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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE CORPORATION OF THE CITY OF LONDON
- the Employer

-and-

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 107
- the Union

AND IN THE MATTER of three grievances of John Keaney

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

James Barber	- City Solicitor
Jim Hobbs	- Director of Fleet Facilities and Departmental Resources
Mike Bushby	- Division Manager of Departmental Resources
Duncan Sanders	- Supervisor

On behalf of the Union:

Michael Klug	- Counsel
Doug Wheeler	- President, Local 107
Al Bruff	- Vice-President, Local 107
John Keaney	- Grievor

Hearing held October 23 and November 27, 2003, January 22, April 1, June 18 and September 16, 2004, in London, Ontario.

AWARD

I. INTRODUCTION

John Keaney, the grievor, filed three grievances related to the Employer decision to supervise his work more closely through coaching. The grievor was an active Union steward and has served on the Union executive and as chief steward. The Union alleged that the Employer actions were anti-Union, that the Employer was harassing the grievor and that the actions taken against him were discriminatory.

II. THE EVIDENCE

The grievor is an Arena and Operations Worker who has been employed full time by the City of London since 1990. During the winter the grievor works in one of the London arenas, tending the ice and dealing with patrons, and during the summer months he works on an operations crew based in one of the several city works yards.

During the winter the grievor worked at Medway Arena, an arena with a community centre located in the same building. He was one of three workers covering the fourteen day and evening shifts each week. There were also casual employees who filled in if the regular employees were absent.

The grievor was supervised by Duncan Sanders. Mr. Sanders was based at Medway Arena but was also responsible for several of the other city arenas. Prior to becoming a supervisor Mr. Sanders had been an Arena and Operations Worker and had himself worked at Medway Arena.

During the winter of 2002, Mr. Sanders became sufficiently concerned about the grievor's

work performance that the decision was taken to supervise the grievor's work more closely. At the hearing there was considerable evidence about Mr. Sanders' difficulties with the grievor's work. The following incidents prompted Mr. Sanders to take action:

1. The grievor worked overtime without obtaining approval (Feb. 2001). The grievor testified that there was a high school hockey game scheduled for late afternoon near the end of his shift and he was worried about the large size of the crowd and the possibility of trouble. He stayed and worked overtime without having permission to do so. While he testified that he thought he had tried to contact a supervisor, he did not obtain approval for the overtime work. The grievor was, however, then applauded for taking the initiative to ensure that the arena was properly tended and that the safety of the patrons was maintained, although he was at that same time encouraged to seek permission for overtime in the future "to ensure our collective butts are covered".
2. The grievor was observed by Mr. Sanders viewing a computer game on a city computer (Feb./ March 2001). The grievor testified that a fellow employee working a different shift had been trying to run a health and safety CD on the office computer and was having trouble. The grievor said he was more familiar with computers and was trying to help by testing the computer using a demo game from a computer magazine.
3. The grievor twice failed to shut the door to the zamboni (the machine used to clean and flood the ice surface) boiler room (March and September 2001). There had been a death from a fire at another city arena shortly before these incidents and the concern about fire safety dictated that the door to the zamboni boiler room be kept closed. Mr. Sanders testified that between the March incident and the September one he had posted a notice and sent an e-mail to ensure that all staff knew of the importance of keeping the door shut. The grievor testified that one of the telephones was located in that room and, if the door was closed, it was difficult to hear the phone. The grievor and other workers appear to have been conflicted over the need to keep the door open

so that they could hear the telephone and the need to keep it shut for fire safety reasons. The telephone was soon moved.

The grievor was unable to recall much about these two incidents but he understood the need to keep the zamboni boiler room door shut. The grievor recalled Mr. Sanders advising him one time about the door being open but the grievor testified that it must have been left open from the previous shift. In any event, the grievor said that when he checked the door on that occasion it was closed.

4. The grievor left the arena unattended while people were in the arena (October 2001). The grievor had left the arena around noon to get lunch nearby. He said there were city tradespeople working in the facility when he left, but there were no patrons, and he had locked the arena door. He understood his action to be proper and said it had been common practice among arena workers to leave for brief periods to buy lunch if the arena was empty of patrons. On the other hand, Peter Feenstra, another city arena supervisor, testified that he had arrived at the arena that day and found the door unlocked and saw what he took to be a school hockey group leaving the ice, with no sign of any city employee. In reply evidence the grievor again testified that he had locked the door and speculated that perhaps a city trades employee had unlocked the door.

