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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TIMKEN CANADA LP

- The Employer

-and-

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION (UNITED STEELWORKERS) AND LOCAL UNION No. 4906

- The Union

AND IN THE MATTER OF the grievance of Len Webber

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

B. R. Baldwin	- Counsel
John G. Blunt	- Human Resources Manager
Todd Lautzenheiser	- Plant Manager
Wilf Riecker	- Human Resources Manager (Retired)

On behalf of the Union:

Steven R. Banks	- Area Coordinator
Kathy Cornish	- President, Local Union
Randy MacCaskill	- Chair, Grievance Committee
Len Webber	- Grievor

Hearing held March 26, in St. Thomas, and April 16 and May 3, 2010, in London, Ontario.

AWARD

INTRODUCTION

Lay-offs under this collective agreement are normally done by order of occupational seniority. An exception is made for the permanent partial shutdown of more than 50% of the bargaining unit positions in a department, in which instance lay-offs are based upon continuous service, that is plant seniority.

In March of 2009 the Employer instituted a major lay-off and the grievor, a senior employee, was laid off. In January of 2010 the grievor was offered termination and severance pay as is required by the *Employment Standards Act* after any long lay-off. In addition, the Employer had removed some equipment and closed some portions of the plant. The Union submitted the permanent partial shutdown exception in the collective agreement should have applied. The Employer said there had been no permanent partial shutdown of the grievor's department. Both parties also relied upon discussions which occurred during their negotiations and each referred to the transcript of their discussions.

The issue is this: Was there a "permanent partial shutdown of more than 50% of the bargaining unit positions" in the grievor's department so that continuous service should have been used in determining the order of lay-off?

THE FACTS

The parties to this 2008-2011 collective agreement are Timken Canada LP, the Employer, and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) and Local

Union No. 4906, the Union. Len Webber, the grievor, has been employed since 1983. In the fall of 2008 the Employer's St. Thomas plant had some 300 employees. About 70 were laid off in November/December 2008 due to a market slowdown and those employees were laid off in the usual manner by seniority within their occupation.

December 7, 2008, after the above lay-offs, language was introduced in Article 17.06 of a new collective agreement to the effect that if there is:

- the permanent shutdown of a department, or
- the permanent partial shutdown of more than 50% of the bargaining unit positions in a department, or
- the elimination of a job classification,

there are special lay-off provisions and the order of lay-off is determined by length of continuous service with the Employer (i.e. plant seniority), rather than occupational seniority. The only matter in dispute here is the partial shutdown of a department.

In March 2009 the grievor was laid off from his position of Grinder & Honer, Cups & Cones in the Cone Grind department. He was one of some 140 employees laid off by order of seniority within their occupation.

I note that after the March 2009 lay-offs a "complaint" (i.e. the first step of the parties' grievance and arbitration process) was filed alleging that the Employer should have used the new permanent partial shutdown language of the collective agreement. However, the Union did not pursue the issue.

In January 2010, after 35 weeks of lay-off, the grievor was offered severance and termination pay as required by the *Employment Standards Act.* He declined that money and, instead, he retained his right of recall. He also grieved and asserted that in January 2010 the Employer should have treated the lay-off as the permanent partial shutdown of

50% of the positions in the Cone Grind department and applied the new continuous service lay-off provision.

The grievor was recalled to work March 10, 2010.

I heard from six witnesses. Although the Union witnesses testified first, I begin with the evidence of the plant manager who testified for the Employer.

Todd Lautzenheiser is the plant manager at this St. Thomas facility. He is the senior person in the plant and is responsible for all activities in the plant. He said the plant was part of Timken's Mobile Industries business which has a diverse customer base including auto makers Ford, GM and Chrysler, auto parts manufacturers, truck manufacturers, agricultural implement manufacturers, and the aerospace industry, as well as after market suppliers in these various segments. He said that this St. Thomas plant supplies to all the above areas, and that most of the plant's sales are shipped to the US so that the production in the St. Thomas plant is very closely tied to the health of the US economy.

Mr. Lautzenheiser testified that the plant was founded on making tapered roller bearings, that cones were one part of tapered roller bearings, and that the Cone Grind department (the grievor's department) was a key part of making cones. He said that Cone Grind was a core process for the plant's main product and the Employer had not abandoned this product.

As for the lay-offs in March 2009, Mr. Lautzenheiser said they were caused by the major economic contraction which caused customers to cancel orders in an unprecedented manner and left a large inventory in the supply chain. He said that in mid-2008 this plant and other plants in the Mobile Industries division operated at full capacity. In

mid-2008 some auto customers began making cuts in orders and this affected the St. Thomas plant with lay-offs occurring in late 2008. He said the demand for product plummeted in 2008 and 2009. The St. Thomas plant made staffing adjustments, as did all other plants in the division. He said the St. Thomas plant had tried to get the right size workforce for its current business. As for the March 2009 lay-offs, Mr. Lautzenheiser said the business declined rapidly right up to the time of the lay-offs. He said that he had been with Timken for 25 years and had seen cyclical contractions in the business but had never seen orders drop as quickly, or as deeply, as in 2008-2009. He said the drop in business was second only to the 1930's depression. Mr. Lautzenheiser reviewed the number of products shipped to customers during 2008-2009 which demonstrated a dramatic drop in shipments.

