior employee in the central region of the Property Support Services Branch

I find support for my interpretation in the definition of “district” as “a regional administrative unit” contained in the Dictionary of Canadian Law, 2nd ed., Dukelow. In the result, it is appropriate to tie the identification of a surplus employee to the administrative district or administrative unit in which he is employed - in this case the eastern region which encompasses both the Kingston and Kemptville offices.

Kingston and Kemptville are about 140 kilometres apart by road. Sault Ste. Marie and Thunder Bay are nearly 700 kilometres apart. The union argues that the same analysis should apply here, despite the greater distance, particularly since purchasing agents in the two locations had the same supervisor.

[24] It appears that *Parayankuzhiyil, supra*, is not the only decision to have considered the meaning of the words of Article 20.1.2, previously Article 24.1.

[25] In *Laurin/Joly*, 1759/90 (October 30, 1991, Verity), the grievors were travel consultants employed by the Ministry of Tourism and Recreation at an Ontario Travel Information Centre near Hawkesbury. There were similar centres at Lancaster and Cornwall, with two travel consultants likewise employed at each of those locations. The travel consultants at all three centres were supervised by the same supervisor. After the Hawkesbury centre was destroyed by fire, Mr. Laurin was sent to work at the Cornwall centre and Ms. Joly was sent to work at the Lancaster centre, both on the basis that they would be reimbursed their costs of travel. After five or six weeks, the grievors were informed that the Hawkesbury Centre would not be replaced, and that they were to be laid off accordingly. The award focused on Ms. Joly’s claim that this was improper when more junior travel consultants continued to work at the Lancaster centre. Lancaster is about 60 kilometres by road from Hawkesbury.

[26] The union took the position that the grievors were in the same “administrative district or unit, institution or other such work area” as the more junior employees at Lancaster, as the decision notes at page 13:

The Union contends that there is a short answer to the first issue in that the grievors should never have been declared surplus and subject to lay-off under Article 24.1 because they were not the most junior employees “in an adminis-

trative district or unit, institution or other such work area.” The Union acknowledged that the Ministry properly applied Article 24.1 in these circumstances but chose the wrong employees to be identified as surplus employees.

The union argued in the alternative that once laid off, Ms. Joly was entitled to bump a more junior employee at Lancaster because at that time Lancaster was her “headquarters” for purposes of the “within a forty ... kilometre radius of the headquarters of the surplus employee” test in what was then Article 24.6.1(a).

[27] Despite the small numbers of employees, the common supervision and the relatively short distances, the Board dismissed the union’s argument that employees of the three travel centres were in the same “administrative district or unit, institution or other such work area,” asserting at pages 14 and 15 that

We are not persuaded as to the merits of the Union’s “short answer” to the interpretation of Article 24.1. In our view, a “material change in organization” within the meaning of 24.1 arises in this case not in the context of an administrative district or unit but rather as a single or individual office.

The Board found, however, that Lancaster was grievor Joly’s “headquarters” at the time of lay-off because it was where she then worked, so she should have been allowed to bump one of the Lancaster employees.

[28] In *Paul*, 2295/92 (October 6, 1995, Stewart), the Board interpreted the language of what was then Article 5.2.2, under which an employee whose position had been reclassified to a class with a lower salary maximum was entitled to the appointment to the first vacant position in his former class that occurred “in the same administrative district or unit, institution or other work area in the same ministry in which he was employed at the time the reclassification was made.” Before his reclassification, the grievor had been an Information Officer 2 in the Parks and Natural Heritage Branch of the Policy division of the Ministry of Natural Resources in the Greater Toronto area. The argument made by the union is described at page 4 of the award:

Mr. Adams argued that the provision contemplates that an employee is entitled to return to a position which may arise in his immediate work area, such as the particular institution in which he is employed. However, if no position is available there and there is a position in the former classification available elsewhere in the Ministry, particularly within the geographic region in which

the employee worked, Mr. Adams argued that the employee is entitled to such a position. Mr. Adams argued that the phrase “administrative district” in Article 5.2.2 has a geographical connotation and submitted that where such a district exists within the Ministry’s operations, an employee whose position has been reclassified is entitled to a position that becomes available within that “administrative district. Accordingly, in this case, Mr. Adams argued that Mr. Paul is entitled to the first position in his former classification arising in the greater Toronto area. In the alternative, Mr. Adams argued that the appropriate cachement area for the purposes of the application of Article 5.2.2 is the entire Policy division, rather than the Branch.

