IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ZEHRS MARKETS,
A DIVISION OF ZEHRMART LIMITED
- The Employer

-and-

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 1977
- The Union

AND IN THE MATTER OF the grievance of Steve Rowley

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Carole Hoglund	- Counsel
Sharon Hughes	- Manager Industrial Relations
Dave Walker	- General Manager

On behalf of the Union:

John L. Stout	- Counsel
Scott Penner	- Secretary-Treasurer
Art McIntosh	- Union Representative
Al McLean	- Union Representative
Steve Rowley	- Grievor

Incumbent:

Ron Kore

Hearings held March 2, March 30 and April 6, 2000 in Cambridge, Ontario.

AWARD

I. INTRODUCTION

In this grievance a junior applicant grieved his denial of promotion to assistant store manager. The Union submitted that the grievor had done this job on a fill-in basis for several years, had considerable experience of the type normally required by the Employer for these positions, and was qualified.

The successful applicant for this position had sought and been denied this same job in 1996 as the Employer found he did not have adequate experience for the position and thus was not suitable. The Union had grieved that 1996 decision but had failed to overturn it. The Union now submitted that the successful candidate was not qualified for the position, relying on the Employer's own decision to that effect in 1996 and on the fact that the successful candidate's experience was not in the area normally required for the position.

At the conclusion of the Union's evidence the Employer brought a non-suit motion asking that the grievance be dismissed on the grounds that the Union had led no evidence of the successful candidate's abilities.

II. THE EVIDENCE

Zehrs Markets, the Employer, operates a grocery business. One of its grocery stores in St. Catharines, Ontario is known as #36 Geneva.

In October, 1999 the Employer posted a Notice of Vacancy for an assistant store manager for this store. The assistant store manager had a variety of duties including replacing the manager when the manager was absent and operating the grocery department at the store.

Twelve (12) employees sought the position. Ron Kore, the meat manager in this store and the second most senior applicant, was awarded the position effective October 25, 1999.

In 1996 the Employer had also hired an assistant store manager for this store. Mr. Kore had been the meat manager then and he had applied for the position in 1996. He was the third most senior candidate but was not selected. Instead the Employer chose the fourth most senior candidate, John Dametto, a senior dairy clerk, for the assistant store manager position.

Mr. Kore had asked his union representative, Art McIntosh, for the reason he had been passed over in favour of a more junior employee. Mr. McIntosh sought information from the Employer and was advised that, while Mr. Kore had some grocery experience, it was not sufficiently recent. He was thus found to be unsuitable to be an assistant store manager.

Mr. Kore grieved the 1996 decision. The Union pursued Mr. Kore's grievance but withdrew it at the arbitration stage. The text of the Union's letter, signed by Mr. McIntosh, was as follows:

> The Local Union wishes to advise you of the resolve and withdrawal of the above noted grievance.
> The Union deems this grievance to be withdrawn without prejudice or precedent.
> Please feel free to contact me with any questions or concerns you may have in regard to this matter.

The Employer's 1996 decision to select a junior applicant and to deny Mr. Kore the assistant store manager position remained in effect.

By 1999 the store had moved to the opposite end of the shopping centre and had been given a new name and number internally as #36 Geneva, changed from # 12 St. Catharines. Mr. Kore remained as the meat manager.

In 1999 the Employer again posted the position of Assistant Store Manager. Mr. Kore applied and was appointed to the position. Mr. Kore was the second most senior applicant.

The most senior candidate, Frank Hall, grieved. However, Mr. Hall has since left his employment with the Employer and his grievance was not pursued to arbitration.

Steve Rowley also grieved. It was his grievance which was before me for resolution.

The grievor was the third most senior applicant. He was a senior grocery clerk at the time of his application, a position he had held for some 6 years. He also had been a senior dairy clerk for some six and a half years. He has had 20 years of grocery store experience.