5. The grievor failed to complete logbook entries and ice depth measurements (October 2001). Each city arena had a logbook and the arena staff were to make entries on a daily basis regarding the condition of many aspects of the facility (parking lot, washrooms, lights, walkways, etc.). Any corrective action was to be noted (shovelled walkway, plunged clogged toilet, etc.) In addition, the logbooks contained weekly inspections sheets on which the ice depth was to be recorded for several locations on the rink and other inspections noted (roof drains, arena boards, time clock, etc.) as well as monthly inspection sheets for still further inspections (fire extinguishers, exhaust fans, etc.). The Employer provided logbooks for these inspections. The daily

forms were completed in order, one for each day. The weekly form was frequently completed Wednesday since there were often two employees working the day shift then. The monthly sheets are scattered throughout the logbooks in no discernible fashion and it was not clear when, or by whom, the monthly inspection sheets were to be completed. There were concerns raised during the winter of 2002 about the failure to complete some of the forms at the grievor's arena. It was ultimately unclear just whose fault this was, although as one of the three regular operators the grievor clearly shared the responsibility for ensuring the completion of the logbook. In any event, Mr. Sanders was of the view that the grievor was responsible for some of the incomplete forms.

The grievor again failed to make weekly and monthly logbook checks (February 2002).

6. The grievor arrived for work late (January 2002). Mr. Sanders testified that there had been a rental of the ice rink for the early morning; the grievor denied that had been the case.

7. The grievor opened the zamboni room door without using the two safety hinges (February 2002). This was a heavy door with cables attached to counterweights. One of the cables broke that year and the door fell. There were ongoing concerns about the possibility of the door falling again and injuring someone. Safety hinges were installed on a temporary basis to prevent the door from falling and the hinges were to be used every time the door was opened. The grievor believed that this safety hinge system was inadequate to prevent the door from falling and, in addition, because the grievor had to be under the door to engage or disengage the hinges he felt that the hinge manoeuver was itself unsafe. In any event, Mr. Sanders testified that the grievor had used only one of the two safety hinges on one occasion. The grievor could not recall failing to use the two hinges and he had no recollection of Mr. Sanders raising this issue with him.

The decision to engage in closer supervision was communicated to the grievor at this point.

8. The grievor failed to properly clean the floor in the community centre (February 2002). There was one day each week when shuffle board was scheduled at the community centre, followed promptly by dancing. The shuffle board players wanted a slippery surface, the dancers did not. The wax put on the floor for shuffle board was thus to be cleaned using special chemicals and Mr. Sanders believed that the grievor had failed to properly clean the floor. When Mr. Sanders raised this with the grievor, the two of them had a discussion as to who should do this work and whether, if the arena workers did the work, it would affect the value of their job, and potentially their pay, under the job evaluation system

9. The grievor failed to dispose of a broken chalk board and cigarette butts, as requested (March 2002). Mr. Sanders testified that he asked the grievor to dispose of a broken chalk board from the community centre, as well as cigarette butts which had been thrown on the ground near the door over the winter. Mr. Sanders said the grievor declined to dispose of the chalk board and told him to get someone else to do it. As for the cigarette butts, Mr. Sanders said the grievor stated that was not part of his job. The grievor testified that when asked to dispose of the broken chalk board he had explained to Mr. Sanders that it should not be put in the dumpster but rather picked up by other city employees in a truck and he felt Mr. Sanders had agreed with him on that point. As for what he described as the sand, salt and cigarette butts in the parking lot, the grievor said he had again explained to Mr. Sanders his view that this material should not be disposed of through the dumpster but rather cleaned up by a street sweeper and that he had, once more, understood that Mr. Sanders had agreed with him.

10. The grievor was observed showing another employee computer games (March 2002). Mr. Sanders testified that the grievor was standing over the other employee, an

employee who did not have computer access, showing him how to play computer games. The grievor said he had no recollection of any such event.