Mr. Lautzenheiser testified that the plant had not eliminated any products in 2009. He said that the lay-offs had been a result of low orders. He said that orders had gradually increased after the March 2009 lay-offs but had not returned to previous levels.

Mr. Lautzenheiser testified that in the March 25, 2009 meeting during which the lay-offs were announced, in responding to a question, he had made a prediction about the length of the lay-off and what the staffing levels might be like in the future. As he recalled, he had tried to predict the staff levels after a year and had given an estimate of 120 to 140, as compared to the 300 in 2008.

As for the number of lines in the Cone Grind department, Mr. Lautzenheiser testified that before the March 2009 lay-offs there had been 12 lines and there were now only 9. He said that at no point had the number of lines dropped below 9. He said that the Employer had tried to reorganize the department and make it more efficient. With the 9 lines he felt it was possible now, at full operation, to produce more product than had been

produced with 12 lines. It was a situation of being able to make more product with less equipment. As for the other three lines, he said the Employer still had all that equipment and had simply moved it to a warehouse near the plant. He said that in the past year the Employer had invested over $100,000 in reconfiguring the Cone Grind department to make the product flow more efficiently.

Mr. Lautzenheiser said that two of the 14 Mazak machines in the Green Department had been removed. He also agreed that a washroom, a locker area and a lunch room had been closed. He said that there was not the same need for these facilities with so many fewer employees but that the closed areas could be reopened if they were needed.

As for the grievor's occupation, Grinder & Honer, Cups & Cones, Mr. Lautzenheiser said the number of employees in that occupation had returned to the levels before the March 2009 lay-offs. However, he said the number of Operators, Progressive Grinding (the lead hand classification) had not returned to that level. He said this was, in part, due to having more experienced employees in the department and was also a conscious Employer effort to reduce the number of "indirect" employees, that is employees who were not actively producing product.

Finally, Mr. Lautzenheiser testified that the Employer had not used Article 17.06 in laying off employees because the Employer had not had a permanent shutdown of a department or a permanent partial shutdown. There had been continuous work in the department but the work required less staff, due to the reduced demand. The Employer had temporarily cut the department operations from three shifts to two, then to one and a partial shift, and was now back to two shifts. In terms of the number of lines, the Employer had cut from 12 to 9 lines or a 25% reduction.

In cross examination, Mr. Lautzenheiser agreed that many employees who had been laid off had not returned. He said that he was not certain as to their status as employees. He agreed that some of the salaried staff had been terminated. He said that the Employer had tried to align its work force with its product demand and had also tried to align its costs to the demand for its products. He agreed that there were fewer employees working in the grievor's occupation than before the lay-offs, but said that the number of employees in that occupation per shift was similar to the number per shift before the lay-offs.

Mr. Lautzenheiser also expanded on the Employer's efforts to stream-line the department. He said there was an effort to create cells, through a grind line and an assembly line that work together. He said that this was proving to be more efficient, and allowed the Employer to improve its costs. He said the reduction in the number of indirect staff was unrelated to the creation of cells.

Kathy Cornish is president of the Local Union. She testified about the Employer meeting March 25, 2009, at which the Employer announced a major lay-off. She said the meeting was held off-site at a church hall and that employee attendance was mandatory.

Ms Cornish took notes of the meeting and she identified those notes in her evidence. She said the meeting was chaired by Todd Lautzenheiser, the Plant Manager, and that he and Wilf Riecker, then the Human Resources Manager, spoke. She testified that Mr. Lautzenheiser announced that there would be a "significant" number of lay-offs and that the operation would be much smaller in the future. She said that Mr. Lautzenheiser outlined some details of the operating plan and announced that there would be 140 lay-offs with only 73 bargaining unit members remaining at work. She said Mr.

Lautzenheiser advised that there would be individual envelopes available at the end of the meeting to advise each employee of his/her status.

Ms Cornish testified that Mr. Riecker explained that after 35 weeks of layoff employees would be offered a choice between taking severance and termination pay or retaining their recall rights. She also noted that during the question and answer session near the end of the meeting, a question had been asked about the use of the new lay-off language in Article 17.06. She recalled that Mr. Riecker, or perhaps Mr. Lautzenheiser, had answered that it had not been used in these lay-offs but could be used when the lay-offs became permanent.

I pause to note that, quite unusually, these parties have a provision in their collective agreement which entitles either party to make a record of meetings between the parties. The Employer had a certified court reporter record, and subsequently transcribe, the entire 2008 negotiations. That transcript was later put in evidence for each day of negotiations that these disputed lay-off provisions were discussed.

In cross examination, Ms Cornish was asked a series of questions about the 2008 negotiations which led to the new lay-off language. Given the transcript set out below, it is sufficient to note that Ms Cornish's recollection of the negotiations was consistent with the transcript.

Randy MacCaskill is a long-time employee and the Union's grievance chair.

Mr. MacCaskill identified several machines that had been removed from the plant recently. He testified that in December 2008 there had been 12 lines in the grievor's Cone Grind department. Since December 2008 line #1, line # 4 and line # 12 in the Cone

Grind department had been removed from the plant, and the Mazak 620 machine and the Mazak DT20 machine had also been removed. He testified that other parts of the plant had been closed, including a lunch room, a women's washroom and a locker room.

