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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE SPECIALIZED PACKAGING GROUP, INC.
- The Employer

-and-

COMMUNICATIONS. ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 517-G
- The Union

AND IN THE MATTER OF two grievances under two collective agreements involving the termination of the employment of thirteen employees

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Joseph J. Masterson	- Counsel
Don Gray	- Managing Director
Brenda Chapman	- Director of Human Resources

On behalf of the Union:

Michael Klug	- Counsel
John Holmes	- President, Local 517-G

Hearing held October 2, December 22 and December 23, 2008, in London, Ontario.

AWARD

INTRODUCTION

This Employer and Union have two collective agreements covering employees at their London plant. In July 2008 the Employer terminated the employment of seven employees in one bargaining unit and six in the other bargaining unit because of poor financial conditions and a decrease in sales.

Both collective agreements provide the right for the Employer to dismiss employees for reasonable cause. Both collective agreements also provide the right for the Employer to lay off employees due to a shortage of work. However, in this case the Employer did neither - it discharged the employees without cause by providing pay in lieu of notice.

Confronted with a deteriorating financial situation and a shortage of work, could this Employer discharge employees or did it have to lay them off?

FACTS

The Specialized Packaging Group, Inc., the Employer, makes cardboard packages in its London plant. The Communications, Energy and Paperworkers Union, Local 517-G, the Union, represents two groups of these employees, commonly referred to as the "finishing" group and the "litho" group. The employees in the **Finishing** group bind, finish, fold and ship the packages. The employees in the **Litho** group are responsible for printing the packages and these employees are generally more skilled and higher paid.

The parties have one collective agreement for the **Finishing** group and a different collective agreement for the **Litho** group. The two collective agreements have some

similarities but they also have important differences.

Three witnesses testified - Don Gray, the Managing Director of the Employer's London operation, Brenda Chapman, the Director of Human Resources for the Employer, and John Holmes, the President of the Union. As there were no substantial factual disputes, I simply summarize the relevant facts.

In 2007 and 2008 the Employer's London plant was facing serious financial difficulties. Much of the Employer's London product is sold in the United States and the value of the Canadian dollar had risen sharply against the US dollar, making the operation at the London plant less cost effective. At the same time the economic downturn in the United States led to a decrease in demand for the Employer's product. Energy costs had increased sharply and could not be passed on to customers. Finally, the Employer lost some contracts to other manufacturers.

As a result of all these factors, the Employer began to lay off employees. The Employer instituted rotating layoffs in the **Litho** bargaining unit before the end of March, 2008. In addition, in May 2008 the Employer approached the Union for concessions and both collective agreements were eventually renegotiated for a five year term, effective September 2008. In meetings with employees during the spring and summer of 2008, meetings held when the Employer was seeking new collective agreements, the Employer spoke in positive terms about promoting growth opportunities and about investing in new equipment for the plant. While no new equipment is yet in place, the Employer continues to seek new work.

By July 2008 the Employer had concluded that the amount of work for the London plant would not recover to its earlier levels and therefore decided to permanently reduce the

workforce. Both collective agreements include detailed provisions regulating the lay-off of employees when there is a shortage of work. Included in the collective agreements are provisions which indicate which employees are to be laid off first. In July 2008 the Employer determined who would be the first employees to be laid off but, rather than laying those employees off, the Employer discharged them. The Employer terminated the employment of seven employees covered by the **Finishing** collective agreement and six employees covered by the **Litho** collective agreement effective July 4, 2008. It did so by means of a separate letter to each employee, copied to the Union. All the letters were similar and indicated that the Employer had to "adjust our workforce on a permanent basis" and that the employment relationship was "being terminated." All 13 employees were provided with two weeks pay in lieu of notice and their benefits were continued for those two weeks.

I note that there was no suggestion and no evidence of any concern about the work of any of the 13 discharged employees, and no claim of just cause for discharge.

The reason the Employer chose to discharge the 13 employees rather than lay them off was largely due to the cost savings - the Employer estimated that the cost to maintain the 13 employees on lay off would be $100,000 per year.

The Union promptly filed two grievances, one under each collective agreement, contesting the terminations. The two grievances are before me for resolution.

I heard evidence related to whether the shortage of work was permanent or temporary. After July 4, the date these 13 employees were discharged, two of the discharged employees have worked for the Employer for short periods. In fact, one of those employees in the **Litho** group, Bryan Squire, was "re-hired"and then "re-fired" on four

separate occasions during the fall of 2008, such that he was discharged by the Employer a total of five times in under six months. As well, during some weeks since July there was considerable overtime worked by the **Finishing** employees, including over 400 hours in one week in late October. Finally, in late fall 2008 the Employer advertised two vacancies for machine operators in the **Finishing** group but the Employer did not hire anyone.

Also on the question of the duration of the shortage of work, as I noted above the increases in both the Canadian dollar and energy costs had been factors which led to the discharge of the 13 employees. However, by the conclusion of the hearing the Canadian dollar had once again dropped against the US dollar and energy prices had likewise dropped, such that two of the original reasons for the shortage of work no longer applied.

In terms of understanding some of the language of the two collective agreements, I heard evidence that this bargaining relationship has been in existence for many years. In earlier years collective agreements were negotiated by the Employer's predecessor and by the Union's predecessor through centralized bargaining with the Council of Printing Industries and those negotiated master agreements covered many plants in Ontario and Quebec. While recent collective agreements have been negotiated by these parties directly, some of the collective agreement language reflects the time when a master agreement was negotiated in the above manner.

Finally, I heard detailed evidence about the downturn in the Employer's financial position, about the renegotiation of the two collective agreements, and about the selection of the employees who were discharged. However, given the issues before me there is no need to relate the details of that evidence.

COLLECTIVE AGREEMENTS

The key provisions of the parties' 2007-2009 **Finishing** collective agreement are as follows:

[Preamble]

. . .
This Collective Agreement expresses the full and complete understanding of the parties on hours, wages, grievance procedure and other terms and conditions of employment.

ARTICLE 9 - ANNUAL VACATIONS

. . .
9.10 Temporary layoffs because of lack of work or illness shall not be considered broken service.
. . .

ARTICLE 13 - DISCHARGE AND DISCIPLINARY PROCEDURE

13.01 Management shall not take disciplinary action without first warning the employee, unless the circumstances justify immediate discipline or discharge. In the event of a claim that an employee has been discharged or disciplined unjustly or unreasonably, a grievance shall be filed in writing.

13.02 Last warnings shall be given in writing to the employee and the Union steward. The Employer and the Union agree that disciplinary penalties shall not be imposed unreasonably or unjustly.

13.03 In the event of an employee leaving or being discharged by the Employer, one (1) week's notice shall be given. The foregoing shall be subject to the minimum provisions of the Ontario Employment Standards Act. The Employer, upon request, shall give to the Union the reason for discharge of any employee, in writing, within three (3) working days of such request. No notice or pay shall be required in the event of discharge for cause.

13.04 Whenever an employee is told to report to a management supervisor for an interview concerning discipline; the employee shall be accompanied by his/her Steward or Union Officer.

13.05 All written warnings and suspensions shall be cancelled after twenty-four (24) months from the date of the last recorded disciplinary action.