11. The grievor left work for a grievance investigation without a reasonable explanation for the length of the absence (April 2002). The grievor agreed that he frequently took time off for Union work and that he did not always provide a full explanation as to where he was going nor how long he would be away. The grievor felt some matters were confidential and that he did not need to provide full details of his absence.

I would note that while Mr. Sanders raised some of the above matters with the grievor at or near the time they happened, none resulted in discipline, not even a verbal warning.

Finally, I note that Mr. Sanders testified that he had more concerns about the grievor's work performance than he did about the work of any other employee he supervised.

The first grievance:

In February 2002 the grievor's supervisor, Duncan Sanders, decided to take action regarding problems with the grievor's work performance. About the same time the Employer offered a training program for its managers on dealing with the Union. Part of that course involved coaching an employee so as to assist the employee in improving his or her work performance. Whether it was because coaching was suggested in that course, or whether the idea came from some other source, Mr. Sanders decided to coach the grievor. Mr. Sanders discussed the matter with his superiors and Mr. Sanders testified that he and his superiors felt coaching might be helpful, although the evidence was not clear which managers were involved in making the decision. As Mr. Sanders had previously worked at the grievor's job in the same arena, his superiors felt that Mr. Sanders was ideally suited to be the coach. The decision to coach the grievor was communicated to the grievor February 21, 2002.

The grievor was opposed to this initiative. He expressed his view that there was a fine line between what was being proposed and harassment and he indicated that he would not participate. His first grievance complained of the decision to supervise him more carefully.

The second grievance:

When the rink closed in the spring, the grievor and other arena workers were transferred to a works yard and assigned to work on projects involving roads, sewers, parks, etc. For many years the arena workers have been asked to indicate a preference as to the city works yard they wished to work from during the summer. Most employees were then transferred to work in the yard which they preferred. The grievor was asked for and indicated his preference for summer 2002. However, Mr. Sanders was working in a different yard and the decision was made to move the grievor to that same yard so that Mr. Sanders could continue the coaching. The grievor was advised March 27 that he would not be transferred to his preferred location.

John Parsons was the division manager responsible for several areas, including arenas. He testified that he and Bill Coxhead, Mr. Sanders' supervisor during the summer, had wanted to keep Mr. Sanders and the grievor together for the summer so that the coaching could continue. Bill Coxhead was manager for parks and forestry and testified that he was involved in discussions about the grievor's summer transfer and that he concurred that Mr. Sanders and the grievor should be transferred to the same yard. He said he had no real knowledge of the reasons which had prompted the coaching but he felt it advisable to maintain the working relationship so that the coaching could continue throughout the summer.

The grievor's second grievance complained of the failure to transfer him to his preferred works yard.

Prior to the written reply to the first two grievances, the Employer's communication with the grievor over the reasons for the decision to supervise him more closely and his summer work location was vague or evasive.

The third grievance:

A written Step 2 reply to the first two grievances was provided by Mr. Parsons, the division manager, in a letter to the Union's Chief Steward. The reply indicated that the grievor was "assigned to work under the Supervision of Duncan Sanders so that he could continue to facilitate and address performance concerns through appropriate performance counselling. John [the grievor] is aware of the concerns we have and they were discussed with him at various meetings." That letter was copied to, among others, the grievor.

In his third grievance, the grievor then grieved that the above grievance reply had itself violated the collective agreement as the employment concerns were not legitimate and were frivolous and harassing in nature.

The grievor's Union activities:

The grievor has long been an active and vocal supporter of the Union and he has served in several Union capacities. He had been the chief steward and member of the executive and he remained a steward during the relevant period. He was an active and vocal steward, aggressively pursuing his concerns whenever he felt that the Employer was in violation of the collective agreement. Mr. Sanders acknowledged that the grievor was very vocal and persistent in his commitment to the Union and the Union agenda. It was clear in the evidence that the grievor operated in a very direct manner, raising issues as they occurred.

The Employer and the Union have had a difficult relationship. In particular, there was a strike during the summer of 2001 during which the grievor took an active role in support of the Union position.