As senior grocery clerk, the grievor said he replaced the assistant store manager when he was on vacation. As well, when the assistant store manager replaced the store manager during the manager's vacation, the grievor replaced the assistant manager. As most managers and assistant managers have five weeks vacation per year, the grievor acted as assistant manager for about ten weeks each year. In addition, the grievor said that he was regularly in charge of the store when both the manager and the assistant manager were absent and that he frequently opened and closed the store. Unlike senior grocery clerks, the grievor said that meat managers did not replace assistant store managers. He said that only very infrequently did a meat manager open or close the store.

The union representative, Art McIntosh, also testified. He had worked for the Employer for many years and has been a full-time union representative since 1992, providing services to employees at various Zehrs stores. He testified about his experience with the Employer and his impressions as to the type of employee the Employer selected as assistant store manager. He said that an assistant store manager was usually chosen from those employees with

grocery and/or dairy experience. (He explained that for many years grocery and dairy had been one department.) He also reviewed the results of the 50+ postings for assistant store manager conducted under this 1994-2000 collective agreement. This information supported his testimony. It further indicated both that the successful candidate was usually the most senior applicant willing to accept the position and that the most senior applicant willing to accept the position was usually a person with grocery or dairy experience.

Mr. McIntosh testified about the position of meat manager, the position which had been held by Mr. Kore. The meat manager runs the meat department. The meat departments have changed over the years as more meat is now cut off-site leading to fewer meat cutters in the stores. As well, there has been an increase in the number of products in the meat department, especially in the number of frozen products. The meat departments have seen the introduction of technology similar to that which has been introduced throughout the stores. Mr. McIntosh also agreed that a meat manager could not ordinarily seek expert assistance from the store manager as the manager usually did not have a meat department background.

Mr. McIntosh was cross-examined about the position the Union had taken in the 1996 grievance. The Employer and Mr. Kore suggested in their cross-examinations that Mr. McIntosh had advised Mr. Kore in 1996 (1) that he should grieve, (2) that he was qualified, (3) that he had the ability to be an assistant store manager. However, Mr. McIntosh testified that he did not do so, that his role was not to determine such matters. He said his job was to explain to his members how the grievance procedure worked and to advise his members, including Mr. Kore, that they could grieve the Employer's decision if they felt that they had the qualifications and ability to be assistant store manager. Mr. McIntosh testified that was the advice he gave Mr. Kore in 1996.

At the conclusion of the Union's evidence the Employer brought a motion for a non-suit. The Employer asked that I dismiss the grievance on the basis that the Union had failed to lead sufficient evidence for me to uphold the grievance - that is, that the Union had failed to lead evidence as to Mr. Kore's ability and qualifications and thus there was no suit, or case, for the Employer to meet. The Employer called no evidence in accordance with the standard practice in such motions.

After the parties completed their submissions on the motion for a non-suit, I reserved my decision on that issue. They then argued the merits of the grievance.

I note that Mr. Kore, as the successful applicant for this position, had been given notice of the hearing and he was in attendance throughout. He cross-examined Mr. McIntosh at some length. When the Employer moved its non-suit motion, Mr. Kore was advised of his right to present evidence. He chose not to do so. Similarly, Mr. Kore was invited to make submissions on both the Employer's motion for a non-suit and on the grievance. He declined.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The following are the relevant provisions of the parties' 1994-2000 collective agreement:

ARTICLE 6 - SENIORITY

. . .

6.07 Seniority is the principle of granting preference to employees within the bargaining unit for promotions, . . . transfers, . . . Seniority, ability and qualifications to perform the work will be considered in promotions and where ability is approximately equal, seniority shall govern. . . . The Company undertakes that its decision shall be neither arbitrary not unfair.

6.08 (a) . . .
If there is not a suitable applicant from among the full time employees, the Company shall

> offer the job to the most senior part time employee who is willing to take the job and who has the knowledge, skill, ability and qualifications to perform the work. . . .