ARTICLE 14 - MANAGEMENT RIGHTS

14.01 The company and the employees mutually agree that all the ordinary functions of management are hereby preserved and retained by the Company, and without limiting the generality of the foregoing, that all the provisions of this agreement are intended only to enunciate and clarify rights, duties, privileges, and prerogatives of each of the parties to this agreement, and to fix and determine their respective responsibilities.

14.02 The employees acknowledge that it is the exclusive function of management in the plant to:

a) Maintain order, discipline and efficiency.

a) Hire, discharge, classify, promote, demote or discipline employees, provided that a claim of discriminatory promotion or demotion or a claim that an employees [sic] has been discharged or disciplined without reasonable cause may be the subject of a grievance and dealt with as provided herein

a) Generally to manage the industrial enterprise in which the company is engaged . . .

ARTICLE 17- LAYOFFS

17.01 For the purpose of layoffs due to lack of work, the Employer affirms the present policy that those employees entitled to the finishing rate are to be given preferential consideration to those who are paid less than the finishing rate, subject to the retained employees being able to meet the normal requirements of the work and seniority shall govern provided efficiency of operation is not impaired. Recall of employees off shall be in the order of seniority subject to the recalled employees being able to meet the normal requirements for work and provided efficiency of operation is not impaired.

17.02 Seniority for the purposes of this Agreement shall be deemed to mean the length of service with the Employer as of the first day of hiring. The Employer agrees to provide the Union office with seniority lists for the respective classifications (according to classifications spelled out in this Agreement) within sixty (60) days of the date of ratification of this Agreement. The seniority lists shall be posted on the bulletin board and updated as required by the shop steward.

17.03 For the purposes of this article the company will advise the Shop Steward before posting the list of employees designated for layoff.

17.04 When employees are given layoff notice due to lack of work the company will notify the employees as far in advance as possible.

ARTICLE 32 - CEP GRAPHICAL BENEFIT PLAN OF ONTARIO

32.01 [The Employer makes premium payments for a benefit plan]
. . . as long as the Employee's name is maintained on their payroll, but excluding payment for any period of labour dispute while the employees are not working. . . .

ARTICLE 37 - SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN

37.01 [The Employer makes premium payments to the CEP Supplemental Benefit Trust Fund of Canada. Of relevance here, the Employer makes these payments based on the "basic day rate" which means]
. . . the basic day rate of an employee in his classification, including vacations, plant holidays and/or authorized leaves of absence but excluding full weeks of layoff and of absence due to sickness or compensable injury, . . .

MEMORANDUM OF AGREEMENT #2

Where, in the opinion of the Local Union signatory to this collective agreement:

a) an employee, who has the ability to perform the work in question, has been terminated without regard to his length of service with the Employer; or

b) a Local Union officer, or chief shop steward, has been laid off while there is work available on his shift that he is willing to perform, and further provided that he has the ability to perform the work in question; or

c) there is a substantial amount of overtime being worked in a classification while there is an employee from that plant and in that classification on layoff readily available to perform the required work;

the Local Union may request that a meeting with the Employer take place forthwith.

Should a solution, satisfactory to the Local Union 517 not be found, it shall have the right to refer the matter to an impartial arbitrator, as provided in Article 12, Step Five, Grievance Procedure.

With respect to the Section (b) above, it is understood that in some plants there are departmental chief shop stewards.

MEMORANDUM OF AGREEMENT #6

ALTERNATE WORK WEEK SCHEDULE

[This memorandum outlines an alternative 12 hour shift schedule. Only one part is relevant here.]

Lay Off
In the event of a lay off the Company must return to the regular work week schedule.

* * * * *

The key provisions of the parties' 2007-2009 **Litho** collective agreement are as follows:

[Preamble]
. . .
This Collective Agreement, together with the Agreements referred to herein, expresses the full and complete understanding of the parties on hours, wages, grievance procedure and other terms and conditions of employment.

ARTICLE 3 - PLANT HOLIDAYS

. . .

3.03 . . .

Employees who are on lay-off shall be entitled to receive holiday pay, or the difference between S.U.B. and /or EI if they are eligible for such benefits.

. . .

3.07 Should an employee be on layoff or vacation on the day when the increased one-half hour for each holiday is being worked, he shall be entitled to receive seven and one-half (7 ½) hours pay when calculating his holiday pay.

ARTICLE 12- GRAPHIC COMMUNICATIONS PENSION PLAN OF CANADA

12.01 [The Employer makes payments to the above plan]

. . . as long as the employee's name is maintained on the Company's payroll, but excluding payment for any periods of labour dispute while the employees are not working. . . .

ARTICLE 13 - GRAPHIC COMMUNICATIONS SUPPLEMENTAL RETIREMENT & DISABILITY FUND OF CANADA

13.01 [The Employer makes payments to this plan based on the "basic day rate" which means]

. . . the basic day rate of employees in their classifications, including leave of absence due to sickness and layoff, for as long as the employee's name is maintained on the company's payroll, but excluding payment for overtime, premiums, shift differentials or any periods of labour dispute while the employees are not working. . . .

ARTICLE 14 - SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN

14.01 [The Employer makes payments to the Graphic Communications Supplemental Unemployment Benefit Trust Fund of Canada based on the "basic day rate" which means]

. . . the basic day rate of an employee in his classification, including vacations, plant holidays and/or authorized leaves of absence but excluding full weeks of layoff and of absence due to sickness or compensable injury, . .

ARTICLE 20 - MANAGEMENT RIGHTS

20.01 The company and the Employees mutually agree that all the ordinary functions of management are hereby preserved and retained by the Company, and without limiting the generality of the foregoing, that all the provisions of this agreement are intended only to enunciate and clarify the rights, duties, privileges, and prerogatives of each of the parties to this agreement, and to fix and determine their respective responsibilities.

20.02 The employees acknowledge that it is the exclusive function of management in the plant to:

a) maintain order, discipline and efficiency.

b) hire, discharge, classify, promote, demote or discipline employees, provided that a claim of discriminatory promotion or demotion or a claim that an employee has been discharged

or disciplined without reasonable cause may be the subject of a grievance and dealt with a [sic] provided herein.

c) generally to manage the industrial enterprise in which the company is engaged . . .

ARTICLE 31 - CEP GRAPHICAL BENEFIT PLAN OF ONTARIO

31.01 [The Employer makes premium payments for this benefit plan]
. . . as long as the employee's name is maintained on his Company's payroll, but excluding payment for any periods of labour dispute while the employees are not working. . . .

ARTICLE 38 - REDUCED SCHEDULE

38.01 In the event of temporary lack of work due to slack business in the plant or any department thereof, the Company may, as far as the efficient and orderly operation of the Plant will permit, share the available work time as equally as practicable among the Employees in the same job classification. Employees who have been employed with the Company less than six months may be excluded from this provision, but such Employees, if retained, must share such division of work.

38.02 Employees who have been employed with the Company less than six months and are excluded from the provision in Article 38.01 above, shall be recalled before any new Employees are hired as a replacement.