Mr. Sanders and other managers were also concerned about the grievor's role in investigating grievances and the grievor's time away from normal duties. Under this collective agreement a steward is allowed time off work to investigate a grievance, but the Employer was concerned about the grievor's exercise of that right. For example, on at least one occasion the grievor had gone home to investigate a grievance. The Employer had raised its concerns with the grievor and advised him that the Employer wanted the grievor to indicate when he was going to leave work to investigate a grievance and how long he would be away. In part, at least, this was motivated by the need to replace the grievor when he was away from the arena on Union business.

III. COLLECTIVE AGREEMENT PROVISIONS

The following are the key provisions of the parties' 2000-2003 collective agreement:

ARTICLE 4 - UNION MANAGEMENT RESPONSIBILITIES

. . .

4.2 The Corporation and the Union agree that there shall be no discrimination, interference, restriction or coercion exercised or practised with respect to any employee in the matter of . . . transfer . . . discipline . . .or otherwise by reason of age, race, . . . nor by reason of his/her membership or activity in the Union . . .

. . .

ARTICLE 16 - GRIEVANCE PROCEDURE

16.1

(a) It is the mutual desire of the Corporation and the Union that all complaints and grievances shall be adjusted as quickly as possible. If a complaint arises during normal working hours, the Chief Steward, or a member of the Grievance Committee, or a Steward, shall be granted reasonable time off from his/her duties, with pay, if such time off is required during normal working hours, to discharge the duties of his/her office to investigate the complaint with the employee and/or Supervisor concerned.

. . .

16.3

. . .

Step No. 2

. . . The Department Head shall give his/her decision or answer in writing within ten (10) working days following the Step 2 meeting date.

. . .

ARTICLE 18 - DISCHARGE AND DISCIPLINE CASES

18.1 In the event an employee, who has attained seniority, is discharged or disciplined and the employee considers that an injustice has been done, the matter may be taken up at Step 2 of the Grievance Procedure. In such cases, Manager or his/her nominee, shall ensure that a Steward is requested to be present at the time the employee is advised of the discipline or discharge.

. . .

ARTICLE 26 - RIGHTS AND PRIVILEGES

26.1 All the rights, benefits and privileges which the employees now enjoy, receive or possess shall, to the extent that the same do not conflict with this Agreement, continue to be enjoyed, possessed and held by employees.

. . .

IV. UNION POSITION

The Union submitted that the Employer's unusual and punitive conduct toward the grievor was contrary to the collective agreement and also contrary to the unfair labour practices provisions of the *Labour Relations Act.* The Union submitted that the original decision to supervise the grievor was harassing and was based on the grievor's union activity. The decision to transfer the grievor to the same works yard as Mr. Sanders, his supervisor, was

a discriminatory transfer. Finally the reply to the grievances was disciplinary, there was no just cause for that discipline, and it was not done in the presence of a steward.

The Union reviewed the evidence in detail.

The Union submitted that the heightened level of supervision was based on trivial matters and was part of an effort to build a case against the grievor as a steward. The transfer was more of the same. The Union submitted that it was not until the reply to the grievance that the Employer clearly indicated that the decisions on the coaching and the summer transfer had been taken due to problems with the grievor's work performance.

The Union said that it had shown a *prima facie* case of anti-union motivation such that, failing a credible explanation, I should find that the entire course of conduct was improper discrimination or, in the alternative, that some of the conduct was improper. Given the Union evidence, the Employer was required to lead its own evidence as to why it acted as it did. The Union submitted that the Employer had to show that its actions were in no way motivated by the grievor's Union activities.

In addition, the Union submitted that the actions amounted to discipline and violated the agreement as there was not proper cause. Both the transfer and the letter setting out the reasons for the earlier actions were communicated without a Union steward present and this constituted a violation of the collective agreement, as such actions were required to be taken at a meeting with both a steward and the employee present.

As for the coaching decision, there was confusion as to when and how the decision was made. The fact that it was taken when the course on dealing with the Union was being offered suggested a link between the two and indicated it was anti-union.

The Union submitted that the practice had been to send employees to the yard for which they expressed a preference. Under Article 26 that right was continued. In failing to transfer the grievor in accordance with his preference the Employer had violated Article 26.