SCHEDULE "F"
(Schedule "F" indicates that an assistant store manager and a meat manager are paid the same amount.)

IV. THE POSITION OF THE EMPLOYER

The motion for a non-suit

The Employer submitted that the issue before me was this:

> Did the Employer violate Article 6.07 in awarding this position to Mr. Kore?

The Employer submitted the Union bore a two-part onus. First, the Union had to establish that the grievor was qualified for the position. Secondly, the Union had to establish that the grievor (Mr. Rowley) had greater ability than the successful applicant (Mr. Kore), for if the two were approximately equal then seniority would govern and Mr. Kore would be entitled to the position.

The Employer submitted that the Union had led no evidence as to Mr. Kore's ability. The Employer said the question in this non-suit motion was whether there was any evidence from which I could conclude that the grievor had more ability than Mr. Kore. The Employer said that, as there had been no evidence of Mr. Kore's ability, I could not make any such comparison and the non-suit motion should be successful.

In particular, the Employer submitted that I could not consider the 1996 competition as the Union had withdrawn Mr. Kore's grievance on a "without prejudice" basis.

The Employer referred me to the following awards: *Re Toronto Hydro-Electric System and*

Canadian Union of Public Employees, Local 1 (1992), 25 L.A.C. (4th) 87 (Marszewski); *Re Hercules Canada Ltd. and United Steelworkers, Local 13159* (1974), 5 L.A.C. (2d) 257 (O'Shea); *Re Dufferin-Peel Roman Catholic Separate School Board and Canadian Union of Public Employees, Local 1483* (1985), 21 L.A.C. (3d) 368 (Kennedy); and *Re Metropolitan Toronto Separate School Board and Canadian Union of Public Employees, Loc. 1280* (1990), 11 L.A.C. (4th) 252 (Marszewski).

The grievance

If I found that the Union had established a *prima facie* case and dismissed the non-suit motion, the Employer said that I should still conclude that Mr. Kore was appropriately chosen as the grievor, at best, had approximately equal ability and, in order to be successful, the junior grievor needed to have more ability.

If this was viewed as a promotion, the Employer said that Mr. Kore had the ability to do the job, that his years of experience as a meat manager demonstrated that point. The grievor had to show that he had demonstrably more ability in order to succeed in the grievance. If both Mr. Kore and the grievor were qualified, Mr. Kore, as the senior of the two, should be successful.

The Employer also submitted that, while this position was a promotion for the grievor, it was a transfer for Mr. Kore because it involved no increase in pay. The question was one of suitability in a transfer, as opposed to relative ability. I should find Mr. Kore to have been a suitable candidate.

The Employer asked me to dismiss the grievance.

The Employer referred to the following additional case: *Re Ottawa Civic Hospital and Ontario Nurses' Association* (1989), 9 L.A.C. (4th) 348 (Mitchnick).

V. THE POSITION OF THE UNION

The motion for a non-suit

The Union submitted that it only need establish a *prima facie* case in the non-suit motion; it did not have to prove its case on a balance of probabilities. The question was whether the Union had established a case which had to be answered.

The Union said that the evidence indicated the Employer's decision was arbitrary. In 1996 the Employer had decided that Mr. Kore was not suitable and then, in this posting, had found him to be qualified for this same position. The evidence indicated that Mr. Kore had remained a meat manager since 1996. His difficulty in 1996 had been his lack of recent grocery experience; by 1999 that experience was even less recent. A finding that he was now qualified was arbitrary and unfair.

The Union said there was evidence as to Mr. Kore's ability and experience. The evidence indicated that Mr. Kore had no experience serving as acting assistant store manager or doing the work required of an assistant store manager. The evidence indicated that he had been a meat manager without recent grocery experience, and that in 1996 the Employer found him not to be a suitable applicant for this same position. The Union thus said it had led some evidence of Mr. Kore's qualifications or ability as it was required to do.