In cross-examination, Mr. MacCaskill agreed that 3 of the 12 lines in the Cone Grind department had been removed. Mr. MacCaskill agreed that the Mazak 620 machine had not been in the Cone Grind department.

In re-examination Mr. MacCaskill testified that he recalled there being 21 employees in the Grinder & Honer, Cups & Cones occupation in March before the lay-offs and after the lay-offs there had been only 11. As for the "Operator, Progressive Grinding" position (i.e., the lead hands) he said there had been 11 before the lay-offs and only 4 after, of whom only 2 were assigned to the Cone Grind department.

Len Webber is the grievor and has been employed by the Employer since 1983. At the time of his lay-off in March 2009 he worked in the Cone Grind department as a Grinder & Honer, Cups & Cones. He said that he had seniority in two other departments, the Stamp and Chamfer department and the Screw Machines department, but that both those departments had been shut down before this lay-off. He confirmed that he had not taken his termination and severance pay in January 2010, electing to retain his recall rights. He also said that three lines (i.e., lines 1, 4 and 12) of the previous 12 lines in the Cone Grind department had been removed. Finally, he noted that employees who were junior to him had remained working after he was laid off.

Wilf Riecker was the Human Resources Manager for the Employer and retired in 2009, having worked in the plant for 41 years. He had worked in the Human Resources department beginning in 1981, and had been the Employer's chief spokesperson in

negotiations since 1985. He outlined the lay-off provisions as having provided for occupational seniority long before he was involved. He said that each job involved different processes and that an employee, because he or she had posted into a new job, may have seniority in more than one occupation. In the event of a lay-off, assuming sufficient seniority, an employee might keep his or her current job or might be able to hold onto a job he or she had held previously. If an employee did not have sufficient seniority to hold any job, he or she might be able to claim a job in the utility pool where continuous service is used.

Before the 2008 negotiations, Mr. Riecker said that Article 17.06 provided that if an employee was unable to claim a job by seniority, the Employer could place the person in a job for which the Employer considered the employee competent, but that employee could not displace another employee.

Mr. Riecker summarised the 2008 negotiations on the issue in dispute. He said the Union proposed changing the lay-off provisions to provide that lay-offs would be based on the length of continuous service with the Employer, rather than occupational seniority. He said the Employer was opposed to that proposal. The Employer then raised Article 17.06 as a way of addressing some of the Union's concerns. He said the Employer wanted to look at situations in which continuous service, rather than occupational seniority, might be used. He gave as an example a situation in which an operation was stopped and a long service employee might then be in jeopardy if he or she had no occupational seniority in another job. He said that during the negotiations he had provided examples of processes in the plant which the Employer had discontinued. He said the work had simply ceased being done and often the equipment had been removed.

Mr. Riecker identified the transcripts of the 2008 negotiations and reviewed various parts

of the transcripts. He noted the discussion of this issue on October 28, 2008, after the Union's initial proposals for continuous service had been presented. That day he advised the Union as follows:

> . . . we're very reluctant to make a wholesale change to the seniority system, a wholesale change that goes to plant service across the board.
> My point is that there may be other options. There may be options where we can address your concerns but not make a wholesale change to the seniority system. (at page 343)

Mr. Riecker testified about the negotiations on November 25, 2008. That day he made an Employer proposal for a new Article 17.06 as follows:

> In the event of the shutdown of an entire department or the elimination of a job classification, an employee unable to show sufficient seniority to claim an occupation, may continue to claim jobs as outlined above until all such jobs are exhausted. Should this occur, the Company may then, if possible, place the employee on any job for which it may consider the employee competent provided the employee has more seniority than the most junior employee working in the occupation. If there is more than one such employee the Company will make that determination beginning with the most senior employee. The occupational seniority date will be his continuous service date which will become effective after having worked the required number of days in the occupation to acquire seniority as per Article 15.02. (at page 632-633)

There was then a discussion during which Mr. Riecker acknowledged that the above proposal did not cover the partial elimination of a department, and Mr. Riecker agreed to take the Union concerns under advisement (at page 644). Later that day the Union made a counter-proposal that dealt with "a partial or entire shutdown of a department or the reduction of a job classification" (at page 668).

December 3, 2008, Mr. Riecker made another Employer proposal as follows:

> In the event of a partial or entire shutdown of a department or the elimination of a job classification, an employee unable to show sufficient seniority to claim an occupation may continue to claim jobs as outlined above until all such jobs are exhausted. Should this occur the Company may then, if possible, place the employee on any job for which it may consider the employee competent, dependent on his skills, abilities and qualifications to perform the duties required, provided the employee has more seniority than the most junior employee working in the occupation. If there is more than one such employee the Company will make that determination beginning with the most senior employee. The occupational seniority date will be his continuous service date which will become effective after having worked the required number of days in the occupation to acquire seniority as per Article 15.02. (at page 683-684)

The Union responded to the above proposal that same day and suggested, among other things, that the employee should be placed in the job occupied by the most junior employee.