The Union asked that I find a violation of the agreement and the *Act,* that I direct the Employer to cease and desist from those actions, and that I remain seised as to the issue of compensation, in particular for the extra costs associated with the transfer to a work site that required a longer commute.

The Union referred to the following: *Re Ottawa Citizen (Division of Southam News Inc.) and Ottawa Newspaper Guild* (1988), 2 L.A.C. (4th) 77 (R.M. Brown); *Re Inglis Ltd. and United Steelworkers, Local 4487* (1978), 17 L.A.C. (2d) 380 (Beck); *Re Board of Commissioners of Police for the City of Sault Ste. Marie and Sault Ste. Marie Police Association* (1982), 3 L.A.C. (3d) 208 (Kennedy); *Re Horizon Operations (Canada) Ltd. and Communications, Energy & Paperworkers Union, Local 2000* (2000), 93 L.A.C. (4th) 47 (Coleman); *Toronto (City) v. Canadian Union of Public Employees, Local 416 (Standby Grievance)* [1998] O.L.A.A. No. 640 (Haefling); *Re 1403177 Ontario Ltd. O/A Sunshine Bricklayers/Sunshine Bricklayers and Bricklayers, Masons Independent Union of Canada, Local 1* (2002), 107 L.A.C. (4th) 440 (Herman); *Re Stelco, Inc. Hilton Works and United Steelworkers, Local 1005* (1981), 29 L.A.C. (2d) 244 (Brent); and *Parry Sound (District) Social Services Administration Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.)* [2003] 2 S.C.R. 157, [2003] S.C.J. No. 42 (Supreme Court of Canada).

V. EMPLOYER POSITION

The Employer said that the first grievance, the coaching grievance, was in essence an allegation of harassment. There was nothing to suggest that Mr. Sanders was harassing the

grievor and the grievor had, in fact, suggested that his relationship with Mr. Sanders was cordial.

As for the second grievance, the transfer grievance, the Employer had good grounds to do the coaching and also good grounds to have Mr. Sanders continue as coach so there was no violation of the collective agreement in having the two continue working in the same location.

As for the third grievance, the grievance reply grievance, I would be establishing a new legal principle if I were to find that expressing legitimate performance concerns in that reply was harassment.

The Employer also reviewed the evidence in detail.

The Employer said that the weight of the evidence was that the performance concerns were legitimate. The Employer submitted that the treatment of the grievor was, in fact, mild. Rather than discipline the grievor, the Employer had simply tried to work with the grievor to improve his performance.

As for the alleged right to choose a summer work location, the Employer submitted the evidence indicated the right was simply to express a preference. The grievor had exercised his right to express his preference, but he did not have a right to transfer to a particular work location.

Finally, the Employer said none of the decisions was disciplinary in nature.

The Employer asked that the grievances be dismissed.

The Employer referred to the following: *Quality Meat Packers Ltd. v. United Food and Commercial Workers (Cusnir Grievance)* [2002] O.L.A.A. No. 852 (Bendel); *Alloy Wheels International (Canada) Ltd. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 1991 (Curzon Grievance)* [1998] O.L.A.A. No. 755 (Brunner); *Canadian Niagara Hotels Inc. v. Hotel, Restaurant and Hospitality Service Employees Union, Local 442 (Langohr Grievance)* [1998] O.L.A.A. No. 642 (Whitehead); and *Camco Inc. v. United Steelworkers of America, Local 3129* [2000] O.L.A.A. No. 512 (Faubert).

VI. CONCLUSIONS

Were the Employer actions disciplinary?

I begin with the Union submission that the coaching, the transfer and the grievance reply were disciplinary in nature. The collective agreement has a "proper cause" standard for discipline and, if these actions were disciplinary, the Employer would be required to prove the grounds on which it acted and to demonstrate proper cause.

Discipline is a common concept in labour relations but trying to define discipline and explaining why some particular employer action is, or is not, discipline is a surprisingly difficult task. In that sense it is similar to pornography, about which similar comments have been made.

Discipline is generally accepted as designed to correct behaviour, although not every action with the purpose of correcting an employee's behaviour is discipline. For example, advice on how to do a job is designed to correct behaviour but is not normally disciplinary. Most discipline is in the nature of punishment and discipline often carries with it a financial

penalty. The common types of discipline in the workplace are verbal warnings, written warnings, short suspensions, longer suspensions, and then discharge. Those actions are accepted as disciplinary because each may cause the employee disadvantage in his or her employment relationship in the future.