38.03 Payments required under Article 13, CEP Supplemental Retirement and Disability Plan and Article 14, Supplemental Unemployment Benefit Plan, shall not be reduced because of the application of the above provisions.

38.04 Seniority list for each classification will be posted January 1st of each year.

1. Employees will be laid off in the following order, least plant seniority first in each classification. The Company reserves the right to change the order of layoffs so that it does not affect the efficient operation of the plant.

2. Each Employee laid off will complete a two (2) week layoff before it moves to the next Employee on the list.

3. The layoff list will be in effect from January 1 to December 31 of each year. January 1st the list will be started over again with the Employee with the least seniority being laid off first.

Note:

1. Seniority refers to plant seniority within a classification.

2. Apprentices are not differentiated from Journeyperson in any classification.

ARTICLE 41 - VACATIONS

. . .

41.16 In the event of termination of employment, for any reason whatsoever, all accumulated vacation pay credits shall be paid in full at the time of the termination of employment. . . .

. . .

ARTICLE 43 - LAYOFF AND DISCHARGE

43.01 In the event of discharge, the Company shall give one week's notice or one week's pay and shall, upon request, furnish the reason or reasons to the Union for such discharge. This provision shall not apply in cases of discharges for cause.

43.02 The discharged employee has the right to lay a grievance, subject to the grievance procedure, as hereinafter provided.

43.03 In the event of a decision to discharge a shop steward or an officer of the Local, the Company will notify the Union of his decision five (5) working days before the discharge takes effect, to give the Union an opportunity to confer with the Company. This provision shall not apply in cases of discharge for cause as provided in 43.04 (Refer to 27.01) [Note: Article 27.01 requires the Union to advise the Employer of the shop stewards and Union officers employed in the plant.]

43.04 A shop steward or an officer of the Local may be discharged for cause immediately with five (5) days regular pay in lieu of notice. If this should occur, then both parties to this agreement agree to invoke Step 3 (b) of Article 18, Grievance Procedure.

43.05 When the Employees are given layoff notice due to lack of work, the Company will notify the Employees as far in advance as possible.

43.06 In the event of layoff, an Employee shall be considered an Employee of the Company for all purposes except payment of wages and any contributions required to be paid to the Supplemental Unemployment Benefit Fund. In cases of termination, the contributions required herein shall continue for each week that wages are received.

ARTICLE 47 - ALTERNATIVE WORK WEEK SCHEDULE
12 HOUR SHIFTS / 6 DAYS PER WEEK

[This Article outlines an alternative 12 hour shift schedule. One part is relevant here.]

. . .

47.07 **Lay Off**

In the event of a lay off the Company must return to the regular work week schedule.

. . .

MEMORANDUM OF AGREEMENT #1

Where, in the opinion of the Union signatory to this collective agreement:

a) an Employee, who has the ability to perform the work in question, has been terminated without regard to the length of service with the Employer; or

b) a Union officer, or chief shop steward, has been laid off while there is work available on the shift that they are willing to perform, and further provided that they have the ability to perform the work in question; or

c) there is a substantial amount of overtime being worked in a classification while there is an employee from that plant and in that classification on layoff readily available to perform the required work;

the Union may request that a meeting with the Employer take place forthwith.

Failing to resolve the matter with the Employer, the Union may request a meeting with the representative of the Employer, with a view of finding a satisfactory resolution. It is understood that such a meeting shall take place forthwith.

Should a solution, satisfactory to the Union, not be found, it shall have the right to refer the matter to an impartial arbitrator, as provided in Article 18, Step Four, Grievance Procedure.

With respect to Section (b) above, it is understood that in some plants there are departmental chief shop stewards.

EMPLOYER SUBMISSION

The Employer submitted that the issue was this:

> Do the collective agreements permit this Employer to restructure its workforce by means of termination rather than layoff?

The Employer submitted that although many collective agreements were clear that discharges were limited to those for cause, thereby taking away the employer's right to discharge on notice, no such provision existed in either of these collective agreements.

The Employer accepted that its decision to discharge these employees had to be made in

good faith. The Employer reviewed the evidence and submitted that terminations were fundamental to the survival of the plant, were used as a last resort, were precipitated by factors outside the Employer's control and had been conducted openly and fairly, such that the discharges were made in good faith.

Turning first to the **Finishing** collective agreement, the Employer said this agreement expressly protected the Employer right to discharge employees by providing notice. The Employer had possessed such a right before it had a collective agreement and there was no firm foundation in the collective agreement to imply any restriction on this Employer right. The preamble made it clear that the collective agreement expressed the full understanding between the parties. Article 14.01 preserved all of the ordinary management rights. Article 14.02 (b) indicated that the Employer had the exclusive right to hire and discharge, subject to a grievance about reasonable cause. Article 13.01 also addressed reasonable cause, but the agreement did not restrict the Employer to discharge only for reasonable cause. The Employer said that Article 13.03 made it clear that the Employer may discharge without reasonable cause - there was in Article 13.03 a general requirement to give notice of discharge, but the Article then stated that this requirement for notice did not apply if the Employer discharged an employee for cause. That Article indicated there was a right to discharge employees by giving notice. Memorandum #2 reinforced this view - if an employee was "terminated" without regard to the length of service, the Union could request a meeting and, if the matter was not resolved, the Union was able to refer the matter to an arbitrator.

As for the **Litho** collective agreement, the Employer said the preamble, the management rights provisions, and Article 43 on layoff and discharge were all similar to provisions in the **Finishing** agreement. Similarly, the **Litho** agreement Memorandum #1 was nearly identical to the **Finishing** agreement Memorandum #2. While these discharged

employees could grieve that their seniority was not respected as required by Memorandum # 1, they were given no right under that Memorandum to grieve that the dismissal was without reasonable cause.

It would be improper to read into either collective agreement a general limitation to the effect that discharges could only be for reasonable cause. The two agreements simply did not contain such a limitation on the Employer's rights. Neither collective agreement said that the Employer could only discharge for reasonable cause.

The **Litho** agreement has a work-share arrangement in Article 38 which involves a series of rotating lay offs, but it states that the Employer "may" opt for the work-share arrangement. The use of the word "may" made it clear that the use of the work-share approach was a decision left to the Employer. Similarly Article 41.16 dealing with vacations made it clear that the vacation pay was to be paid in the event of termination of employment "for any reason whatsoever."

After reviewing the awards listed below, the Employer summarized its position saying that the parties' two collective agreements had no express limit on the Employer's ability to discharge employees without cause. No such limit should be implied. To require the Employer to lay off in this situation would require the Employer to maintain the employees on lay off indefinitely as there was no express limit on how long an employee remained on layoff. Moreover, the rotating lay offs were to be made only "as far as the efficient and orderly operation of the Plant will permit" and permanent rotating layoffs among the employees in the **Litho** group would not further the orderly operation of the plant.

The Employer asked that both grievances be dismissed.