December 5, 2008, was the last day of negotiations and the lay-off language was resolved that day. Early that day Mr. Riecker presented another proposal for a new Article 17.06, a proposal which was ultimately agreed to, and it read, in part, as follows:

> In the event of a permanent shutdown of an entire department, or a permanent partial shutdown of more than 50 per cent of the bargaining unit positions in any department, or the elimination of a job classification, an employee unable to show sufficient seniority to claim an occupation may continue to claim jobs as outlined above until all such jobs are exhausted. Should this occur the Company may then place the employee on the job of the most junior continuous service employee in the plant provided the Company considers that the employee has demonstrated the skills, abilities and qualifications necessary to perform competently the required duties. If there is more than one such employee being displaced, the Company will make that determination beginning with the most senior employee. (at page 732-733)

Mr. Riecker advised the Union that there had been some refinements from previous drafts and that the Employer had made a change requested by the Union so that now the employee would be placed in the job of the most junior employee.

The issue was discussed further that day. Mr. MacCaskill asked what permanent meant. Mr. Riecker replied as follows:

> Well, permanent means permanent. It's like when there is a shutdown that would be akin to the shutdown of the screw machine department or the roller department or the rock pit [sic] department which happened many years ago, as opposed to a contraction of a department. I mean, if there was a contraction of a department, then it would be a normal lay-off situation. However, if the contraction is significant, and it means a true downsizing, the mothballing of equipment, and it will impact more than 50 per cent of the individuals in the occupation, then that will invoke this language. (at page 753-754)

Mr. MacCaskill pressed further on the meaning of permanent and Mr. Riecker replied as follows:

> Permanent is permanent. . . . (at page 755)

Mr. MacCaskill interjected and Mr. Riecker replied:

> Let me finish. If we stop production, disconnect the equipment, remove the equipment, that's a permanent shutdown. . . . (at page 755)

Mr. MacCaskill interjected again and Mr. Riecker then commented:

> . . . I want to make it clear that there is a difference between a contraction and the permanent shutdown. What is permanent? Permanent is indefinite, it's forever. (at page 756)

Mr. MacCaskill then replied "Okay" and Mr. Banks, the Union's chief negotiator, commented as follows:

> So, language basically will have no effect. We just went through 71 employees being laid-off, or 71 on notice or whatever. Under the scenario that we've been confronted with today, this language would have no effect? (At page 756)

Mr. Riecker replied "That's correct." (at page 756)

After a recess, the Union proposed several changes, including deleting the second "permanent" in the first line and deleting "of more than 50 per cent of the bargaining unit positions."

After another recess Mr. Riecker replied that the Employer had looked at the Union proposals but was remaining "with the current language" and he continued as follows:

> . . . We feel that we definitely need to consider these situations only in the event of a permanent shutdown, or a permanent partial shutdown of more than 50 per cent of the bargaining unit positions in any department. We're not prepared to go through this effort if we have a period of weeks or months where we might not have any need to run any production in a particular department. So, the intent of this language is really to deal with permanent shutdown, just like I referred to; examples in the past would have been the roller grind department or the screw machine department. (at page 772).

That same day the Union agreed to the Employer proposal (at page 804). That proposal became the parties' new Article 17.06.

Mr. Riecker testified that the number of lay-offs in March 2009 had been difficult to predict as the market situation was changing so rapidly. He agreed that just shortly before the meeting he had suggested to Ms Cornish, the Union President, a lower number

of lay-offs would be needed and he said that he had been surprised by the final number of lay-offs.

As for the question in the March 25, 2009, meeting about using Article 17.06, Mr. Riecker said that he had been the person who answered it and that he had said the Article would not be used in these lay-offs.

Mr. Riecker said that the Cone Grind department had been in the St. Thomas plant all the time he had worked at the plant and that there were no plans to get out of the cone grind business.

In cross examination Mr. Riecker said that he had known there were going to be major lay-offs in March 2009, but he had first thought the number to be laid-off would be about 90 and the number had grown to 140 in the days just before the announcement.

Mr. Riecker also agreed that during negotiations there had been discussion about the new Article 17.06 being designed to provide increased protection to senior employees. He agreed that a reduction in the workforce from 300 to 73 employees was a significant change.

John Blunt is the Employer's current Human Resources Manager and was the final witness. Mr. Blunt has been involved in negotiations since 1988 and provided evidence regarding the numbers of employees in the Operator, Progressive Grinding and the Grinder & Honer, Cups & Cones occupations. He said that employees in both occupations could be assigned to work on either Cones or Cups, that is in either of two departments. He testified that the Employer had the following number of employees working in the grievor's Cone Grind department:

Date	Number of Operators	Number of Grinders & Honers
December 2008	7	18
End of February 2009	6	18
After March 2009 lay-offs	1	9
End of April 2009	1	15
End of October 2009	2	17
End of March 2010	2	21

Mr. Blunt testified that the reason for the reduction in the Operator classification was due to the higher skill level of the remaining Grinder & Honer employees. He said the role of the Operator was to assist and trouble shoot and there was now less need for the Operator position in the Cone Grind department.

Finally, Mr. Blunt testified that during the 2008 negotiations there had been no discussion of a permanent partial shutdown of a department based on either the passage of time or the standard in the *Employment Standards Act* for offering termination and severance pay.

In cross examination, Mr. Blunt was asked about 17 other employees in the Grinder & Honer occupation. Mr. Blunt testified that he thought they had been laid-off in November or December, 2008. He said that the numbers he had provided began with the end of December 2008 numbers. He agreed that, in total, there were about 39 employees in the Grinder & Honer occupation, including those with recall rights.