It is generally accepted that in order for discipline to be just, or in this case proper, the discipline should be progressive. That is, proper discipline involves a progression from mild forms of discipline to gradually more serious forms of discipline should the improper behaviour continue. So for example, if two employees engage in identical misconduct the employer may, applying the concept of progressive discipline, properly impose mild discipline on an employee with no prior discipline and more serious discipline on an employee who has recently received a written warning and a short suspension for similar actions. It is commonly accepted that a written warning and a suspension can be relied upon to justify a more serious form of discipline than would be warranted if that employee had no similar actions on his or her employment record. It is in that sense that a matter may cause the employee later disadvantage.

An employer action which is simply a method of helping an employee improve his or her job performance is not disciplinary. As an example, an employee who is required to take a job related course during work hours at full pay in order to improve his or her work is not generally thought of as being disciplined. Taking a course is not perceived of as punishment, there is no financial penalty, and taking the course would not have an impact in terms of progressive discipline.

Turning now to the facts of this case, none of the Employer actions, that is closer supervision, the Employer decision to transfer the grievor to a work location other than his preferred location, and the written reply to the grievances giving the reasons for those earlier actions,

is a normal type of discipline. None of those things is commonly accepted as punishment. I note that there was no immediate financial penalty in any of those decisions (e.g. no lost work time and no reduction in pay). Finally, there was nothing which would appear as part of the grievor's disciplinary record in a future case of progressive discipline. I do not believe an arbitrator would accept any of these three actions as prior discipline for purposes of progressive discipline. In my view, none of those actions create future work problems for the grievor and none of the actions amount to discipline as that is understood in a collective bargaining environment. Therefore the Employer does not need to meet the proper cause standard.

For clarity, I wish to note that in this case it was the Employer's *decision* to engage in coaching which was the focus of the first grievance. The grievance did not complain about the actual coaching and I heard no evidence about how the coaching was conducted. I acknowledge that in another case the evidence about the coaching might be such that it demonstrates the coaching was done in a punitive manner and not as a means to improve work performance. Coaching which is done as punishment may be discipline.

Similarly, I wish to note that neither a grievor's opinion that a matter is discipline, nor an employer's opinion that a matter is not discipline, is determinative of the question of whether a matter is discipline. This question must be resolved through an objective evaluation of the entire circumstances, not through reliance on the subjective opinions of the participants.

I accept, then, that some coaching may be disciplinary, but I have concluded that this decision to engage in coaching was not discipline.

Did the Employer actions reflect an anti-Union motivation?

The Employer led evidence about the various problems which the grievor's supervisor, Mr. Sanders, had with the grievor's work. The Union alleged an anti-union motivation and, if that was indeed a motivating factor, the decisions would be tainted and would violate both the collective agreement and the *Act.*

The three grievances all flow from the initial Employer decision to more closely supervise the grievor, that is to coach, or mentor, or counsel him. Because of the importance of the initial coaching decision, I begin with two general points:

1. The Employer is entitled to supervise its employees. It may engage in close supervision or it may prefer to engage in lax supervision. The level of supervision is a matter for the Employer to decide and need not be the same for all employees. As an example, a junior inexperienced employee may be supervised more closely than a senior experienced employee. If the Employer is concerned about a particular employee's work performance, it may decide to increase the level of supervision and it may, if it wishes, call that coaching, or mentoring, or counselling.

2. What the Employer may not do is base its decisions regarding the level of supervision on certain prohibited grounds, such as an employee's race or, alternatively, an employee's membership or activity in the Union. Both of those grounds are prohibited by the collective agreement itself, as well as by legislation. Of relevance here, the *Labour Relations Act* prohibits discrimination against an employee based on Union activity.

