

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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SUN VALLEY FOODS

- The Employer

-and-

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION,
LOCAL 175

- The Union

AND IN THE MATTER OF a group grievance regarding transfers and job postings

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Frank A. Angeletti	- Counsel
John Calver	- Plant Manager, McDonalds Further Processing
Mike Vanderhorst	- Manager, Human Resources

On behalf of the Union:

Naveen Mehta	- Counsel
Kevin Dowling	- Union Representative
Betty M. Pardy	- Chief Steward

Hearing held October 28, 2005, and January 9 and March 31, 2006, in London, Ontario.

AWARD

I. INTRODUCTION

In order to address its concerns about an employee's work performance, the Employer transferred the employee. The issue in this grievance is whether the Employer can transfer an employee without adhering to the job posting provisions of the collective agreement.

II. EVIDENCE

Both an individual and group grievance were referred to arbitration. The parties decided to proceed first with the group grievance; the individual grievance will be considered at a later time.

The group grievance proceeded by way of an agreed statement of facts, below. There was no other evidence.

AGREED STATEMENT OF FACTS

1. The Company is engaged in the production of poultry menu items for McDonalds.
2. Ana Vincenti ("Vincenti") currently works in the McDonalds Portion Control ("MPC") Department as a Product Inspector on the day shift.
3. At all times material to the grievance, Vincenti worked as a QA Inspector on the day shift in the McDonalds Further Processing ("MFP") Department.
4. The MFP Department produces finished products for McDonalds such as McNuggets, McChicken, Grilled Chicken and Selects. There are approximately 110-120 employees in this department, working on both the day and afternoon shift.
5. In her role as a QA Inspector, Vincenti worked at a Critical Control Point ("CCP") on the production line. In that capacity, she performed a final quality check before product was shipped to the customer.
6. As part of her regular daily duties, Vincenti was responsible for performing a Pre-Operational

Inspection of the production line. This “Pre-op” Inspection is conducted in order to ensure that the food may be safely processed on the production line.

7. As part of the Company’s standing operating procedure, Vincenti was required to document her Pre-op Inspection observations on an MFP Pre-Operational Report.
8. As well, as part of the standing operating procedure, Vincenti was supposed to notify a supervisor immediately in the event that her Pre-op Inspection revealed any danger to food safety, so that the supervisor could take the appropriate steps to rectify the situation, including delaying the start up of the production line.
9. Vincenti received extensive training on quality inspection and food safety issues.
10. On July 18, 2005, during her Pre-op inspection, Vincenti observed metal wiring in the stainless steel hopper of the incline conveyor belt on the production line. Vincenti observed the metal wiring at approximately 5:30 a.m.
11. Vincenti did not document her findings on her Pre-Operational Report, as required. Further, Vincenti did not immediately advise any supervisor of her findings, as required.
12. At approximately 7:15 a.m., Vincenti spoke with her Supervisor, Eleanor Martinez (“Martinez”), regarding weekend overtime opportunities. Vincenti failed to mention the metal wire to Martinez at that time.
13. In addition to the Pre-op Report, Vincenti also fills in daily QA paperwork while the line is running.
14. Vincenti made a notation on the last page of the QA paperwork which stated:

“5:30 a.m. two pieces of metal scrub-brush (*sic*) were found on incliner belt.”
15. The QA paperwork document went on to say that corrective action was taken as follows:

“5:30 a.m. foreign (material) was reported to QA Supervisor.”
16. Vincenti admitted that she made these notations on the QA paperwork.
17. At approximately 11:15 to 11:30 a.m., Martinez first observed the notation on the QA paperwork, and addressed it with Vincenti. Vincenti had no explanation as to why she documented her findings on the QA paperwork rather than on the Pre-op Report, as she was required to do.
18. Vincenti also admitted that she failed to notify a Supervisor and provided no explanation for her failure to do so.
19. After speaking with Vincenti, Martinez had the production line stopped. As a result of this incident, production time was lost and some product had to be placed on hold, meaning that it could not be shipped out to the customer. The dollar value of the product jeopardized was approximately \$230,000.00.

20. As a result of this incident, Vincenti was issued a five (5) day suspension, which she has grieved. Previously, Vincenti had received other discipline related to the careless performance of her job, including :

May 31, 2004, three (3) day suspension for failure to perform metal detector checks on the production line.