The Board rejected the broad approach advocated by the union. In doing so it made these observations at page 6 and following:

In my view, the words “the same” indicate that the clause is clearly intended to provide for the right of an employee to the first classified position arising in the particular work environment he was in at the time of his reclassification. I agree with Mr. Smith’s submission that the reason that the clause outlines alternatives is because there are many work environments within the Ontario public service. ...

...

To the extent that a purposive approach to the issue is appropriate, it must be noted that entitlement to a position elsewhere in the Ministry is an entitlement that would often be of no practical value to a re-classified employee if it means that he or she is required not only to relocate but to relocate without the benefit of a moving allowance. ...

...

In my view, the real issue in this case is what constitutes the grievor’s work area. The reference to “institution” in Article 5.2.2 indicates that the work area is to be defined narrowly. While the evidence before me as to the structure of the Ministry of Natural Resources was quite limited, it is apparent that the Provincial Parks and Natural Heritage Policy Branch is a discrete work structure. The entire policy division, in my view, is broader than what is contemplated by the reference to “work area” in Article 5.2.2. While geographic designations, including the Greater Toronto Area, exist within the Ministry, the evidence did not establish that this particular administrative district in any way constituted the grievor’s “work area.”

[29] While it seems organizational boundaries were more salient than geographic ones in the circumstances of the *Paul* case, the Board’s comment on the reason for specifying the alternatives “administrative district or unit, institution or other work area” is equally applicable to the provision in issue here. The decision also touches on the problem of geographic boundaries in the second of the above-quoted paragraphs, noting that a broad view of this sort of language may not be in the interest of employees generally. That is further illustrated by the

Board's decision in *Union Grievance*, 665/81 (March 31, 1982, Kennedy) concerning the relocation of the OHIP head office (hereafter, "the OHIP case").

[30] In June 1980, the government of the day announced that OHIP's head office would be relocated from Toronto to Kingston over a period of three years. The employer took the position that those OHIP employees willing to relocate to Kingston were guaranteed jobs there, but those unwilling to do so would be treated as having abandoned their positions. The union's position was that the proposed relocation involved a lay-off of the affected employees, who therefore had the rights that the collective agreement afforded in the event of a lay-off. It argued that the positions of the affected employees had a geographic component, so that movement of the work from Toronto to Kingston was not a transfer of existing positions but an abolition of those positions and creation of new positions with a different geographic element. It noted that, as here, the "Position Specification and Calls Action Form" for the affected positions specified a geographic location for the positions. It also pointed to the "40-kilometre radius" test in the lay-off provisions, which required mutual consent for assignment of a surplus employee beyond that geographic limit. It argued that if the parties had not recognized that positions have some geographical constraint, there would have been no need to limit the geographic area within which a surplus employee could be compelled to accept a vacancy.

[31] The Board expressly accepted the union's arguments, making these observations at pages 12 to 14 and 16 of its decision:

The issue to be resolved on this arbitration relates directly to Article 24.1 of the Collective Agreement and whether in the circumstances the employees, who are unable or unwilling to relocate to Kingston are entitled to the contractual rights of employees who have been laid-off. The issue may be even more narrowly stated as the determination of whether or not the positions occupied by incumbent employees in Toronto have a geographic component. It is our view that the situation has been characterized correctly by the Union as a situation of lay-off and for the reasons relied upon by the Union. The technical arguments submitted by the Union have been summarized in this award. In addition to those, Mr. Goudge argued that on the basis of reality and reasonableness a job in Kingston could not realistically be viewed as the same job that previously existed in Toronto. ...

It may further be noted that in Article 24.1, the identification of a surplus employee is related to “an administrative district or unit, institution or other such work area.” The Employer’s position is, in substance, that where the job content remains the same the employee can be transferred anywhere within the Province of Ontario to perform that work. The specific language of the clause however defines narrower boundaries outside of which the employee becomes a surplus employee rather than one who has abandoned the job. The actual identification of those boundaries in the abstract is not within the purview of this arbitration. Each situation has to be viewed on its own facts and in the light of what is reasonable in all the circumstances. The contract language in Article 24 indicates, without specific definition, that the parties have agreed that those limits do exist.

...