Turning then to the allegation of anti-Union motivation, I look first at whether there was any direct evidence of anti-Union motivation. There were suggestions of things which took place that could have motivated the Employer improperly, but no clear evidence that any did. The

parties were involved in a strike the previous year and the grievor, a dedicated Union member, was involved in that strike. While the Employer and the Union have had a troubled relationship, there was no evidence of anything the grievor did during that strike, or any other actions of the grievor, which would prompt Employer retaliation. Similarly, the grievor had been an active Union steward but the evidence was he had long been a Union activist. There was no evidence that he had done something recently as a steward that would have altered the manner in which the Employer treated him. Likewise there was evidence that the Employer offered a course for its managers on how to deal with the Union. On its own, trying to better educate the Employer's managers in dealing with the Union and with unionized employees is a permissible Employer activity. One of the suggestions in the course was to coach employees to better performance. Given the current popularity of coaching as a management tool in business literature, it was not surprising that this was included in such a course, however, simply because the idea of coaching may have come from this course does not make the Employer motivation anti-union. Finally, the Employer was concerned about the grievor's use of time off to investigate grievances. While as a steward the grievor has a right to some time off, that right is not unlimited, is for only certain purposes and must be reasonable. I find nothing wrong in the Employer expressing its concerns about the grievor's time off for Union activity and find nothing to suggest this motivated the Employer decision to engage in coaching or the decision on the transfer.

The lack of direct evidence that the Employer was motivated by an anti-Union sentiment does not end the matter. It is not necessary for the Union to prove the Employer's motivation. Instead, under Section 96(5) of the *Act* there is an express reverse onus provision, such that the Employer has the burden of proof to demonstrate it did not act contrary to the *Act*, that its motivation in supervising or transferring the grievor was not related to his union membership or union activity.

Motivation is a difficult matter to assess. None of the Employer witnesses admitted they were motivated by an anti-Union sentiment. Assuming they were motivated by an anti-union sentiment, however, denial of that fact would not be surprising. It is necessary to review all the evidence with care and reach a determination as to whether the Employer was acting out of anti-Union motivation.

In undertaking that analysis, it is important to keep in mind the decisions that were made. For example, an employer would not normally need conclusive proof of performance weaknesses to decide to increase the level of supervision. When an employer has concerns about an employee's work but is unsure as to the extent of, or reasons for, those possible problems, increased supervision may well allow the employer to determine if indeed there are work performance weaknesses and, if so, the cause.

I turn then to the performance concerns raised. The test to be used is: Was this a real Employer concern based on reasonable grounds which would justify the Employer engaging in closer supervision? The Employer is not required to prove these facts as would be required if the matter were disciplinary.

1. The grievor did not have permission to work overtime.
2. The grievor was looking at a computer game at work, although I accept that the reason was to check the computer.
3. The zamboni boiler room door was left open twice, although I cannot conclude the grievor was responsible in each instance.
4. The grievor did go to lunch when people were in the arena. I was not, however, persuaded that this was improper. Both the policy about who could be left in the arena and Mr. Feenstra's evidence as to who was left in the arena were vague. If the Employer had to prove this for the purpose of justifying discipline, I would find that it had failed to do so. However the evidence was sufficient for Mr. Sanders to follow

up on the matter.

5. I find the grievor at times failed to make the required inspections but I am not persuaded that all the times about which Mr. Sanders was concerned were the responsibility of the grievor. For example, the sheets for the monthly checks appear at odd times in the log books and it was not clear who was responsible for performing the checks. A review of the logbooks demonstrates that the grievor did many checks, although I conclude that he did not do all the checks which he should have done.
6. The grievor was late on one occasion.
7. The grievor failed to use one of the safety hinges on one occasion.
8. The grievor did not clean the floor. The fact that the grievor raised the issue of who should do the cleaning, suggesting that he need not do so, and that the matter was not pursued does not render Mr. Sanders' concerns groundless.
9. The grievor did not remove some garbage. Once again the fact that the grievor suggested that there was another better way and the matter was not pursued does not make Mr. Sanders' concern groundless.
10. The grievor was showing a fellow worker how to play computer games on the city computer.
11. The grievor made liberal use of his steward leave under Article 16. While this was in accordance with the grievor's view of the provision, his use of the leave could reasonably prompt a concern from Mr. Sanders and the Employer and a desire to monitor it more closely.