July 30, 2003, one day suspension for failure to note “best before” dates on nine skids of product.

June 5, 2003, failure to correctly perform a Critical Control Point Check.

February 5, 2003, verbal warning for failure to perform a Critical Control Point Check.

21. Vincenti received food safety retraining following these incidents.

22. In determining its disciplinary response, the Company considered the following:

- The previous disciplinary history of Vincenti;
- The failure of Vincenti to alert a Supervisor and to follow standing operating procedure;
- The failure of Vincenti to properly document a serious health risk;
- The failure to consider the seriousness of the food safety risk;
- The failure of Vincenti to be forthcoming when asked about her failure to report the incident.
- The significant financial liability to the Company.

23. Given the significant food safety risk and potential liability that Vincenti posed in the MFP Department, along with the failure of progressive discipline and retraining to improve Vincenti’s conduct, the Company administratively transferred Vincenti to her current position in the MPC Department.

24. In her current role, Vincenti is not responsible for monitoring a Critical Control Point, as she previously did in her QA Inspector Role in the MFP Department. It is the Company’s position that the food safety risk is minimized as Vincenti is no longer the last quality control check point prior to product being shipped to the customer.

25. In transferring Vincenti, the Company relied on its management rights, set out in Article 6 of the Collective Agreement as follows:

Article 6

- (a) maintain order, discipline and efficiency; and

- (b) hire, retire, discharge, classify, schedule, transfer, assign, direct, promote, demote, layoff, and suspend or otherwise discipline employees for just cause; and
 - (d) Management rights, as outlined above, shall not be exercised in a manner inconsistent with the terms of this Agreement.
- 26. Under its management rights, it is the Company's position that it has the ability to "transfer" an employee.
- 26(a) On June 3, 2005, Maria Furtado, a production worker in MPC retired. At that time the Company decided not to fill the position as a result of the retirement of Maria Furtado. There was no job posting for such retirement.
- 27. At the time Vincenti was transferred to the MPC department on August 31, 2005, it is the Company's position that there was no permanent vacancy in that department.
- 28. By transferring Vincenti to the MPC department to minimize food safety risk, the Company accepted the financial burden of effectively carrying an additional employee in the department.
- 29. As a result of the transfer of Vincenti into the MPC department, the Union filed a group grievance dated August 11, 2005 alleging that the position of Vincenti in the MPC department was to be filled through the job posting provisions of the Collective Agreement and that the transfer of Vincenti ignored the provisions of Article 17.01 (a) of the Collective Agreement.
- 30. The Company has denied the group grievance on the basis that the job posting provisions of the Collective Agreement do not apply since there was no permanent vacancy as defined in the Collective Agreement and that the transfer of Vincenti was a non-disciplinary, administrative transfer.
- 31. For purposes of this Arbitration, the parties have agreed to proceed first with the group grievance.
- 32. The parties have agreed that the disciplinary grievance of Vincenti will be addressed after the group grievance.

III. COLLECTIVE AGREEMENT

The relevant provisions of the parties' 2000-2005 collective agreement are as follows:

ARTICLE 6 - MANAGEMENT

- 6.01 The Union acknowledges that it is the exclusive function of the Company to:
 - (a) maintain order, discipline and efficiency; and

- (b) hire, retire, discharge, classify, schedule, transfer, assign, direct, promote, demote, layoff, and suspend or otherwise discipline employees for just cause; and
- (c) generally to manage the industrial enterprise . . .
- (aa) Management rights, as outlined above, shall not be exercised in a manner inconsistent with the terms of this Agreement.

ARTICLE 17 - JOB POSTINGS

- 17.01 (a) When the Company decides to fill a permanent vacancy within a Division, such vacancy shall be posted for two (2) working days. Subject to 17.01 (b), employees interested in filling the vacancy shall sign the posting within two (2) working days. The vacancy will be awarded and filled within twenty (20) working days of the posting unless the Company decides not to fill the vacancy or an extension is agreed upon between the Parties. A shuffle (a move within a department first by seniority) shall occur, before the position is posted.
- ...
- (h) The term “permanent vacancy” as used in this Article, shall mean a permanent vacancy that occurs from retirement, resignation, transfer or discharge and which the Company decides to fill, or where the requirement for employees exceeds the number of employees in a Department.