... No challenge is made to the Employer’s right to make the fundamental changes in the organization that are proposed but the Employer cannot escape the contractual consequences of those changes simply by categorising them as job transfers. They constitute in substance the abolition of certain positions under the Collective Agreement and the creation of other positions.

[32] I am not called upon to reconcile the decisions in *Parayankuzhiyil* and *Joly*. By the standards of those decisions, the circumstances before me are entirely distinguishable. Neither they nor the other two decisions mentioned are determinative here. They do, however, inform my assessment of the meaning of Article 20.1.2.

[33] When the employer proposes to surplus some but not all of the employees employed in a particular position in “an administrative district or unit, institution or other such work area,” Article 20.1.2 requires that the least senior employees be selected for lay-off. Applying the article involves determining the “work area” of the affected position. The language of the article recognizes that the work area may be different for different positions. The duties and responsibilities of a position may be such that the work area for that position is an administrative district, for others the work area may be an administrative unit, or a particular institution, or “other such work area.” The “work area” may have both geographic and organizational boundaries. Those are the boundaries within which an employee may be required to move to perform his work without the requirement triggering any of the rights or options available to someone who is required to move to a “different” position.

[34] The “work area” is a characteristic of the position, not of the supervisor to whom someone employed in the position reports. The geographic boundaries of a position’s work area do not vary with the willingness to relocate of any particular incumbent. The Position Specification for the position in issue here describes its “Branch and Section” as “Dist. 18 – Sault Ste. Marie.” The assertion that the grievors’ positions had the entire northwest region as their work area, or enough of it to encompass Thunder Bay, flies in the face of the realistic and reasonable view contended for by the union and accepted by the Board in the OHIP case. In so far as it asserts a breach of Article 20.1.2, therefore, this grievance is dismissed.

The Alleged Breach of Appendix 13

[35] The union argues that the movement of the grievor’s purchasing work from Sault Ste. Marie to Thunder Bay amounted to a “change” in “an operation’s headquarters” to which Appendix 13 applied. Appendix 13 provides as follows:

Relocation of an Operation Beyond a 40 Kilometre Radius

The Employer and the Union herewith agree that, when a ministry decides to change an operation’s headquarters to a location outside a forty (40) kilometre radius of that operation’s current headquarters, the following terms and conditions will apply:

- (1) affected employees will be notified, in writing, of the ministry’s decision to change the operations headquarters location and the date when such change will take place;
- (2) (a) employees may accept the change in headquarters location, in which case they will be eligible for reimbursement of relocation costs in accordance with the Employer’s relocation policy; or
 - (b) employees may reject the change in headquarters location, in which case they will be given six (6) months’ notice of lay-off pursuant to Article 20.2.1 (Notice and Pay in Lieu) and have full access to the provisions of Article 20 (Employment Stability) and Appendix 9 (Employment Stability) of the Collective Agreement.
- (3) if several employees hold the same position and fewer of their positions are required in the new headquarters location, the employees with the greatest seniority will be given the opportunity to go to the new headquarters location first.
- (4) it is understood that when an employee accepts the change in headquarters location in accordance with this Memorandum of Agreement, the provisions of Article 6 (Posting and Filling of Vacancies or New Positions) shall not apply.

[36] Appendix 13 speaks of changing the “headquarters” of an “operation.” Elsewhere in the collective agreement, the parties spoke of an employee’s having a “headquarters.” As I observed in *MacIntosh*, 2587/96 (March 17, 1997):

An employee’s “headquarters” for purposes of the central and bargaining unit collective agreements is something that is “assigned” to him or her, as appears from the language of Article 12.2.2(b) of each of the 6 bargaining unit collective agreements. In cases not governed by Article 11 of the central agreement, it appears that the employee’s headquarters would be the location at which he or she ordinarily performs the work of the position to which he or she has been appointed. The assignment of headquarters is implicit in the appointment to the employee’s current “regular” or “permanent” position. The location at which a position exists is a distinguishing feature of the position: two otherwise identical positions at different locations are different positions (see Article 6.6.1).

It is evident from the provisions of Appendix 13 themselves that an “operation” is something in which, or in respect of which, employees are employed. I conclude that the “headquarters” of an “operation” is the headquarters of the employees employed in or in respect of that operation.