As for the Union's withdrawal of Mr. Kore's 1996 grievance, the Union said its letter and the use of "without prejudice" meant that the Union was not to be prejudiced by its

withdrawal of the grievance. It did not mean that the Employer could not to be prejudiced by its original decision to reject Mr. Kore's application, a decision which it had successfully supported throughout the 1996 grievance procedure.

The Union referred me to the following awards: *Ontario v. Ontario Public Service Employees Union (OPSEU)* [1990] O.J. No. 635, 37 O.A.C. 218 (Div. Ct.); *Zehrs Markets and United Food and Commercial Workers, Local 1977 (Honderich)* (February 5, 1986), unreported (Barton); *Zehrs Markets (A Division of Zehrmart Limited) and United Food and Commercial Workers Union, Local 1977 (Bates)* (April 19, 1999) unreported (Whitehead); *Re Gilbarco Canada Ltd. and Canadian Union of Golden Triangle Workers* (1973), 1 L.A.C. (2d) 348 (Carter); *Re Bridge and Tank Co. of Canada Ltd. and United Steelworkers, Local 2537* (1975), 9 L.A.C. (2d) 47 (Weatherill) (application for judicial review denied - see note (1975), 10 L.A.C. (2d) 172); *Re Peelle Co. Ltd. and United Steelworkers of America, Local 6457* (1994), 39 L.A.C. (4th) 370 (Kennedy); and *London and District Service Workers Union, Local 220 and Merrymount Children's Centre* (February 28, 1996) unreported (Backhouse).

The grievance

The Union said that when dealing with the grievance, as opposed to the non-suit, I had to assess the evidence. The Union submitted the evidence demonstrated that the grievor had the ability to do this job. He had worked in both grocery and dairy. He had done the work of an assistant store manager in relief and the evidence suggested he did it well.

On the other hand, in 1996 Mr. Kore was denied this same job. The position went to the more junior Mr. Dametto who was a senior dairy clerk. The Union said I could infer from that decision alone either that Mr. Kore was found to be unsuitable, or that Mr. Dametto who

was a senior dairy clerk had greater qualifications and ability than Mr. Kore. The Union said that, given that evidence regarding the 1996 decision, the Employer should be required to explain why such an inference should not be drawn.

In this case, however, the Union said I need not infer anything about the 1996 decision since I had evidence that in 1996 Mr. McIntosh had been informed by the Employer that Mr. Kore had been denied the job because his grocery experience was not current and thus he was not a suitable applicant. Mr. McIntosh testified no change had occurred since 1996; Mr. Kore had remained the meat manager. The Union said this evidence was sufficient to require the Employer to explain why it had reversed itself. With no explanation, the 1999 reversal appeared to be an arbitrary application of the collective agreement.

The Union submitted that the evidence of those selected in other postings also supported the Union position. That evidence showed that senior grocery clerks, grocery clerks, senior dairy clerks and dairy clerks had the type of background which made them suitable for the position of assistant store manager. The grievor had held such positions whereas, in recent years, Mr. Kore had not.

The Union noted that neither the Employer nor Mr. Kore called any evidence to show that Mr. Kore was a suitable applicant or to rebut the evidence led by the Union.

The Union asked that I declare that the Employer had violated the collective agreement, that I award the position to the grievor retroactive to October 25, 1999, that I award compensation to the grievor and that I remain seised.

The Union referred to the following additional case: *Re Corporation of the Town of Valley East and Canadian Union of Public Employees, Local 6* (1980), 27 L.A.C. (2d) 154

(Kennedy).