The Employer relied upon the following awards: *United Nurses of Alberta, Local 11 v. Misericordia Hospital* [1983] A.J. No. 877, [1983] 6 W.W.R. 1, 27 Alta. L.R. (2d) 71 (C.A.); *Re Haldimand-Norfolk Regional Board of Commissioners of Police and Haldimand-Norfolk Regional Police Association* [1979] O.L.A.A. No. 4, 21 L.A.C. (2d) 145 (Brent); *Re Wellington County Board of Education and Ontario Secondary Teachers' Federation, Wellington County District 39* [1979] O.L.A.A. No. 121, 24 L.A.C. (2d) 431 (Abbott); *Re Corporation of the Town of Leamington and Canadian Union of Public Employees, Local 528* [1978] O.L.A.A. No. 89, 19 L.A.C. (2d) 416 (Stewart); *Municipality of Metropolitan Toronto and Toronto Civic Employees' Union, Local 43 et al.* [1975] O.J. No. 2467, 10 O.R. (2d) 37, 62 D.L.R. (3d) 53 (Ont. Div.Ct.); *Re Retail, Wholesale and Department Store Union, Local 414 and Retail, Wholesale and Department Store Union Representatives Association of Ontario* [1980] O.L.A.A. No. 110, 28 L.A.C. (2d) 164 (MacDowell); *Re Lockerbie and Hole Western Ltd. and United Plumbing and Pipefitting Union, Local 496* [1983] A.G.A.A. No. 9, 9 L.A.C. (3d) 211 (Fisher); *Re Burns Foods Ltd. and Canadian Food & Allied Workers, Local P233* [1978] A.G.A.A. No. 1, 1 L.A.C. (2d) 435 (Redmond); *Re Tar Sands Machine and Welding Co. (1975) Ltd. and International Brotherhood of Electrical Workers, Local 424* [1980] A.G.A.A. No. 1, 25 L.A.C. (2d) 425 (Owen); and *Re John G. Stevens* [1970] N.B.J. No. 39, 2 N.B.R. (2d) 456, 12 D.L.R. (3d) 284 (N.B.S.C., App. Div.).

UNION SUBMISSION

The Union submitted that the issue was the same in both grievances - could the Employer terminate the employment relationship for reasonable cause due to lack of work and financial problems or was the Employer obliged to lay off the employees such that the employees maintained employment status and some benefits.

The position of the Union was that the Employer was not free to simply characterize the matter as a discharge following notice or, in this case, pay in lieu of notice. The Union said that in the absence of the clearest of language in a collective agreement, and possibly also in a bankruptcy, the following general principles applied:

1. A shortage of work does not provide reasonable cause for discharge;
2. A reduction in the amount of work, whether the reduction is temporary or otherwise, results in a lay off; and,
3. A lay off implies continued employment status - not the end of the employment relationship - entitling the laid off employee to any benefits provided in the collective agreement.

The Union said the issue before me was whether these two collective agreements contained clear language that overrode the above general principles. The Union submitted that the agreements did not contain such language.

The Union characterized the Employer position as follows: it had the right to discharge employees due to a shortage of work by giving notice and the right of employees to be laid off was granted only at the whim of the Employer and only if the Employer chose not to exercise its right to discharge by giving notice. The Union rejected that interpretation of the two collective agreements. The Union said that the idea that the Employer had complete control over an employee's rights flowing from lay off, simply by characterizing the loss of a job flowing from a work shortage as a termination rather than a layoff, was wrong. As Union counsel put it, the Employer cannot simply say to employees that times are tough, so "poof" you are fired and there go your rights to recall, your seniority, your pension, and your other benefits. The parties did not intend such a result.

The Union then reviewed the language of the **Finishing** collective agreement.

Article 17 is a lay-off provision typical of many collective agreements. There was no limitation to temporary, as opposed to permanent, "lack of work." There was nothing in Article 17.01 to suggest that the parties intended the Employer could discharge instead of laying off. Recall was explicitly stated to be by seniority and seniority was defined in Article 17.02. The Employer had to advise the shop steward in advance and had to advise the affected employees as far in advance as possible. These were all standard ideas in collective agreements.

Much of the language in Article 13 was similar to the language found in many other collective agreements. Article 13.01 made it clear that discipline was normally preceded by a warning and that unjust or unreasonable discipline or discharge may be grieved. Article 13.02 reinforced that view.

The Union noted that at common law economic reasons do not provide cause for dismissal. Similarly, at common law a shortage of work does not provide cause for dismissal. But the Employer claimed to be able to avoid its obligation to discharge only for "cause" by asserting economic reasons and giving notice. In part, this Employer argument flowed from the first and last sentences of Article 13.03. The first sentence required that one week notice of discharge be given. The last sentence said no such notice was required if the discharge was for cause. This did not mean that the Employer could discharge without cause by simply giving a week's notice. These were obligations imposed upon the Employer, not rights provided to the Employer. The collective agreement could have said that the Employer could discharge simply by giving notice, but it did not do so. What did Article 13.03 cover? It was intended to deal with other discharges such as innocent absenteeism, or blameless incompetence, or serious and ongoing disability, where the arbitral precedents already usually require the Employer to provide notice before termination.

Article 14.02, Managements Rights, supported this view by providing generally that a claim that an employee has been discharged without reasonable cause may be grieved.

As for Memorandum #2, this is a meeting clause - the Union may call for a meeting in certain

cases. The only part of this Memorandum which might apply to these facts was part a), but in this case the "terminations" were conducted with proper regard for seniority, so that the Union did not have a right to call for a meeting in this situation. Memorandum #2, a meeting provision with no application to these facts, cannot be taken as providing a substantive right for the Employer to fire employees by simply giving them notice.

In summary, the Union said that the **Finishing** collective agreement provides for:

1. Seniority;
2. Lay off;
3. Recall from lay off based on seniority with no express provision for terminating seniority rights in the event of a layoff; and,
4. The maintenance of benefits for those employees who are laid off.

Although there might be a collective agreement where the Employer position would be sound, this is not such an agreement.

Turning to the **Litho** collective agreement, this agreement is unusual, not simply in terms of the benefits provided to employees who are on a lay off, but also in providing that, in a shortage of work, the pain will be shared among the employees by way of rotating layoffs. This Article 38 speaks of "temporary" lack of work. Here the rotating layoffs had begun by late March 2008 so it was initially clearly viewed as a temporary shortage of work. It cannot be said to have been a permanent shortage of work by July. In any event, the fact that discharged employees had returned to work throughout the fall (including Mr. Squire who was hired and fired four more times), the fact the Employer was seeking more work and considering new investments, and the fact the Employer advertised for more workers, all indicated the shortage could only be termed temporary.

What is the reason for "may" share the work in Article 38? This simply means the Employer could choose to keep all the staff working or it could choose to reduce staff. If the Employer chose to reduce staff numbers, it had to do so by way of rotating lay offs, although the Employer

could exclude those employed under six months from the rotating layoffs. Article 38.02 provided that those employees who had worked less than six months, that is the employees who were excluded from the rotating layoffs, must be "recalled" before the Employer made new hires. It could not have been the parties' intention that the senior employees discharged here would have inferior rights to resume their employment than would those junior employees who were excluded from the rotating layoffs, but those junior persons clearly have a right to recall before any new hires. However, under the Employer interpretation, the grievors would all be new hires if they were to return to work, so they could only be "rehired" after the more junior people, all of whom had a clear right to be "recalled" before the Employer made new hires.