In re-examination, Mr. Blunt testified that, of the 17 other employees in the Grinder & Honer occupation, 13 were laid-off before December 7, 2008, when the new collective agreement came into force, and 4 were laid off December 19, 2008. He was unable to say whether any of the 17 had been working in the Cone Grind department or in the Cup

department.

THE COLLECTIVE AGREEMENT

The key provisions of the parties' 2008-2011 collective agreement follow. This dispute centred upon Article 17.06:

ARTICLE 3
RESERVATION OF MANAGEMENT RIGHTS

3.01 Subject to the terms and provisions of this Agreement, and provided that the functions, rights and authority of Management are exercised in a just and reasonable manner, the Union acknowledges that it is the exclusive function of the Company to:
[specific rights follow]

ARTICLE 17
SENIORITY APPLIED TO LAY-OFFS

LAY-OFF

17.01 A lay-off of employees shall be made on the basis of occupational seniority, provided however, that:
(a) the lay-off is one exceeding five (5) working days duration.
(b) in the event that two (2) or more employees have the same effective seniority date for an occupation, the employee(s) having the greater length of continuous service with the Company shall be considered to have the greater amount of occupational seniority.
. . .

17.02 Employees who are entitled to remain on the basis of occupational seniority or continuous service, as applicable, must be competent and willing to do the work which is available.

17.03 Employees without seniority in the occupation affected shall be the first to be laid off.

17.04 Thereafter, employee(s) with the least amount of occupational seniority shall next be laid off from the particular occupation(s) affected until the number of employees left working at the occupation is that required by the Company. This shall be done regardless of whether the employee(s) concerned is actually working at the occupation(s) affected or not.

17.05 Any employee thus removed from an occupation to which he is actually assigned at the time of lay-off may then claim the job in which he has established his most recent effective seniority date, provided, however, that if such occupation is that of the Utility occupation, the employee may not claim that job except as provided in Subsection 17.07 of this Article 17.

17.06 In the event of a permanent shutdown of an entire department, or a permanent partial shutdown of more than 50% of the bargaining unit positions in any department, or the elimination of a job classification, an employee unable to show sufficient seniority to claim an occupation may continue to claim jobs as outlined above until all such jobs are exhausted. Should this occur the Company may then place the employee on the job of the most junior continuous service employee in the plant provided the company considers that the employee has demonstrated the skills, abilities and qualifications necessary to perform competently the required duties. If there is more than one such employee being displaced, the Company will make that determination beginning with the most senior employee.

The occupational seniority date will be his continuous service date, which will become effective after having worked the required number of days in the occupation to acquire seniority as per Article 15.02.

17.07 [This provision deals with the process of claiming a utility occupation on the basis of continuous service. In order to claim such a position the employee has to be one "who would otherwise be laid off from the Company in accordance with the provisions of this Article"]

. . .

17.09 [This provision deals with the order of recall of laid off employees.]

UNION POSITION

The Union acknowledged that the Employer had the right to lay-off employees, but said that it must exercise that right in a "just and reasonable manner" under Article 3. When the grievor was laid-off in March 2009 it was thought to be temporary. However, in January 2010 he was offered severance pay and termination pay under the *Employment Standards Act* as the lay-off was regarded, in terms of that *Act*, as a permanent lay-off. When it was evident that the lay-offs were permanent, the Employer should have applied Article 17.06 and treated this as a permanent partial shutdown of more than 50% of the bargaining unit positions in the Cone Grind department. When the grievor was laid-off there were more than 35 employees in his occupation. After the lay-off there were only nine working, clearly fewer than half the number, so it was a shutdown affecting more than 50% of the positions.

The Union said its position was supported by the negotiations. The Employer proposal

was said to be designed to assist senior employees in a lay-off. Moreover, the Employer had described a permanent shutdown as one in which equipment was removed from the plant and in this instance three lines in the department had been removed, other equipment had been removed, and parts of the plant had been closed. After the March 2009 lay-offs there were only 73 employees working and some 220 employees on layoff. The Grinder & Honer classification was reduced by more than 50% and the Operator, Progressive Grinding was also reduced by more than 50%. The grievor was a senior employee and he was laid off for nearly a year. This new provision was designed precisely to assist a senior employee such as the grievor.

The Union noted that Mr. Lautzenheiser had informed the meeting that there would be a significant number of lay-offs and that the plant would be much smaller going forward (120 to 140 as compared with 300). This also suggests that this was a permanent reduction in staffing.

As for remedy, the Union asked that I find that the grievor should have been recalled under Article 17.06 when his lay-off became permanent under the *Employment Standards Act*. He should be made whole from that point forward.

The Union relied upon the following: Extract from Palmer, *Collective Agreement Arbitration in Canada*, 2nd Edition, page 171 ("temporary"); *Re United Electrical Workers, Local 541, and Canadian General Electric Co. Ltd.* (1966), 17 L.A.C. 401 (Roach); and *Re Curtis Products Corporation and I.W.A. Canada, Local 500* (2002), 110 L.A.C. (4th) 193 (Langille).

EMPLOYER POSITION

The Employer made an extensive submission. The Employer said that there had been no permanent partial shutdown of the Cone Grind department at any time.