[37] The term “operation” is not expressly defined in Appendix 13, nor in two other provisions in which that word is used: Article 19.1, which addresses circumstances in which “a reorganization, closure, transfer, or the divestment, relocation or contracting-out of an operation in whole or in part will result in fifty (50) or more surplus employees in a ministry” and paragraph 5 of Appendix 9, which provides that “Where an operation or part thereof is being disposed of, and the employer has determined that an opportunity for tendering or bidding is warranted, employees shall be given the opportunity to submit a tender or bid on the same basis as others”.

[38] The Shorter Oxford dictionary (9th ed., Clarendon Press, Oxford) offers the following pertinent definitions of “operation”:

1 a the action or process or method of working or operating. **b** the state of being active or functioning (*not yet in operation*) ... **2** an active process; a discharge of a function (*the operation of breathing*) **3** a piece of work, esp. one in a series (often in pl.: *begin operations*) ...

From this and the context in which the parties have used the word, I take “operation” to mean a work process in which one or more persons are employed.

[39] The applicability of Appendix 13 to actions of the employer cannot depend on how the employer characterized those actions at the time it took them. Likewise, it cannot depend on whether the employer did what the provision requires in terms of offering employees the opportunity to move with their work. The provision clearly contemplates in paragraph (3) the possibility that an operation will be downsized at the same time as its headquarters is moved. Accordingly, the provision bears application where fewer employees perform the work of the operation at the new location than performed it in the previous one. The headquarters of an operation is simply the place where the work of that operation is performed. Demonstration that the performance of the work an identifiable work process has moved from one location to another is critical to the application of the provision.

[40] The fact that an operation ceases in one location and an operation begins thereafter in another location constitutes a movement of the headquarters of an operation only if the operation at the new location is “the same” as the one at the previous location. For reasons already mentioned, this identity (in the mathematical sense) of the two operations may exist even though the number and identities of employees employed are not the same. It is the work process itself in respect of which there must be identity or continuity. Without intending to address in advance all of the issues that might arise in determining whether such identity or continuity exists, it seems to me that the purpose(s) and work method(s) of an operation would be features that would distinguish one operation from another.

[41] For purposes of the analysis here, I would describe the operation in which the grievors were employed at the time they were surplusd as “purchasing to serve the needs of ministry operations in the Sault Ste. Marie District of the ministry’s Northwest Region,” and I shall use “Sault Ste. Marie purchasing work” as shorthand for that description. This is a subset of the “Sault Ste Marie Purchasing and Supply *operation*” (my emphasis) referred to in Mr. Miller’s 1994 memo. That operation was engaged in obtaining and supplying goods and services for and to other ministry operations in the Sault Ste. Marie District. Minis-

try operations in that District continued to require goods and services after the reorganization in question here. Not all of those needs were to be met by having the operations perform their own purchasing using credit cards. A distinct purchase and supply function continued to exist for that purpose following the discontinuance of purchasing and warehousing activities in Sault Ste. Marie. The location at which an employee or employees were performing what remained of those functions changed from Sault Ste. Marie to Thunder Bay. Apart from what necessarily follows from the change in work location, the evidence discloses no change in work methods.

[42] The employer argues that it did not move the Sault Ste. Marie purchasing operation. It says it discontinued purchasing activity in Sault Ste. Marie, and thereafter certain “residual functions” previously associated with that activity were accomplished by purchasing officers in Thunder Bay.

[43] This is not a situation (as in *Union Grievance*, 2417/92 (July 14, 1993, Kaplan)) in which an operation simply ceases, leaving the “customers” of the operation to find other suppliers on their own. Here, those who would formerly have dealt with the Sault Ste. Marie purchasing agents were told to deal with the Thunder Bay office. The purchasing records and suppliers lists of the Sault Ste. Marie office, the information base with which the purchasing agents there had worked, were transferred to the Thunder Bay office. A particular agent in Thunder Bay was designated to deal with purchasing for the Sault Ste. Marie district. That purchasing agent travelled to Sault Ste. Marie to meet suppliers and, at least to that extent, acquire knowledge about the work processes in which the Sault Ste. Marie purchasing operation had been engaged.

[44] The employer argues that the “residual functions” of the Sault Ste. Marie purchasing officers that continued to be performed by purchasing officers in Thunder Bay were insufficient to constitute even a single position or, more correctly, that the evidence was insufficient to demonstrate otherwise, and that on that basis I should conclude that it had had no obligation under Appendix 13 to offer either or both of the grievors a position in Thunder Bay.