Article 43 of the **Litho** agreement was similar to the **Finishing** agreement's Article 13. An obligation imposed upon the Employer to provide notice of discharge cannot equal a right to discharge simply by providing the required notice. The Employer must also abide by the other provisions in the collective agreement.

Article 43.06 makes it clear that benefits continue in a lay off (see also Articles 12.01, 13.01, and 31.) The Union no doubt negotiated these provisions for difficult economic times and no doubt the Union gave up other provisions in order to secure them. It cannot have been the parties' intention that the Employer could avoid these provisions simply by characterizing a lay off as a termination without cause, but with notice.

The Union reviewed the cases below and asked that I find that:

1. The employees were wrongly discharged in July 2008;
2. The employees be reinstated and given redress; and,
3. The Employer failed to follow Article 38 of the **Litho** agreement by failing to adopt rotating lay offs.

The Union asked further that I remit the remaining issues of remedy to the parties and retain jurisdiction.

The Union relied upon the following awards: *Re Artcraft Engravers Ltd. and Graphic Communications International Union, Local 517* (1990), 12 L.A.C. 4th 363 (Brent); *Re United Steelworkers, Local 2375, and Bowmanville Foundry Co. Ltd.* (1965), 16 L.A.C. 37 (Arthurs); *Re Ontario Produce Co., Oshawa Foods Division of Oshawa Group Ltd. and Teamsters Union, Local 419* (1991), 22 L.A.C. 4th 274 (Haefling); *Re Board of Governors of Kitchener-Waterloo Roman Catholic High School and London & District Service Workers Union, Local 220* (1984), 16 L.A.C. (3d) 177 (Davis); *Re Aramark Canada Ltd. and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Union, Local 674* (2005), 144 L.A.C. (4th) 414 (Cummings); *Re Int'l Electrical Workers, Local 2028, and Ajax Hydro Electric Power Comm'n* (1963), 13 L.A.C. 396 (Kimber); *Central Huron (Municipality) v. International Brotherhood of Electrical Workers, Local 636 (Subcontracting Grievance)* [2006] O.L.A.A. No. 652, 87 C.L.A.S. 113 (Burkett); *Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Reville); and *Lakeport Beverages v. Teamsters, Local 938* (2005), 143 L.A.C. (4th) 149 (Ont. C. A.).

CONCLUSIONS

Confronted with a deteriorating financial situation and a shortage of work, could this Employer discharge employees or did it have to lay them off?

In this instance the Employer's decision to discharge the 13 employees rather than lay them off saved the Employer considerable money and the discharged employees lost much in terms of their benefits. However, the issue is not who gains financially but whether under these collective agreements this Employer can discharge employees simply by giving reasonable notice.

At common law - that is under the body of legal principles that are derived from the judgements of the courts and form the basis of the legal system in Ontario - and absent some contrary provision in a collective agreement, or statute, or individual contract of employment, an

employer may discharge employees either with cause or without cause. At common law, if the employer does not have cause for discharge, then the employer is required to either provide reasonable notice of the termination of employment or provide pay for the same reasonable period of time.

It is clear that some collective agreements do not limit the employer to dismiss only for just cause. For example, in *Re Haldimand-Norfolk, supra,* Arbitrator Brent was confronted with a collective agreement which contained no management rights clause and no clause which limited in any way that employer's right to discharge. She concluded that she had no authority to review a discharge. Some of the other awards relied upon by the Employer are similar in result. Those awards indicate that if a collective agreement does not contain a "just cause" limitation on that employer's right to discharge, then no such limitation should be implied and the employer may discharge by simply providing notice.

These discharges were made because of a lack of work and financial problems. Under common law principles this would not be cause for discharge (see, for example, *Re Artcraft Engravers, supra*), nor would this amount to just cause under a collective agreement. The Employer made no claim that its reasons amounted to cause. It follows that if this Employer can discharge under these collective agreements it must be because it has the right to discharge without cause by providing notice, or pay in lieu of notice.

There are no articles in either collective agreement which directly address this issue of discharge on notice. If this Employer has a right to discharge on notice it arises by implication either from the managements rights articles or from other articles. These grievances therefore require a careful examination of several provisions of the two collective agreements.

Finishing collective agreement

The Management Rights article of the **Finishing** agreement is Article 14 and it preserves to the Employer "all the ordinary functions of management." At common law an employer has the right to discharge an employee by providing reasonable notice, or pay in lieu of notice. Reading only this express preservation of "all the ordinary functions of management" suggests that this Employer has preserved the right to discharge employees by giving reasonable notice, or pay in lieu of notice.

However, the Management Rights article also indicates that the other provisions in the collective agreement "are intended only to enunciate and clarify the rights, duties, privileges, and prerogatives" of the parties and to fix "their respective responsibilities." The Union and the employees have many rights expressed elsewhere in this collective agreement. I cannot conceive that these parties intended that matters such as wages, benefits, etc., were preserved to management under this collective agreement. I conclude that this preservation of the ordinary functions of management is subject to the provisions contained elsewhere in the collective agreement and that this Employer has only retained a right to discharge employees by giving notice if that right is not otherwise limited by the collective agreement.

There is a restriction on the Employer's right to discharge contained in the Management Rights article itself. The Management Rights article states that the Employer may discharge employees but then provides that the employees can grieve those dismissals on the basis that the dismissal was made "without reasonable cause" and the employee can seek a remedy which might include reinstatement. This right to grieve a discharge is a general right to grieve any discharge on the basis that the Employer did not have reasonable cause.

There are other provisions in the collective agreement which restrict the Employer's right to discharge. Article 13 - Discharge and Disciplinary Procedures - addresses this issue. Article 13.01 indicates that a grievance can be filed if an employee has been discharged "unjustly or unreasonably." Article 13.02 states that "disciplinary penalties shall not be imposed unreasonably or unjustly." Under this collective agreement, apart from the Management Rights

article, there is second clear limitation on dismissals - they can only be for just or reasonable cause.

But what did the parties intend if the Employer had a shortage of work and needed to reduce the size of its workforce? As in many collective agreements, this agreement provides an express right to lay off employees. While at common law an employer could not lay off employees but was instead required to dismiss them, this Employer now has a right to lay off.

While the collective agreement speaks of lay off and addresses what happens during a lay off, lay off is not defined. A lay off is simply a period during which an employee is off work and is normally an action initiated by an employer to reduce the size of its active work force. A lay off can be distinguished from a discharge as follows - a lay off normally occurs when an employer wishes to eliminate one or more jobs from the workforce, whereas a discharge normally occurs when an employer wishes to eliminate a particular employee from the work force. Unlike a discharge, a lay off does not terminate the employment relationship. The laid off employee has an expectation that he or she will be recalled to work when needed. Lay offs can be temporary or permanent, and they can be for a definite period - e.g., for two weeks - or for an indefinite period - e.g., until recalled. Using the general understanding of lay off, this situation was one in which the Employer would be expected to lay off the necessary number of employees so that the size of the active workforce matched the amount of available work.