Although the Union submitted that the permanent partial shutdown occurred in January 2010, it was the Employer's position that the issue should be assessed as of the time of lay-off, that is, as of March 2009. Article 17.06 does not speak of permanent lay-offs, but rather of the permanent partial shutdown of a department. The process set out in that Article is one to be applied as of the time of lay-off, not some months later. These rights, whatever they may be, are rights which are established as of the time of lay-off. It is at that time that certain rights to claim another job arise. The Article makes no mention of the *Employment Standards Act*, and does not reference the time when severance or termination pay must be offered. To use the *Employment Standards Act* provisions would be wrong.

Instead, to decide if this was a permanent partial shutdown of a department I should look to both subjective and objective elements.

On the subjective side, both Mr. Lautzenheiser and Mr. Riecker testified that there was no intention of permanently shutting down 50% of the positions in the department. Both explained why they felt the Article did not apply. The Employer did not use Article 17.06 and had explained at the lay-off meeting that it would not be used.

As for objective evidence, the Cone Grind function is a core function in the plant. It has not been abandoned. No process in the department has been eliminated. Mr. Lautzenheiser gave evidence that the lay-offs were due to a deep recession. Customers simply stopped buying the products. The plant had been running with three shifts but saw a major drop in orders in late 2008 and into 2009. That mirrored the North

American economy, which is not surprising as most of the plant's products go to the United States. The department continued to run but with reduced staffing and for a time with only one full shift and one partial shift. Staffing had since returned to two full shifts. If demand increased further, the plant could return to three shifts. Sales had gone down and it was sensible in March 2009 for the Employer to adjust the staffing to the sales.

As for the major cuts to the Operator, Progressive Grinding occupation, that was a result of a reorganization not of a shutdown, and it did not require the Employer to apply Article 17.06. The Employer had simply looked at the staffing and decided that with all the senior employees it was unnecessary to have so many in the Operator occupation.

The Employer reviewed the negotiations for the new collective agreement. The Union had proposed a general change from occupational seniority to continuous service. Had the Employer agreed to that proposal, the grievor would have had bumping rights, but instead the parties had agreed to the new Article 17.06. A review of the negotiations indicate that the parties were of one mind as to the intent and the meaning. The Employer had provided an explanation as to the meaning of this provision, the explanation was understood, and the Union agreed to this language.

The new language was effective December 7, 2008. I should assess what happened after ratification, not apply the provision retroactively. The evidence was clear that while there were still people on lay-off who had been at work December 7, 2008, the number was less than 50%. The Employer has not laid off more than 50% in the grievor's occupation.

As for the impact of the *Employment Standards Act,* the Employer said that this collective

agreement speaks of a permanent shutdown of a department, not a permanent lay-off, and so the *Act* had no application. That *Act* simply specifies when an employer has to offer severance and termination payments.

The Employer asked that I dismiss the grievance.

The Employer relied upon the following: *Shorter Oxford English Dictionary,* Sixth Edition, "permanent"; *Random House Unabridged Dictionary* Second Edition, "permanent"; *The International Webster New Encyclopedic Dictionary*, "permanent"; *Re Copper Canyon Timber Ltd. and U.S.W., Local 1-80* (2008), 94 C.L.A.S. 66, 2008 CLB 4084 (Sullivan); *Re Hayes Forest Services Ltd. and I.W.A.-Canada, Local 2171* (2006), 86 C.L.A.S. 186, 2006 CLB 12492 (Hope); *Re Cypre River Falling Ltd. and I.W.A.-Canada, Local 1-85* (2001), 63 C.L.A.S. 89, 2001 CLB 12269 (Kinzie); *Re Doman Transfer - Interior Chip Haul Division and I.W.A., Local 1-367* (1991), 23 C.L.A.S. 141, 1991 CLB 10971 (Vickers); *Re Skeena Cellulose Inc. and C.E.P.U., Local 404* (2004), 79 C.L.A.S. 399, 2004 CLB 13698(Ready); *Re Stave Lake Cedar Mills Inc. and I.W.A., Local 1-367* (1989), 16 C.L.A.S. 35, 1989 CLB 10748 (McKee); *Stave Lake Cedar Mills Inc. and I.W.A-Canada., Local 1-367* [1991] B.C.C.A.A.A. No. 408 (McKee); *Re Skeena Cellulose Inc. and C.L.A.C., Local 44* (2001), 66 C.L.A.S. 297, 2001 CLB 13085 (Somjen); *Re Colonial Cookies (Division of Beatrice Foods Inc.) and United Food & Commercial Workers, Local 617P* (1990), 13 L.A.C. 4th 405 (Foisy); *Marianhill Inc. v. Canadian Union of Public Employees, Local 2764* (2009), 97 O.R. (3d) 305 (CA); *Re Canadian National Railway Company and C.A.W.*-Canada (1997), 67 L.A.C. (4th) 1 (M.G. Picher); *Re Ontario (Ministry of Community Safety and Correctional Services) and O.P.S.E.U.* (2007), 89 C.L.A.S. 293, 2007 CLB 12522 (GSB, Herlich); *Re G4S Cash Services (Canada) Ltd. and Teamsters, Loc. 419* (2006), 87 C.L.A.S. 80, 2006 CLB 12417 (Randall); *Re Canadian Waste Services Inc. and United Food and Commercial*

