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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

SHELL CANADA PRODUCTS LIMITED
(Sarnia Refinery)
- The Employer

- and -

COMMUNICATIONS, ENERGY & PAPERWORKERS UNION OF CANADA
Local 848
- The Union

AND IN THE MATTER OF a grievance of George Brown

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

B. R. Baldwin	- Counsel
Jacques Beauchamp	- General Manager
Kerry Margetts	- Dispatching/Utilities Manager
Peter Martindale	- Utilities Coordinator
Chris Jones	- Manager, Human Resources
Mary Bishop	- Human Resources

On Behalf of the Union:

Carol Fraser	- National Representative
Bob McMillan	- Chief Steward, Local 848
Steve Rumbold	- President, Local 848
Dan Hennaert	- Treasurer, Local 848
Rick Harris	- Vice President, Local 848
Dan Simon	- Secretary, Local 848
George Brown	- Grievor, Assistant Phase 7 Operator

Hearing held January 17, 1997 in Sarnia, Ontario.

AWARD

I. INTRODUCTION

In August 1996 George Brown, the grievor, applied for the position of "swing assistant" at the Employer's Sarnia Refinery for 1997. The swing assistant position was one of five positions being filled simultaneously. The grievor was the only applicant for the swing assistant position. He was qualified for the position and had performed the swing assistant job in 1995. The grievor did not, however, obtain the position of swing assistant. Instead, he was assigned to the position of "vacation relief/day assistant".

In his grievance the grievor sought the swing assistant position.

II. THE EVIDENCE

There was no factual dispute in the grievance and as a result I will simply set out the background. The Employer advised me that the required notice of the hearing had been given to the other interested employees. None of those interested employees attended the hearing.

There were two conflicting approaches to this case. The Union submitted this was a promotion case under Article 14.08, *infra*. The Employer submitted the matter was one of management right in the annual assignment of staff to available positions, subject only to a requirement under Article 11.03 (c) (ii), *infra,* to rotate the swing positions "where possible".

The Employer operates a refinery in Sarnia. This grievance involves assignments to positions in the Steam Plant, which is also referred to as Utilities. There are currently eighteen (18) employees in Utilities. Because of the nature of the operation, employees are

required to be present seven (7) days a week, twenty-four (24) hours a day. In Utilities there are four (4) crews of three (3) employees each. In addition, because of vacations and statutory holidays, there are additional employees who are not regularly assigned to any of the four crews.

The positions on the four crews are regarded as preferred assignments. Once an employee has obtained a position on one of the four crews, it is regarded as a "permanent" position.

There are four additional positions in Utilities of particular relevance for this grievance. One of the four positions is known as "swing operator", a second is called "swing assistant". In most years there have been two "vacation relief" positions. The practice over the last several years has been to fill these four additional positions annually. For 1997 the Employer decided to retain one vacation relief position and to fill the other vacation relief position as a combination "vacation relief/day assistant" position.

The four positions were usually advertised in the late summer and employees were invited to apply for the position(s) they desired. In addition to seeking applications for the four vacation relief and swing positions, in August 1996 the Employer advertised for candidates to apply for a fifth position as operator on crew 1. (The August 1996 advertisement included a position as trainer and a position as trainee, but neither of these last two positions are of relevance to the grievance.)

The grievor is a phase 7 operator in Utilities with a 3rd class Stationary Engineer's certificate. In 1996 he had been a "spare" and had been assigned to various duties, including vacation relief for the latter part of the year. For 1997 he applied for the swing assistant position, the position he had held in 1995. The grievor is a valued employee and is quite able to perform the swing assistant duties.

Employees were asked to express their interests in the positions by September 9. Shortly after September 9 the grievor was advised by Peter Martindale, the Utilities Coordinator, that he had been the only candidate for the swing assistant position and that he would likely obtain the position. Mr. Martindale did not promise the grievor the position. Nevertheless, Mr. Martindale indicated to the grievor that he had an excellent chance of obtaining it.

The Employer then considered filling the five positions. The Employer regarded the position of operator on crew 1 as a promotion in terms of the collective agreement. (See, for example, Article 14.08, reproduced later.) Rick Wojtaszek was the only candidate for the position of operator on crew 1. Mr. Wojtaszek was junior to the grievor but Mr. Wojtaszek had a second class certificate which was required for this position. As Mr. Wojtaszek had the required qualifications, the position was awarded to him.

The Employer then considered the other four positions. The Employer did not view the filling of these positions as falling under the promotion provisions in the collective agreement (i.e. Article 14.08). Instead, the Employer viewed the process as one of attempting to assign the available staff to fill these less desirable positions, something which had traditionally been done on an annual basis.

Previously the Employer had been able to accommodate employee wishes. However, in the fall of 1996 when it filled the four positions for 1997, the new combined vacation relief/day assistant position proved to be a very unpopular position. No employee in Utilities wanted the vacation relief/day assistant position. The Employer considered various options for assigning employees to different positions but was unable to find anyone who wanted to take the vacation relief/day assistant position.

The Employer ultimately followed a practice which is common within the Sarnia refinery.

The practice is not a written one but rather is one which has evolved over the years. As a practice that has evolved, the precise nature is somewhat unclear. Nevertheless it is clear that the essence of the practice is as follows:

> When a position must be filled and no employee wants to do the job, the position is assigned to the most junior qualified person who has not done the job in the past.