In Article 17 the parties clearly contemplated a way for the Employer to reduce its workforce - the Employer has the right to lay off employees when there is a shortage of work. The introductory words to Article 17.01 state clearly that lay offs may occur due to a "lack of work." The order of layoffs is specified in Article 17.01. Seniority is to govern, provided the employees can do the work and the operation of the business is not impaired. The Employer is required to prepare "seniority lists" which are posted on the bulletin board - in this way employees are aware of the order in which lay offs and recalls occur. Employees to be laid off are to be given notice "as far in advance as possible" (Article 17.04) and the Shop Steward is to be advised before the

list of those to be laid off is posted (Article 17.03). The recall of employees is normally in the order of seniority.

Apart from recall rights, laid off employees have other rights under this collective agreement. The duration of employees' vacations increases with the amount of unbroken service. Article 9.10 specifies that layoffs do not amount to a break in service for the calculation of vacations. Moreover contributions to and benefits under the CEP Graphical Benefit Plan of Ontario continue under a layoff (Article 32.01), although the payments to the Supplemental Unemployment Benefit Plan do not (Article 37.01). Although not working, laid off employees suffer no break in their service, they retain their seniority, and they are entitled to be recalled in the order of their seniority if there is a need to increase the work force in the future.

Seniority is a central part of this collective agreement, and of most collective agreements. The importance of seniority is generally accepted by the parties to collective bargaining, by arbitrators, and by the courts. On this issue I note the recent decision of the Ontario Court of Appeal in *Lakeport Beverages, supra*, which fairly summarizes the general view. Mr. Justice Laskin, for the Court, wrote, in part, as follows:

> 56. . . . Seniority, of course, is vital to employees, a cornerstone of the collective bargaining relationship. A long-established principle of labour law is that seniority can only be affected or altered by express language in the agreement. Arbitrator Reville put it this way in [*Tung-Sol, supra*] at 162:
>
> > Seniority is one of the most important and far-reaching benefits which the trade union has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness whenever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement. [emphasis added]
>
> 57. In the light of this principle, Lakeport cannot rely on its general authority in the management rights clause to deprive seniority employees of the rights they have already attained. Express language, not just the general management rights clause, would be required to alter their seniority status. No such language can be found in this collective agreement.
>
> [Note: The emphasis in paragraph 56 was added by the Court.]

A right to discharge an employee by providing notice would also amount to a right to terminate that employee's seniority rights by providing notice. While these parties may have agreed to the right to terminate seniority by providing notice, the long-held view in Ontario is that an arbitrator should be hesitant to reach such a conclusion and that such a right needs to be clearly expressed in the collective agreement.

To this point, this collective agreement appears straight forward - it appears the Employer can only dismiss employees for reasonable cause but it can lay off employees if there is a shortage of work. Those Employer rights are expressed in clear language.

But the Employer said that other language in the **Finishing** collective agreement gave it the right to discharge employees, without cause, by providing notice.

Article 13.03 is one such provision relied upon by the Employer. Article 13.03 is a notice provision and consists of four sentences, the fourth of which was key to the Employer submission. The first sentence requires an employee to provide at least one week's notice of resignation, or retirement, etc., and the Employer to provide at least one week's notice of discharge. The second sentence makes the notice provision subject to the minimum in the *Employment Standards Act.* The third sentence indicates the Union can obtain reasons for any discharge. There then follows a peculiar fourth sentence which the Employer relied upon. It states "No notice or pay shall be required in the event of discharge for cause." Apart from clearly providing an exemption to those situations in which the Employer had to give notice or pay, did these parties also intend to provide an exemption in those situations where the Employer had to have reasonable cause for discharge? That is, did the parties intend this exemption to the notice provision found in the first sentence of this same Article 13.03 to also serve as an exemption to the reasonable cause provisions contained in Article 13.01, in Article 13.02,

and in Article 14.02 b) on Management Rights? Exempting situations of reasonable cause for discharge from the general requirement imposed upon the Employer to provide notice of discharge is quite different from providing a general right to discharge without reasonable cause by simply giving the employee notice. Had these parties intended to provide an exemption from the discharge for reasonable cause restrictions elsewhere in the collective agreement, I would have expected that intention to be stated much more clearly.

It is unnecessary for me to determine precisely what the parties intended by Article 13.03. I need only decide whether it creates an exemption from the general requirement that discharges can only be for reasonable cause and, as I have indicated, I do not believe this was the intention. Nevertheless, I accept that Article 13.03 is a curious provision.

The Employer also relied upon Memorandum of Agreement # 2 which is a provision entitling the Union to secure a meeting in certain circumstances. Clause a) allows the Union to call for a meeting if an employee with ability "has been terminated without regard to his length of service." Clause b) allows the Union to call for a meeting if a Union officer or chief shop steward is laid off when there is work which that person is willing and able to perform. Finally, clause c) allows the Union to call for a meeting if there is a substantial amount of overtime while an employee is on lay off. In addition, the Memorandum provides that if a solution is not found as a result of the meeting, the Union may refer the mater to arbitration in all three situations.

Clause b) and c) of Memorandum of Agreement #2 deal with problems arising during lay off situations. What, then, is meant by clause a)? Could "terminated" have been used here to mean laid off? As I noted earlier, the parties were originally part of a master agreement negotiated through the Council of Printing Industries. Some of the language

suggests this Memorandum may have come into the agreement during that period. For example, the introduction speaks of "the Local Union signatory to this" agreement and, more importantly, the concluding sentence notes that "it is understood that in some plants there are departmental chief shop stewards." As this Employer has but one plant, the final sentence, in particular, suggests this provision has been in existence for many years and came from the central bargaining. It is possible, especially since b) and c) clearly deal with lay offs, that "terminated" in a) simply means that if the Employer instituted lay offs of employees without regard to seniority, the Union could seek a meeting. But whatever the parties intended by the word "terminated," and therefore in whatever situation they intended the Union could secure a meeting and perhaps arbitrate, did they also intend this Memorandum to exempt the Employer from the need to prove reasonable cause for discharge? Once again I would have expected such an intention to have been much more clearly stated. Nevertheless, I accept that this is also a curious provision.

Considering Article 13.03 and Memorandum of Agreement #2 together does not, in my view, advance the matter for the Employer. The parties have a collective agreement which clearly expresses a right for employees not to be discharged except for reasonable cause, a right to grieve any discharge on the grounds that the discharge was made without reasonable cause, and also a clear right for the Employer to lay off employees in precisely the situation which arose here. The process of lay off respects seniority, and employees on lay off retain rights resulting from their seniority. Although the Employer used seniority in selecting these employees for discharge, the discharged employees now have no seniority rights. I cannot read these two provisions either separately or together as providing a right for the Employer to discharge on notice, avoid the need to show reasonable cause, and thereby also eliminate the employees' seniority rights. I do not find in this collective agreement any language which indicates that the parties intended to provide the Employer with the right to eliminate an employee's seniority rights by simply

giving notice.

I find it useful in a case such as this which requires an examination of the interplay of many sections in the **Finishing** agreement, to step back and ask whether it seems likely the parties would have intended the outcome which my examination of the language has suggested. For several reasons, I think this outcome makes sense and was the outcome the parties intended.

Firstly, the fact that most other collective agreements in Ontario provide for discharge for cause and for lay off, but do not provide for termination on notice, suggests that these parties may also have intended this very common collective bargaining outcome.