VI. CONCLUSIONS

The motion for a non-suit

While a non-suit motion is uncommon in labour arbitration, it does occur on occasion. The basic idea of a non-suit motion is quite simple. The party responding to the grievance (normally the employer) brings a motion submitting that the grievance should be dismissed due to the absence of evidence on an essential element of the other party's grievance. The procedure developed in the Ontario courts, and applied by arbitrators, requires the party making such a motion to first decide whether it will call evidence. If it decides to call evidence, it cannot later make a non-suit motion; if it chooses to make the motion, it cannot later call evidence. A non-suit motion contains an element of risk for, if the arbitrator finds against the motion, that party is denied an opportunity to lead any evidence in support of its position.

At a basic level the issue in a non-suit motion is whether there is some evidence from which a reasonable person could find in favour of the first party (usually the Union); the issue is not whether the grievance should succeed. The proper approach is explained in the Divisional Court decision in *Ontario v. OPSEU, (supra)*. The Court quotes from a variety of authorities expressing the issue in similar terms such as, is there a case to be answered, is there some evidence to support the claim, and is there a *prima facie* case? The Court concluded that if there is some evidence the non-suit motion must be dismissed; if there is no evidence the motion must be granted. The Court also indicated that the judge or

arbitrator must lean in favour of the respondent to the motion.

The Divisional Court has said that what is needed to defeat a non-suit motion is a *prima facie* case. *Prima facie* (a Latin term translated literally as "at first sight") means that the evidence tends to prove a fact although it does not need to do so conclusively or, put another way, that the evidence is sufficiently strong to require the other side to answer it.

It is clear that there is some evidence from which one might find this grievor to be qualified or suitable for an assistant manager position. He has performed that role on an acting basis during vacations and has been both a senior grocery clerk and a senior dairy clerk, two positions commonly held by other successful applicants for assistant store manager positions.

The issue raised by the Employer was whether there was evidence of Mr. Kore's ability, or evidence allowing me to compare the grievor and Mr. Kore. The Employer submitted there was no evidence of Mr. Kore's ability, and no evidence of Mr. Kore's and the grievor's "relative" ability.

The Employer submitted I could not use the 1996 decision because the Union withdrew Mr. Kore's grievance on a "without prejudice" basis. However, there was no evidence to support the Employer's submission that it could not be prejudiced by the 1966 decision. This interpretation of Mr. McIntosh's letter was not put to him during his testimony and nothing in Mr. McIntosh's testimony suggested that he or the Union intended to protect the Employer from the consequences of its 1996 decision. Nor does the wording of the letter lead to that result. Instead, I conclude that the Union was intending to withdraw its grievance without prejudice to its own position and that the Union did not intend, and did not signify, that the Employer was not to be prejudiced or constrained by its original

decision.

In part, the Employer's position seemed to be that the Union had to call witnesses who compared the two applicants. I cannot accept that suggestion. In my view, what is needed is that I have some evidence of the two applicants from which a comparison can be made, if necessary, and it would be sufficient for me as arbitrator to make that comparison and draw a conclusion as to their relative ability. Similarly, if this grievance requires only a determination of Mr. Kore's suitability, it would be sufficient if there was some evidence from which I could resolve that question.

The Union said there was evidence of Mr. Kore's ability. The Union said I had evidence that:

1. As a meat manager, Mr. Kore did not replace the assistant store manager during vacations, was not otherwise left in charge of the store, and did not open and close the store;
2. Mr. Kore had no recent experience in the grocery department, experience which was considered the normal background for this position; and,
3. In 1996 Mr. Kore had been found by the Employer to be unsuitable for this same position and, although the matter had been grieved, the Employer decision stood.

I conclude that the evidence led by the Union, the only evidence which I received, tends to show that:

1. Mr. Kore did not have the normal background for this position;
2. Mr. Kore did not have recent grocery experience, considered important for an assistant manager whose duties involve running the grocery department;
3. The Employer found Mr. Kore to be unsuitable in 1996; and,
4. Mr. Kore only had meat department experience since 1996.