IV. UNION POSITION

The Union submitted that the issue was whether the movement of Ana Vincenti to her new department violated Article 17. Article 17 deals with job postings and the Union said the Employer had circumvented those provisions. An essential element of the collective agreement is seniority and seniority had not been applied in this instance.

The Union submitted that there had been a permanent vacancy in the McDonalds Portion Control (MPC) department created by the retirement of Maria Furtado (see paragraph 26(a) of the agreed facts) and the Employer then moved Ms Vincenti into the department confirming the existence of a vacancy. Although Ms Furtado had retired, creating a vacancy, the Employer had moved Ms Vincenti into the department without following the job posting provisions and had thereby violated the collective agreement.

Nothing in the collective agreement allows for administrative transfers. This movement of Ms Vincenti affected other employees' rights in areas such as overtime, vacation preferences, etc. All permanent transfers such as this one should be done by way of job postings.

The Union asked that I find a violation of Article 17 and that I remain seized as to further remedies.

The Union relied upon the following authorities: *Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Reville) and *Re Regional Municipality of Waterloo and Canadian Union of Public Employees, Local 1883* (2003), 116 L.A.C. (4th) 381 (Stewart).

V. EMPLOYER POSITION

The Employer noted that under Article 6 the Employer had a general right to transfer employees. The Employer had transferred Ms Vincenti in accordance with that general Employer right and had done so in order to minimize food safety risks.

Article 17 deals with job postings and the issue to be decided is whether the Employer, in making this transfer, violated the job posting requirements. Because Article 17.01 (a) begins with "When the Company decides to fill a permanent vacancy," only when the Employer decides to fill a permanent vacancy does the Employer need to post a job. The job posting provisions of this collective agreement require both that a permanent vacancy exist and that the Employer decides to fill that vacancy.

Turning to Article 17.01 (h), although Ms Furtado retired in June, the Employer decided not

to fill that vacancy so there was no permanent vacancy created then. The transfer of Ms Vincenti occurred August 31 and there was no permanent vacancy then as there was no evidence of a retirement then, nor of a resignation, etc.

Although the concluding portion of Article 17.01 (h) sets out a second meaning of permanent vacancy, there was no evidence August 31 that there was a requirement for employees for the MPC department which exceeded the number of employees in that department. On the contrary, in paragraph 28 of the agreed facts there was agreement that Ms Vincenti was being carried as an additional employee.

Moreover, in order for Article 17.01 (a) to be applicable the Employer must decide to fill a permanent vacancy, however it arises, and there was no evidence that the Employer made such a decision.

The job posting provisions apply in only some situations and those are spelled out in Article 17. None of those situations apply here. That is, there was no permanent vacancy August 31 and no evidence the Employer decided to fill any permanent vacancy. As the job posting provisions did not apply, they were not violated.

The Employer asked me to dismiss the grievance.

The Employer relied upon the following: *Re Rio Algom Mines Ltd. and United Steelworkers* (1972), 1 L.A.C. (2d) 244 (Rayner); *Re Toronto Star Ltd. and Printing & Graphic Communications Union, Local N-1* (1976), 12 L.A.C. (2d) 397 (Dunn); *Re Dominion Stores Ltd. and Retail, Wholesale and Department Store Union, Local 414* (1978), 19 L.A.C. (2d) 337 (Weatherill); *Re Camp Hill Medical Centre and Nova Scotia Nurses' Union* (1996), 53 L.A.C. (4th) 314 (Slone); *Re Northumberland Co-operative Ltd. and United Food &*

Commercial Workers, Local 1288P (1994), 42 L.A.C. (4th) 69 (Collier); *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 195 v. Kendan Manufacturing Ltd. (Klinger Grievance)* [2000] O.L.A.A. No. 79 (Watters); and *Re Treasury Board (Department of Human Resources Development) and Hillis* (2004), 134 L.A.C. (4th) 258 (Matteau).

VI. CONCLUSIONS

This is an issue of the interpretation of the collective agreement. The Employer did not follow the job posting provisions in Article 17 and the sole issue to be determined is whether the Employer was required by the collective agreement to do so. That issue requires me to determine the parties' intention:

Did the parties intend that the Employer be required to post a job in a situation such as this?