Workers International Union, Local 175 (1999), 85 L.A.C. (4th) 73 (Snow); *Re Spruce Falls Power and Paper Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2995* (1990), 13 L.A.C. (4th) 372 (Palmer); *Re Quaker Oats Co. of Canada Ltd. and Service Employees Union, Local 183* (2000), 91 L.A.C. (4th) 1 (Emrich); *Re AirBC Ltd. and Canadian Auto Workers, Local 2213* (1997), 61 L.A.C. (4th) 406 (McPhillips); *Re Hallmark Containers Ltd. and Canadian Paperworkers Union, Local 303* (1983), 8 L.A.C. (3d) 117 (Burkett); *Re Henkel Canada Ltd. and Teamsters Chemical, Energy and Allied Workers' Union, Local 1552* (1996), 47 C.L.A.S. 327, 1996 CLB 12525 (Foisy); and *Re B.C. Transit and I.C.T.U., Local 1* (1994), 38 C.L.A.S. 31, 1994 CLB 12267 (Bird).

CONCLUSIONS

In most situations under this collective agreement employees are laid off according to their seniority within a given occupation. However, the order of lay-off is by continuous service when there is (1) the permanent shutdown of an entire department, (2) the elimination of a job classification, or (3) the permanent partial shutdown of more than 50% of the positions within a department. Although there was evidence that departments had been closed in the past and that job classifications had been eliminated in the past, there was no suggestion that the grievor's Cone Grind department had been permanently shutdown nor any suggestion that the grievor's job classification of Grinder & Honer, Cups & Cones had been eliminated. It follows that the only issue in dispute in this grievance is whether there had been a "permanent partial shutdown of more than 50% of the bargaining unit positions" in the Cone Grind department so as to trigger the application of Article 17.06. Although the Union was correct that fewer than 50% of the employees were at work in that department for part of the relevant period, the issue is not simply how many employees were laid off but, instead, how many positions

have been permanently shutdown.

Temporary lay-off or permanent partial shutdown in March?

The undisputed evidence was that the Employer was suffering from a major reduction in demand for its product at the time of the March 2009 lay-offs. The drop in demand was the most serious the plant manager had experienced in his 25 years with Timken, and he said it was the worst Timken had experienced since the depression of the 1930's. There was no evidence that the Employer had any desire to change its product mix or sell fewer roller bearings. Instead, the evidence was clear that this was a market driven change in production levels. At the time of the lay-offs this was not thought to be a permanent downturn in the economy nor a permanent reduction in orders, and it was not viewed as a permanent shutdown of the positions.

I acknowledge that events which occurred after the lay-off may be relied upon to clarify the cause of the lay-off, that is whether this was a temporary lay-off or a permanent partial shutdown. In this instance, both the downturn in the economy and the reduction in staff continued for over a year. Could the Employer have been wrong? Does the evidence suggest that this downturn is permanent?

I do not have evidence to show that the poor economic environment is permanent. Instead, the evidence indicated that the economy is gradually recovering, at least in relation to the Employer's products. As for the reduction in sales, the evidence disclosed that as the economy has gradually improved, the Employer's sales of roller bearings have gradually improved. As sales have improved, the Employer has gradually recalled employees, including the grievor.

I find that there was no permanent partial shutdown of the Cone Grind department in

March 2009. I note that the issue of whether there was a permanent partial shutdown was raised by the Union shortly after the March lay-offs but was not pursued then, suggesting that the Union reached this same conclusion.

Can Article 17.06 apply months after a lay-off?

The Union said there was a permanent partial shutdown in January 2010 when the duration of the lay-offs reached the point that the Employer was required to offer termination and severance benefits under the *Employment Standards Act*.

In my view there is a difference between a lengthy lay-off under that *Act* which requires the offer of termination and severance benefits and a permanent partial shutdown of the Cone Grind department. Permanent has a different meaning than lengthy. Permanent conveys a more enduring meaning, it is something which is expected to last indefinitely without change. Parties often include in collective agreements the notion of a permanent employee - there is no expectation that the permanent employee will never die, nor quit, nor retire, but there is the expectation that a permanent employee will remain employed indefinitely. I find that "permanent" as used here in permanent partial shutdown has a similar meaning. A lengthy lay-off does not on its own equal the permanent partial shutdown of the department.

On the facts of this case it appears that the grievor may have agreed with that interpretation since in January 2010 he decided not to take his termination and severance benefits and instead he retained his recall rights. I assume that the grievor was making a rational decision based on his expectation that there was a reasonable possibility that he would be recalled, as in fact he was. In any event, I conclude that this 35 week lay-off which triggered the offer of termination and severance benefits under the *Employment Standards Act* did not turn a lengthy but temporary lay-off in the Cone Grind department

into the permanent partial shutdown of that department.

But the Union did not rely only upon the 35 weeks of lay-off and the offer of termination and severance benefits. The Union also relied upon the evidence that three of the 12 lines in the Cone Grind department were moved out of the department and into storage off-site. This removal of the three lines was accompanied by a re-configuring of the remaining nine lines, all at a cost of $100,000. Although the Employer witnesses said that the three lines could be re-installed, there was no evidence that the Employer had any such plans. Given the storage of the equipment and the money which the Employer invested in re-configuring the remaining nine lines in the Cone Grind department, I conclude that these changes were permanent changes, in the sense that they were designed to last indefinitely. I find these permanent changes amount to the permanent shutdown of the three lines and is a "permanent partial shutdown" of the Cone Grind department.