In terms of a *prima facie* case, that evidence supports the Union's position as to Mr. Kore's suitability for this position, even if it does not do so conclusively. Furthermore, it is sufficiently strong that it requires an answer from the Employer or from Mr. Kore. I conclude that the evidence establishes a *prima facie* case.

The Union has thus led evidence from which I might assess Mr. Kore's ability or suitability for this position and which I could use to compare him with the grievor. It follows that the non-suit motion is dismissed.

The grievance

There were two possible tests proposed by the parties:

1. This is a transfer and the issue is whether Mr. Kore is suitable; or,
2. This is a promotion and the issue involves a comparison between the ability of Mr. Kore and the ability of the grievor.

I begin by determining which approach is required by the collective agreement. The first sentence of Article 6.07 says that seniority applies in promotions and transfers, and that preference is given to the senior applicant. The second sentence provides additional requirements in cases of promotions, but not in cases of transfers. What is not clear is which job changes are transfers as opposed to promotions.

For Mr. Kore this is a new job but it involves no change in pay and is perhaps a transfer. For the grievor it would be a new job with an increase in pay and would be a promotion. The parties did not pursue this question of transfer versus promotion in great detail; each seemed to feel that its position would succeed using either test.

I consider Mr. Kore first. Although the title of "assistant store manager" sounds more impressive than meat manager, there is no pay increase. A more impressive title is not enough to make this a promotion. In the absence of an indication in the collective agreement that the parties felt this would be a promotion - such as a higher pay rate - I have concluded that for Mr. Kore the move from meat manager to assistant store manager is a transfer, not a promotion.

What is the test to be applied when someone applies for a transfer? The issue of transfer versus promotion has been examined in two earlier cases under this same collective agreement. In each case the arbitrator concluded he was dealing with a transfer and he described the approach to be followed in assessing a request for a transfer.

In *Zehrs Markets (Honderich), supra* (Barton), the grievor sought to move from a grocery clerk to a produce clerk. Although the award is not as clear on these points as one might wish, the following comments appear at page 2:

> . . . the Company first looks to the full time bargaining unit. A competition clause exists in which members of that unit are tested against each other in terms of their relative ability and qualifications to perform the work. In this case three full time employees were involved in the process. Should the Company be unable to find a "suitable" person in the full time unit, the Company then goes to the part time unit. The issue in this case is whether or not the Grievor was a "suitable" candidate. I take the word suitable to mean competent in the sense of having the threshold knowledge, skill, ability, qualifications, in particular ability and qualifications to perform the work. It is necessary that the candidate have the present ability because there is clearly no training provision provided in the agreement. Should the successful candidate have the necessary present ability, he or she then enters the job and may have a short familiarization period to become totally competent. This period is clearly not intended to be a training period and it is assumed that the person knows the job but merely requires some time to adapt to the new situation in which he finds himself.

In that case the grievor had worked part-time in produce from 1977 to 1983. In 1983 he took a position as a grocery clerk and had not worked in produce after that change. In the fall of 1985 he was held not to have the necessary threshold qualifications to be a suitable

applicant for the produce position. It seems that Arbitrator Barton found this to be a transfer and thus the test was one of suitability, not of relative ability.

The issues were addressed more directly in *Zehrs Markets (Bates), supra* (Whitehead) in which the grievor grieved his failure to be transferred to a produce position. He was senior to the successful candidate but had no produce experience. Arbitrator Whitehead examined the provisions in detail and concluded that the award of the position to the grievor who was then working on the night crew and who had both grocery and dairy experience would be a transfer, not a promotion. Arbitrator Whitehead wrote as follows at page 22:

> . . . I conclude that the parties intended that a threshold or sufficient ability test be applied to full-time applicants in general transfer situations, excluding promotions, and that a "suitable" full-time applicant in a transfer situation would be one with sufficient ability to perform the work of the vacant position at a suitable, satisfactory and acceptable level of performance without additional training but with a brief familiarization period, and, if there were more than one such suitable full-time applicant, then, in the context of Article 6.07, the most senior of such applicants would have a right to be offered the job.