In determining the parties' intention, it is helpful to keep the agreed fact situation in mind. In brief, the Employer was concerned about the job performance of a long term employee. Although the Employer had provided retraining and had used progressive discipline, its concerns remained. The Employer was worried about food safety and its own potential liability if it allowed Ms Vincenti to remain in her position. The Employer disciplined Ms Vincenti, but it also transferred her to another position. The issue is whether the Employer can simply transfer an employee or must the Employer always follow the job posting provisions.

In determining the parties' intention, I begin in the usual manner with an examination of the language the parties used in the key provisions in dispute. The job posting provisions in Article 17 specify that those provisions apply to permanent vacancies.

“Permanent vacancy” is defined in Article 17.01 (h) as meaning either of two situations:

1. When there is a permanent vacancy arising from retirement, resignation, transfer or discharge which the Employer decides to fill; or,
2. When the requirement for employees exceeds the number of employees in the department.

Article 17.01 (a) specifies the situations in which the Employer must post a job. The Employer must post a job whenever it “decides to fill a permanent vacancy.” There are thus two parts:

1. There must be a permanent vacancy, and
2. The Employer must decide to fill that permanent vacancy.

I acknowledge that Article 17.01 (a) and the definition in the first part of 17.01 (h) are circular - the job posting provisions in Article 17.01 (a) apply when the Employer decides to fill a permanent vacancy and the term permanent vacancy, in turn, is defined in 17.01 (h) as a permanent vacancy which the Employer decides to fill. Nevertheless, it is clear that, absent a general need for more employees in a department, the vacancy must occur for one of the four listed reasons and the Employer must decide to fill that vacancy.

The Union suggested that the first part of the definition of permanent vacancy in Article 17.01 (h), above, applied - that Ms Furtado had left the department by retirement, thereby creating a permanent vacancy, and that the Employer had decided to fill that vacancy and put Ms Vincenti in the department.

The difficulty with the Union suggestion is that the agreed facts do not support it. Did a permanent vacancy occur when Ms Furtado retired? The parties agreed that “at that time the

Company decided not to fill” the position (paragraph 26(a) of the agreed facts). In late August when Ms Vincenti was moved into the McDonalds Portion Control Department there was no evidence of a vacancy arising from any new “retirement, resignation, transfer or discharge” and, moreover, there was no evidence that the Employer decided to fill any such vacancy.

Similarly there was no evidence that the need for employees exceeded the number in the department, a situation which is included in the definition of permanent vacancy in Article 17.01 (h). On the contrary, the agreed facts indicate the opposite; paragraph 28 records the parties’ agreement that the Employer “accepted the financial burden of effectively carrying an additional employee in the department.” This indicates that Ms Vincenti was not needed. This was not an instance when “the requirement for employees exceeds the number of employees” in the McDonalds Portion Control Department.

The words used in the provisions of Article 17 do not support the Union submission that this was a situation in which the Employer was required to post the job.

Having examined the language of the two provisions, I now look more generally at the language of the collective agreement. Article 6 provides the Employer with a right to transfer an employee. Although the Union suggested that all permanent transfers must be done by way of a job posting, I find that the language of the collective agreement does not require that. Instead, the language of Article 17, when compared with the more general language in Article 6, appears to have been deliberately designed to apply to only a limited set of circumstances and only in those limited circumstances must the Employer post the job. I conclude that “transfer” covers a broader range of circumstances than those situations in which the Employer decides to fill a permanent vacancy within a division.

Finally, examining the agreed facts more generally, the Employer was concerned about the quality of Ms Vincenti's work, although it had repeatedly disciplined and retrained Ms Vincenti. Because of the risk to food safety and its potential liability, the Employer remained concerned about allowing her to continue in her position in the McDonalds Further Processing Department. Although the Employer has provided Ms Vincenti with work in the McDonalds Portion Control Department, there was no evidence that, absent its concern about Ms Vincenti's work and its concern about its own potential liability, the Employer would have considered increasing the number of employees already working in that department. In circumstances such as these, I do not believe the parties intended that the Employer would be required to follow Article 17 and post a job in this department, thereby making the new position available to other employees and compelling the Employer to fill the position in accordance with the criteria in the collective agreement.

In summary, I find that there was no permanent vacancy in the department which the Employer decided to fill, and that the collective agreement did not require the Employer to post the position under Article 17. As the Employer was not required to post the position, it follows that it did not violate the collective agreement.

For the above reasons, the grievance is dismissed.

Dated at London, Ontario this 11th day of May, 2006.

Howard Snow, Arbitrator