Secondly, the Union and the employees have both procedural and substantive protections in situations of lay off and discharge for cause, making it difficult to conceive why the Employer would ever engage in either a lay off or in a discharge for cause if it could, instead, simply label the matter as a discharge upon notice. In my experience, parties to collective agreements do not usually negotiate clear protections, such as these detailed provisions on lay off and on discharge for cause, if those same parties also intend to provide such an obvious way to get around those protections. Because of this, it seems very unlikely that the parties would have intended that the Employer could simply avoid all those detailed provisions by merely labelling what would otherwise be a discharge for cause or a lay off as a discharge on notice.

Thirdly, if the parties had intended the outcome the Employer has suggested, I think it unlikely that they would expressed the right to discharge on notice, a right which is uncommon in collective agreements in Ontario, in such an unusual and oblique fashion.

I conclude that the parties did not intend this **Finishing** collective agreement to provide an Employer right to discharge employees by providing notice, or pay in lieu of notice. Reading the collective agreement as a whole, I conclude that the parties intended that the Employer was required to lay off employees in a situation such as this.

Litho collective agreement

The Management Rights Article in this **Litho** collective agreement, Article 20, is nearly identical to that in the **Finishing** agreement. I believe the parties intended that the two articles in the two agreements would have the same meaning. I considered the Management Rights Article of the **Finishing** agreement above and will not repeat the details of that analysis here. In addition, my general views about seniority and lay off were expressed in the context of the **Finishing** agreement and I do not repeat them here.

As in the **Finishing** agreement, I conclude that under the **Litho** agreement Management Rights article this Employer has retained a right to discharge employees by giving notice only if that right is not otherwise limited by the collective agreement.

Are there such limitations in the **Litho** agreement?

The **Litho** agreement includes in the Management Rights article, Article 20, a general statement that an employee discharge may be the subject of a grievance. The Article also provides a substantive basis upon which any discharge grievance will be assessed - that is, was the discharge made "without reasonable cause."

In addition, Article 43.02 of the **Litho** agreement provides a general right to grieve a discharge. By providing a general right to grieve, this article suggests that there is

something elsewhere in this collective agreement which provides a substantive basis upon which a discharge grievance will be assessed, and a substantive basis regarding discharge is, as noted, found in the Management Rights article.

As for what would happen in a shortage of work, the **Litho** agreement includes provisions regarding the lay off of employees. Article 43 - Layoff and Discharge - touches on some aspects of lay off. Article 43.05 and 43.06 are general provisions on lay off. Article 43.05 specifies the notice the Employer must provide for a lay off. Article 43.06 then specifies that laid off employees remain employees. I note that the lay offs referred to in Article 43.05 are not restricted to instances of temporary lack of work.

Further details regarding lay off caused by a temporary lack of work are then dealt with in Article 38 - Reduced Schedule. The nature of these lay offs differs from the **Finishing** agreement in that the employees are subject to rotating lay offs, in the order of seniority. Seniority lists are prepared and posted January 1, and the least senior employees are laid off for two weeks before moving to the next employee(s) on the list. Each January this process of rotating lay off resumes with the most junior employees. The detailed provisions for this process are in Article 38.04.

To this point, this collective agreement appears similar to the **Finishing** agreement and appears to be straight forward - it provides that the Employer can only dismiss employees for reasonable cause but it can lay off employees if there is a shortage of work.

I now turn to the language in this **Litho** agreement which the Employer submitted gave it the right to discharge employees without cause but by giving notice.

Article 43 - Layoff and Discharge - is one such provision. The Employer relied upon the

second sentence of Article 43.01. The first sentence of Article 43.01 provides for notice or pay in lieu and a right to reasons "in the event of discharge." But the second sentence of 43.01 says that the first sentence "shall not apply in cases of discharges for cause." While I acknowledge that the meaning of this is unclear since the second sentence appears to simply negate the first, for my purposes the issue is narrower - does the second sentence, or the two sentences taken together, express an intention that the Employer can discharge without cause by simply giving notice? If that was the parties' intention, it is very obliquely stated. Moreover, it would be contrary to the intention expressed clearly in the Management Rights article. I think it most unlikely that it was the parties' intention to provide with this language a right to discharge on notice. Nevertheless, I examine the rest of Article 43 to assess whether the other parts of the Article shed light on the parties' intention.

Article 43.02 provides a general right to grieve a discharge, suggesting a general substantive protection against any discharge. Articles 43.03 and 43.04 address the situation of the discharge of a shop steward or Union officer, and have no application to the facts here. Article 43.06 specifies that laid off employees remain employees. Persons who have been laid off are to be employees for all purposes except the payment of wages and contributions to the Supplemental Unemployment Benefit Fund, implying that contributions to other funds are continued in a lay off. An examination of Article 12 on pensions, Article 13 on supplemental retirement and disability, and Article 31 on benefits supports the implication that contributions to these funds continue in a lay off. However, Article 43.06 specifies that in a case of a "termination" contributions to these same funds continue only as long as wages continue. Nothing else in this Article assists with the Employer submission of a right to discharge on notice.

The Employer submitted that Memorandum of Agreement #1 in this collective agreement

was similar to Memorandum of Agreement #2 in the **Finishing** agreement and supported the Employer view of a right to discharge on notice. I agree that the two Memoranda are virtually identical and I agree that the parties no doubt had similar intentions. But, as with the **Finishing** agreement, whatever the parties intended by the word "terminated," did they also intend in this Memorandum which clearly provides for a right for the Union to call for a meeting, to exempt the Employer from the need to prove reasonable cause for a discharge? I would have expected such an exemption to be much more clearly stated.

The Employer also relied upon Article 41.16 which requires that vacation pay credits be paid, in full, in "the event of termination of employment, for any reason whatsoever." A termination of employment may occur through death, or retirement, or resignation, or discharge for cause, and I do not see that this clause lends any support for the Employer submission that this provides a right to discharge by giving notice. If there is a right to discharge by providing notice, that right is not found here.

Taking Article 43.01 and Memorandum of Agreement # 1 together does not further the Employer's position. In the face of much clearer provisions dealing directly with lay offs, provisions providing a general right not to be discharged except for reasonable cause, and provisions providing a general right to grieve any discharge on the basis that there was not reasonable cause, I cannot think that the parties would have intended by a combination of one sentence in a notice provision and a phrase in a meeting provision to provide the Employer with a substantive right to discharge by providing notice. Moreover, any right to discharge on notice would also be a right to eliminate employees' seniority rights and I do not find a clear indication that these parties intended to provide the Employer with a right to eliminate seniority rights by simply giving notice.

The Employer suggested that it was improper to read into the collective agreement a

general limitation on its power to discharge to only those discharges made with reasonable cause. But, in my view, that is putting the issue the wrong way around. It is clear that this agreement has a general statement entitling the Employer to discharge for reasonable cause, a general right for an employee to grieve any discharge on the grounds that there was not reasonable cause, and a general statement about laying off employees. What is lacking is a general statement entitling the Employer to discharge on notice. The issue is whether such a right to discharge on notice ought to be read into the agreement in the face of the other clear provisions. In my view, Article 43.01 and Memorandum of Agreement # 1 do not express such a right and they do not persuade me that such a right ought to be read into the agreement as having been intended by implication.