The removal of lines and the re-configuring of the remaining lines took place over a period of time and it is difficult on the evidence before me to decide exactly when a permanent partial shutdown of the Cone Grind department occurred. However, it is clear that the shutdown had occurred by the end of the arbitration hearing.

But how many positions were involved in this permanent partial shutdown?

I interpret Article 17.06 as requiring that the lay-offs be linked to the permanent partial shutdown, and not just that the lay-offs occur around the time of the shutdown. Contractions of a department are perhaps more likely to occur in slow economic times when fewer employees are working. However, if a permanent partial shutdown affecting only a small portion of the employees in a department occurs at a time when many other employees are already laid off due to a major downturn in the economy, those

lay-offs should not all be treated as one event and, in particular, the earlier lay-offs should not all be attributed to the permanent partial shutdown.

Here the permanent partial shutdown, that is the removal of the three lines, occurred after many employees had already been laid off due to reduction in demand for Employer products. At the same time that the three lines were being removed, demand for product was increasing and the Employer was recalling laid off employees. That is, there were fewer employees working on the 12 lines located in the department immediately after the March 2009 lay-offs than the number of employees working on the remaining nine lines as of the end of the hearing. I find that there was no additional lay-off of any bargaining unit employee at the time of the removal of the three machines.

However, employees who have been laid off generally expect to be recalled to work. This collective agreement includes provisions for recalling employees to work. But no laid off employee should now expect to be recalled to work on the three lines which have been removed and placed in storage. That is, while there were no additional lay-offs at the time of the removal of the three machines, some employees who had originally been laid off temporarily for economic reasons have had the underlying basis for their lay-off changed to the permanent partial shutdown of their department.

Did the parties intend that employees who had been laid off in March 2009 but whose positions were later permanently shutdown could take advantage of Article 17.06? Some of those employees now have no chance to be recalled to the Cone Grind department. It seems to me that the parties would have intended that those already laid off when a permanent partial shutdown occurred could avail themselves of whatever rights flow from this Article 17.06. I see nothing in this language to suggest that employees who were temporarily laid off for economic reasons, but whose department

was subsequently permanently shutdown, or permanently partially shutdown, should be excluded when that permanent shutdown occurs.

The question remains: Was this the shutdown of "more than 50% of the bargaining unit positions" in the Cone Grind department?

In this instance, I received little evidence about the impact of the removal of this equipment on future staffing levels. Nevertheless, I find that removing three of the original 12 lines, or 25% of the lines, amounts to the shutting down of about 25% of the positions in the department. 25% is insufficient to trigger the application of Article 17.06.

While I find that there was a permanent partial shutdown of the Cone Grind department, I find it was not a shutdown of more than 50% of the bargaining unit positions in the department and that Article 17.06 does not apply.

Evidence of the negotiations

When there is ambiguity in the language of a collective agreement it is sometimes helpful to examine the evidence of the discussions during the negotiations for the collective agreement as that evidence sometimes assists in determining the parties' intention. I have already decided that there was not a "permanent partial shutdown of more than 50% of the bargaining unit positions" in the grievor's Cone Grind department and that Article 17.06 does not apply on these facts. Since I found no ambiguity here, it is unnecessary to examine the evidence from the bargaining.

Nevertheless, since both parties relied upon this evidence of the communications during

the negotiations, I will examine it briefly. I note that having the transcript of the negotiations makes the evidence much clearer than it usually is in labour arbitration.

The Union made a proposal to change from lay-offs based upon occupational seniority to lay-offs based upon continuous service. The Employer countered with various situations in which it was prepared to lay-off based on continuous service. Although there was a discussion that this change would help senior employees, the parties did not agree upon a general statement that senior employees could rely upon their continuous service. Instead, they ultimately agreed that in three specific situations continuous service could be used. It seems clear from the transcript of the negotiations that the parties understood what the Employer meant by its proposed language and that the parties agreed upon the Employer's meaning. I have reproduced above portions of the transcript from pages 753-756 and I will not repeat them here. At that time the Employer's chief negotiator, Mr. Riecker, explained his view as to the meaning of Article 17.06, and the Union's chief negotiator, Mr. Banks, replied to the effect that he recognized that this language would not have helped the 71 employees laid off in December, 2008, a lay-off which the evidence indicated was due to a downturn in the economy and a reduction in orders.

The evidence indicated that the March 2009 lay-offs, including the grievor's lay-off, were also due to the continuing downturn in the economy and to further reductions in customer orders. The parties had a clear understanding that Article 17.06 would not have helped the employees laid off in December 2008. Applying that same understanding, Article 17.06 would not have helped those employees laid off in March 2009.

However, there was nothing in the negotiations which dealt with this issue of whether Article 17.06 could be invoked in the months following a lay-off.

Summary

I have found that Article 17.06 does not apply as there was no "permanent partial shutdown of more than 50% of the bargaining unit positions" in the Cone Grind department. The grievance is dismissed.

Dated at London, Ontario this 22nd day of June, 2010.

Howard Snow, Arbitrator