[45] It is important to note that the question is not how much Sault Ste. Marie purchasing work was expected to remain or did remain 3 or 6 months or 2 or 3 years after the performance of that work was shifted to Thunder Bay. The question must be how much such work was being performed in the new location immediately after the shift occurred. The evidence before me is a less than ideal basis for determining that question, but that is largely because the employer failed to call evidence that I must infer was available to it.

[46] On Mr. Behrsin's evidence, perhaps 85 or 90 percent his work was unaffected by the reorganization in 1996. In the absence of evidence to the contrary, I can and do infer that the work he had been doing was still needed and was, in fact, performed from Thunder Bay after Mr. Behrsin ceased performing it. Mr. Kerhanovich's reluctance to be pinned down on the same question with respect to his work suggests that not much of his work was still needed by ministry operations in the Sault Ste. Marie District after the reorganization. His work seems to have been much more related to the garage and warehouse operations and the operations they supported than Mr. Behrsin's. Of course, one might say that to the extent garage and warehouse operations formerly performed in Sault Ste. Marie were consolidated at the regional garage and warehouse at Thunder Bay, the purchasing work associated with the moved garage and warehouse work should properly be regarded as Sault Ste. Marie purchasing work for the purposes of this analysis. Unfortunately, there is no evidence before me from which I can determine how much work that was.

[47] The person who did the Sault Ste. Marie purchasing work after the move, Steve MacGregor, would have been the obvious person to have testified about the volume of Sault Ste. Marie purchasing work performed at the critical time. There is no suggestion that he was beyond the reach of a summons, or that he was physically or mentally unable to testify. While it may be said that either party could have summonsed him, the employer was in a better position to know what his evidence might be if it had. As long as Mr. MacGregor remained an employee, the employer could have required him to give it an account of his work for it. The union could not. He was clearly an employee of the ministry at the time

the grievances were filed. There is no indication that he has ceased to be an employee at any time since. In addition to its greater access to Mr. MacGregor's recollection, the employer also had better access than the union to the recollections of other purchasing agents in Thunder Bay and to the records of their work.

[48] In these circumstances, the evidence tendered by the union is sufficient to persuade me that the Sault Ste. Marie purchasing work performed from Thunder Bay in the period immediately after such work ceased in Sault Ste. Marie constituted at least one full-time purchasing agent job. I am not persuaded, however, that it was sufficient to constitute two such jobs.

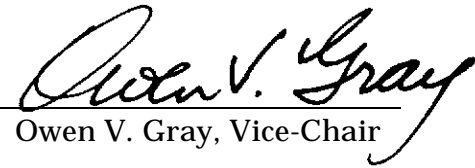
[49] Accordingly, I find that the employer did move the headquarters of the operation in which the grievors were employed from Sault Ste. Marie to Thunder Bay, that the extent of the moved operation was such that there was one full-time purchasing agent position in it at its new location and that, accordingly, Appendix 13 required that the employer offer that position to the grievors in accordance with their seniority. Mr. Kerhanovich was more senior than Mr. Behrsin. His testimony that he would have accepted a transfer to Thunder Bay was unchallenged. The outcome for Mr. Behrsin would have been no different, therefore, if the employer had properly discharged the obligations that I have found it had under Appendix 13. Accordingly, Mr. Behrsin's grievance is dismissed in its entirety.

[50] By way of remedy for its breach of Appendix 13, the employer is to compensate Mr. Kerhanovich for any loss that the union can demonstrate he suffered as a result of that breach, to the extent that that loss has not been mitigated and could not with reasonable effort have been mitigated. I note that the claim made on his behalf in that regard is that if offered the transfer to Thunder Bay, Mr. Kerhanovich would not have retired at the end of 1996, but would have taken the transfer and continued to work for the ministry as a purchasing agent in Thunder Bay until he could retire on a factor 90 basis in May 1999. The evidence from which the amount of compensation payable would be determined is

not before me. As I have already noted, the parties have agreed that this issue may be the subject of a further hearing if they are unable to resolve it themselves.

[51] I remain seised with the issue of the amount of compensation payable to Mr. Kerhanovich and any other issue concerning the implementation of this decision.

Dated at Toronto this 18th day of May, 2000.


Owen V. Gray, Vice-Chair