Arbitrator Whitehead then reviewed the earlier *Zehrs Markets (Honderich)* award and concluded (at page 24) that Arbitrator Barton's award was consistent with his own conclusion that a threshold test was to be used in those transfers which were not promotions.

When parties have obtained an arbitral interpretation of their collective agreement they expect other arbitrators to follow that approach. I intend to do so. As this was a transfer for Mr. Kore, I will use the suitability approach outlined above. In my view, that is a reasonable interpretation of the collective agreement. Thus the appropriate test for Mr. Kore is a threshold ability test, that is the suitability approach described by Arbitrator Whitehead *supra*, and does not require a comparison with the grievor. The question is this: Was Mr. Kore a "suitable" applicant for the position?

I turn then to the evidence about Mr. Kore. I repeat that the Employer submitted I could not use the results of the 1996 competition as the Union withdrew Mr. Kore's grievance on a "without prejudice" basis. For the reasons given earlier I have rejected that submission.

Mr. Kore has been a meat manager for a number of years. The Union's evidence indicated that at some point he worked in a grocery department but that appears to have been in the mid-to-late 1980's. He did not have recent grocery department experience.

The evidence indicated that meat managers usually do not replace assistant store managers and do not open and close the stores. There was no evidence that Mr. Kore was treated differently as meat manager and I conclude he had little or no experience opening and closing the store or filling in as assistant store manager or operating the grocery department. In other words, he had not done this job previously.

Mr. Kore did have experience as a meat manager. The meat department is part of the store and thus Mr. Kore was familiar with those systems and procedures used throughout the store. I conclude, however, that he was likewise familiar with the systems and procedures which were in use in 1996.

In 1996, however, the Employer passed over Mr. Kore for this same job in favour of the less senior Mr. Dametto, a senior dairy clerk. Although a grievance was filed in 1996 the Employer's decision was not changed. I note that in 1996 the issues would have been exactly the same as in 1999. This was a transfer for Mr. Kore in 1999 and it would have been a transfer for him in 1996. In other words, the nature of the test to be applied in 1996 was the same as the one to be used in this 1999 job posting.

Finally, Mr. McIntosh testified that he was advised by the Employer that in 1996 Mr. Kore

did not have adequate grocery experience as his 1980's experience was too remote in time. In 1999 that experience was three years older.

What can I conclude about Mr. Kore's suitability from this evidence? Mr. Kore did not have the usual background in grocery and/or dairy. He had not served as assistant store manager on an acting basis. His grocery experience was not current and in 1996 the Employer concluded that it was inadequate to make him a suitable candidate. As Arbitrator Whitehead put the question, quoted above, could Mr. Kore:

> perform the work of the vacant position at a suitable, satisfactory and acceptable level of performance without additional training but with a brief familiarization period[?]

The evidence in this case leads me to the conclusion that Mr. Kore did not have the necessary background to allow him to step into the job of assistant store manager, including running the grocery department, without training beyond a brief familiarization period. It follows that Mr. Kore was not a suitable applicant and that the Employer violated the collective agreement in appointing Mr. Kore.

Neither party suggested that if I found a violation of the agreement the matter should be remitted to the Employer for further consideration of the posting. Neither party suggested that any applicant other than Mr. Kore and the grievor had any remaining interest in this position. Nevertheless, I have considered the possibility of remitting the matter to the Employer as a remedy. However, I can find nothing in this collective agreement or in the submissions of the parties which would suggest that, in these circumstances, this matter should be remitted for further consideration. I conclude instead that I should make a final determination.

I turn then to the grievor. Since Mr. Kore should not have been awarded the position, what of the grievor? He does not receive the position simply because he grieved. As the next

most senior applicant, was he suitable and, if so, was he at least approximately equal in ability to the junior applicants?