The Employer also relied upon Article 38 which indicates that the Employer "may" lay off when there is a lack of work. Does that suggest the Employer has other options including a right to discharge on notice?

The use of "may" in Article 38 is, in my view, similar to the parties' use of "may" in Article 20 of this agreement where they have provided that a claim that a discharge has been without reasonable cause "may" be the subject of a grievance. Many collective agreements similarly provide that a discharged employee "may" grieve a dismissal. The use of "may" in that context does not mean that the discharged employee has other options, apart from the grievance and arbitration process, in order to seek a remedy. It simply indicates that the employee may choose to do nothing about the discharge. Similarly, when it has a lack of work, this Employer may choose to lay off employees or it may choose to do nothing.

There are two lay off provisions - Article 43 and Article 38. Assuming the Employer

could not discharge on notice, which lay off provision was it to use?

Article 43 provides a standard lay off arrangement. Article 38 allows the Employer to exclude from rotating lay offs those employees with less than six months employment with the Employer (Article 38.01). But if those junior employees are excluded from the rotating lay offs in Article 38, they must still be "recalled" before any new employees are hired (Article 38.02), making it clear that these junior employees are laid off under Article 43.

But all other lay offs are not necessarily made under Article 38. Article 38 uses "temporary" to describe a shortage of work which may lead to the two week rotating lay offs in order of seniority, that is to work sharing among the employees. Lay offs due to any shortage of work which is not temporary would be made under Article 43. There is no definition of temporary and, although it is possible that the parties intended some special meaning of "temporary," no special meaning was specified in this collective agreement. I conclude the parties intended the normal meaning, and temporary is normally used to distinguish something from permanent. Temporary may be for a considerable period of time but is expected to change, whereas in a permanent situation there is no expectation that it will change in the future.

On this issue of whether the shortage of work was expected to change, I note first that the Employer itself had initially characterized the matter as temporary as it had begun with the rotating lay offs not later than March and apparently only changed its view in July. There was no clear change in the facts which would have indicated that the shortage of work was no longer temporary. The Employer was talking with employees about seeking more contracts and more work, and was in fact seeking such work. The Employer was also talking with employees about new investment in the plant. New

contracts and new investment would both lead to more work.

At times during the fall of 2008 the Employer had more work than it had employees as the Employer rehired some of the employees it had discharged, including Mr. Squire, a **Litho** bargaining unit employee, whom it rehired on four separate occasions.

Moreover, during some weeks in the fall of 2008 the Employer required considerable overtime under the **Finishing** agreement - over 400 hours in one week which is more than the work of 10 full time employees, in a situation where only seven employees were discharged from the **Finishing** unit. Moreover, the Employer advertized for new employees, although it did not hire anyone from that advertisement.

I find that this shortage of work was temporary, applying the common understanding of the term "temporary" as a situation that was expected to change. As this was a temporary lack of work, if the Employer chose to lay off any of the more senior employees who were entitled to participate in a rotating lay off, the Employer was required to lay them off by way of the rotating lay off provisions in Article 38.

When considering the **Finishing** collective agreement, above, I stepped back from the details of the language and considered whether the outcome which my analysis of the language suggested made sense and I concluded that it did. Taking the same approach under this **Litho** collective agreement, I conclude for the same reasons I expressed with regard to the **Finishing** agreement - it is a common collective bargaining outcome; it is difficult to believe the parties would have negotiated such detailed lay off and discharge provisions if they intended the Employer to be able to avoid them by simply labelling a matter as a discharge by giving notice; and it is unlikely the parties would have expressed such an uncommon outcome in such unusual and oblique language - that it seems likely

that these parties intended the result which my examination of the language of the **Litho** agreement has indicated.

I have not addressed the many awards cited to me because I determine the intention of the parties to these collective agreements first by examining the language they have used in their collective agreements. The awards cited all turned on the particular facts and language of other collective agreements and, as such, they do not assist here.

However, one of the awards is sufficiently similar that I will refer to it. In *Re Artcraft Engravers Ltd., supra,* Arbitrator Brent was interpreting a collective agreement where the union was the Graphic Communications International Union, Local 517, which I understand to be the predecessor of CEP, Local 517-G, the Union in this case. The management rights article there was similar to the Management Rights articles in these agreements and Article 31 there was similar to Article 13 of the **Finishing** agreement and very similar to Article 43 of the **Litho** agreement. In particular, Articles 43.05 and 43.06 of the **Litho** agreement are very similar to Articles 31.04 and 31.05 of the *Artcraft Engravers* agreement considered by Arbitrator Brent. One of the issues in that case was whether the agreement preserved for that employer the right to discharge by providing notice, as this Employer asserted was the situation under these agreements. Arbitrator Brent concluded that the collective agreement before her did not preserve a right to discharge by way of notice. She wrote in part as follows:

> . . . As I have already noted, there is in this collective agreement no definition of "lay-off." Article 31 deals with both discharge and lay-off. Therefore I consider that even if there is a retention of the company's common-law right to discharge on notice, it has been modified by the express recognition of the parties that the company has the right to lay off, and by arts. 31.04 and 31.05, which deal with lay-off. Specifically, art. 31.04 speaks of a lay-off notice being given "due to lack of work" and there is nothing in the collective agreement which would indicate an intention to limit lay-off to a temporary situation. Also, art. 31.05 confers benefits on laid off employees, and it would be an unreasonable interpretation of the collective agreement to allow those rights to be circumscribed simply by a unilateral act of the company in characterizing its action as a discharge rather than as a lay-off. (at p. 376)

While the two collective agreements before me and the one before Arbitrator Brent have important differences, I nevertheless note that my approach and conclusion are similar to that of Arbitrator Brent.

In summary, I find that in this situation the Employer was not entitled under the **Litho** collective agreement to discharge the employees by providing notice. The parties intended that the Employer would have to lay off employees and provide those benefits which laid off employees are entitled to receive under the **Litho** agreement.

Remedy

Based on my interpretation of the two collective agreements before me, I conclude as follows:

1. The Employer did not have the right to discharge these employees by giving notice;
2. The Employer is directed to reinstate the discharged employees in their employment effective as of the date of their discharges, with no loss of seniority;
3. It was, however, clear that the Employer intended to reduce its work force due to a lack of work and, in the circumstances, I further declare that the employees who were discharged are to be regarded as being subject to being laid off as of the date of their termination/reinstatement;
4. All the employees are entitled to the benefits owed to them as laid off employees; and,
5. The employees who were discharged under the **Litho** agreement are entitled to the benefit of the rotating lay off provisions in Article 38. It was unclear who should have been laid off as of the date of discharge (July 4, 2008). I leave it to the parties to further consider the details of the remedy for this bargaining unit.

I leave it to the parties to consider any other aspects of remedy which may result from my rulings

under these two collective agreements. However, I will remain seised to deal with any issues which may arise in the implementation of this award.

Dated at London, Ontario this 13th day of March, 2009.

Howard Snow, Arbitrator