I find there is substance to each of the above concerns which, taken together, could reasonably prompt an Employer to pursue them by "keeping a closer eye" on the grievor's work through a means such as coaching, that is through closer supervision. Although Mr. Sanders did not express his concerns in the following terms, Mr. Sanders seemed concerned that the grievor did not feel he had to work by the policies or rules - that the grievor felt he

could use the computer for those things he wanted to use it for, that he could leave the boiler room door open, or not use the safety hinges, or not dispose of the trash because he knew of another better way to do so, etc. In any event, that was the view which I formed of the grievor's approach to his work. More importantly, I was persuaded listening to Mr. Sanders' testimony that the concerns he raised about the grievor's work were his real concerns and those problems motivated him to more closely supervise the grievor. I find that Mr. Sanders' concerns were real, they were based on reasonable grounds, and they were of a nature that would justify increasing the level of supervision.

I heard nothing to persuade me that there was another improper motive. In particular I was not persuaded that the grievor's involvement in the Union was a factor prompting the decision to coach. On this point I would note that, in my view, the Employer's desire to ensure that the Union leave provision in the collective agreement is adhered to no more demonstrates discrimination based on union activity than would ensuring that a sick leave provision in a collective agreement is adhered to would demonstrate discrimination against the sick. I find nothing wrong with the initial decision to engage in closer supervision of the grievor.

Having decided to more closely supervise the grievor in late February, it makes sense that the Employer and Mr. Sanders would decide in March to continue that process during the summer, which was what was stated as the reason for the grievor's summer work location. I was persuaded that was the reason for the transfer. I find no basis for thinking the Employer had another improper motive for transferring the grievor to the same work location as Mr. Sanders.

In summary I conclude that neither the original decision to more closely supervise the grievor (the first grievance) nor the decision to transfer the grievor to the same works yard as Mr.

Sanders (the second grievance) was anti-Union.

The Union's alternative submissions.

The Union made an alternative submission that the transfer (the second grievance) violated Article 26 of the collective agreement. That Article requires the Employer to continue certain "rights, benefits and privileges".

Both parties said there was a practice, or a "right", regarding summer transfer locations but they disagreed as to what the right was. It was common ground between the parties that the Employer had a lengthy practice of seeking employee preferences as to summer transfers. The evidence also demonstrated that nearly all employee statements of preference were accommodated. The Union said the right was to have your preference met, not simply to express your preference as the Employer submitted.

This issue involves an assessment of the evidence. The evidence was not particularly clear, probably because this was an alternative argument. Ordinarily a party claiming a right such as this is expected to lead evidence as to that right. But the evidence did not demonstrate that employees had the right to direct their own transfer; instead it indicated simply that they had the right to indicate their preference. The grievor did express his preference. Although he was not transferred where he sought, the idea that he had a right, benefit or privilege under Article 26 to transfer to the location of his choice was not proven. I conclude that the Employer did not violate Article 26 in making this transfer.

Finally, the Union submitted that the Employer reply to the initial grievances violated Article 18 of the collective agreement. Article 18 requires that discipline be communicated to the grievor at a meeting to which a steward has been invited.

I have great difficulty with the Union suggestion that the Employer's formal reply to the grievances, directed to the Union's Chief Steward in which the Employer set out in moderate language the reasons for its actions, was in violation of the collective agreement. The Union suggested that the letter was disciplinary. I decided above that it was not disciplinary. Thus Article 18 dealing with the manner in which an employee is advised of discipline has no application to these facts.

Summary.

1. First Grievance

> I have concluded that the decision to supervise the grievor more closely was neither disciplinary nor motivated by anti-Union sentiment. That grievance is dismissed.

2. Second Grievance

> I have concluded that the decision on the transfer was similarly neither disciplinary nor motivated by anti-Union sentiment. I have also concluded that the collective agreement preserves an employee right to express a preference on summer work assignments, not a right to have that preference met. The second grievance is similarly dismissed.

3. Third Grievance

> I have concluded that the Employer reply to the first two grievances was not disciplinary and there was no requirement that the reply be delivered in a

meeting with the steward and the grievor present. That third grievance is also dismissed.

Dated in London, Ontario, this 15th day of October, 2004.

Howard Snow, Arbitrator