The evidence regarding the grievor disclosed that he had done the job of assistant store manager for some ten weeks per year for the last six years. There was no suggestion that he performed badly in that role; on the contrary, I was left with the clear impression from the grievor that he performed the job adequately. He has also been in charge of the store on a regular basis when the manager and assistant manager have both been out of the store. Again I conclude that he performed that role well. Part of the assistant manager's duties involve running the grocery department. As senior grocery clerk the grievor has the recent grocery experience necessary to run that department. I note that the grievor also has experience as a senior dairy clerk. Senior grocery clerks and senior dairy clerks have been found to have the ability to be assistant store manger in other competitions. I conclude that the grievor was qualified, or had the ability, to be an assistant store manager and was able to do that job without a training period other than a brief familiarization period.

As this would be a promotion for the grievor, merely finding that he was qualified or "suitable" does not entitle him to the position. In a promotion it is necessary that an applicant be "suitable" (that is, able to do the job without additional training beyond a brief familiarization period), but the collective agreement also requires a comparison among applicants and ". . . where ability is approximately equal, seniority shall govern." (Section 6.07).

As noted, in this case the Employer led no evidence. No other applicant who remains in the employ of the Employer grieved. Neither party submitted that any other applicant had any remaining interest in this posting. Neither party submitted that any junior applicant was superior in ability. On what I acknowledge to be limited evidence, and given the parties'

submissions, I am led to the conclusion that no junior applicant was demonstrably superior to the grievor and thus I find the grievor to be at least "approximately equal" to the junior applicants.

My conclusions about the grievor and Mr. Kore are consistent with comments by Arbitrator Whitehead in his award, *supra,* between these parties. At page 25 he wrote as follows:

> . . . evidence of a reasonable period of satisfactory prior experience in a job, although experience is not expressly mentioned as a criterion in the relevant provisions of this agreement, establishes a prima facie case that an applicant is suitable for a position. In a similar way, if an applicant has no previous experience in a job, this establishes a prima facie case, absent other evidence to the contrary, that the applicant does not have the present ability to do the job without training, . . .

Having found that the evidence before me discloses that Mr. Kore was not a "suitable" applicant, I declare that the Employer violated the collective agreement in appointing Mr. Kore as assistant store manager at its # 36 Geneva store. Having found that the grievor was a qualified applicant, had the ability to perform the work of this position without a training period, was the next most senior applicant, and was at least approximately equal to the junior applicants, I direct the Employer to appoint the grievor to this position. I further direct the Employer to compensate the grievor for any losses he suffered from this breach of the collective agreement.

Before concluding I wish to note that there may have been more which could have been said in defence of the Employer's selection of Mr. Kore than the exhibits and the evidence of the grievor and Mr. McIntosh demonstrated. However, both the Employer and Mr. Kore asked me to decide this grievance without any evidence from them as to Mr. Kore's abilities or qualifications, or any evidence as to why Mr. Kore was selected. I have done so.

I wish to be clear that I have concluded neither that Mr. Kore cannot become an assistant

store manager nor that meat managers cannot become assistant store managers. Instead I have decided simply that, on the evidence before me in this grievance, Mr. Kore did not, in October 1999, have the qualifications and ability to allow him to move into this position without a training period. It may be that if Mr. Kore were to apply now, having spent some six months as an assistant store manager, the result would be different; similarly, it may be that another meat manager with a different work history would be "suitable" in terms of the collective agreement.

Summary

In summary, I have rejected the Employer's motion for a non-suit.

As for the merits of the grievance, I have concluded on the evidence before me that the Employer violated the collective agreement in awarding the contested position of assistant store manager at Store # 36 - Geneva to Ron Kore. I have directed that the position be awarded to the grievor and that the grievor be compensated for his losses.

I will remain seised to deal with any matters which may arise in the implementation of this award.

Dated at London, Ontario this 6th day of May, 2000.

Howard Snow, Arbitrator