There was a suggestion that whether someone had "done the job in the past" was based on whether the person had performed the job within the last five years. There was also a suggestion that the junior person was assigned the job unless he or she had done the job for two of the previous five years. However, neither of these factors was relevant in this instance.

In terms of the practice of assigning junior people to unpopular positions, the Employer made reference to a July, 1986 memo from the Refinery Superintendent to all employees, copied to the President of the Union. That memo indicated the following with respect to day assistants:

> If no qualified Assistant Operators volunteer for the positions, management will select candidates from the complexes having the necessary qualifications and the lowest seniority.

Dan Hennaert, Treasurer of the Union, also testified regarding the practice of assigning the most junior person to an unpopular position if that the person had not previously done the job. He indicated that everyone was expected to rotate through the position and that everyone should have to take a turn.

Relying upon this practice of assigning the junior qualified employee to the unpopular position, the Employer assigned the grievor, as the most junior qualified person, to the position of vacation relief/day assistant. At the same time it filled the other vacation relief,

the swing assistant and the swing operator positions. For 1997 the swing assistant position was assigned to Gord McKay, the same employee who had done that job for 1996.

In the announcement of the assignments for 1997, Mr. Martindale, the Utilities Coordinator, added the following:

> NOTE: The final decision to assign people as indicated above was reached after extensive consultation with many representatives from management, the union and utilities operators. This outcome is not perfect and will not likely sit well with everyone, however from the response I have received it seems to be the least unpopular. The bottom line is that filling the unvolunteered for vacation relief position came down strictly to seniority.

The evidence was consistent with the note. The Employer did consult widely, the outcome was not perfect and it did not sit well with everyone. The evidence did, however, indicate that the reason the Employer assigned the "unvolunteered for vacation relief position [to the grievor] came down strictly to seniority."

With respect to the Employer's position that this was a matter of management right subject to the duty to rotate where possible, the Employer witnesses reviewed various possible packages of assignments which it had considered. Most involved approaches which would have accommodated the grievor's desire to obtain the swing assistant position. One possibility did not do so and the Employer witnesses indicated that if the swing assistant position had to be rotated pursuant to Article 11.03(c), the Employer would not have assigned Mr. McKay, given his seniority, to the vacation relief/day assistant position. Instead the Employer would have assigned Mr. McKay to a third position, assigned another employee (Tim Hall) to the swing assistant position, and would still have assigned the grievor, as the junior qualified employee, to the vacation relief/day assistant position.

I heard no oral evidence as to why the above package of assignments was not made.

However, Kerry Margetts, the Dispatching/Utilities Manager, summarised the various options in writing and that document was in evidence. In the document, the following appears:

> [This option] does force rotation in the swing assistant position, however based on George Brown being the junior person, he does not get the swing assistant position. This is an option if the swing assistant position **must** be rotated. It does not satisfy George Brown's request.

Mr. McKay, who was assigned the swing assistant position, had a seniority date of September 29, 1975. The grievor had a seniority date of November 23, 1987 and was the third most junior person in the department. The second most junior person was Steve MacDougall, but Mr. MacDougall was a trainee who had recently transferred into the utilities department and he had no utilities qualifications. Mr. MacDougall was thus unable to perform the job of vacation relief/day assistant. The most junior person was Mr. Wojtaszek. He had successfully applied for the position of crew operator on crew 1 and was not available for this position. The grievor was thus the most junior person to whom the vacation relief/day assistant position could be assigned.

Finally, although the agreement speaks of rotation of the swing positions, the two positions, swing operator and swing assistant, have not been rotated every year.

III. COLLECTIVE AGREEMENT

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

ARTICLE V
MANAGEMENT RIGHTS

. . .

5.02 The Union further recognizes the right of the Company to operate and manage its business in all respects in accordance with its commitments and responsibilities. The location of the plants, the direction of the working forces, the products to be produced, the schedules of operations, the right to decide on the number of employees needed by the Company at any time, the right to use improved methods, machinery and equipment and jurisdiction over all operations, building,

machinery, tools and employees at the plant aforesaid are solely and exclusively the responsibility of the Company. . . .

ARTICLE XI
HOURS OF WORK
WAGES AND OVERTIME

. . .

11.03 . . .

(c) **For Shift Workers working the continuous, rotating 12-Hour schedule**, the following provisions will apply:

. . .

(ii) In Utilities the 4-team schedule which embodies shift integrity except for two swing positions, and averages 37.3 hours per week shall apply to those employees on continuous rotating shifts in Utilities. The swing jobs are to be rotated where possible for a given period (approx. 6-12 months duration). If and when sufficient staffing is achieved, that is, there are enough Phase 7's, we would plan to change to a schedule (identical to Process) utilizing Phase 7's in lieu of the 9th Operator.

ARTICLE XIV
SENIORITY

. . .

14.08 (a) Subject to the provisions of this Article, preference in promotions other than appointments to supervisory positions shall be given to those employees in the department having the longest plant seniority, provided always that the employees in question are in the opinion of the Company of equal skill, competence and efficiency.

(b) For the purposes of this Article, the departments are as follows:

(i) Production Units
(ii) Dispatching
(iii) Steam Plant and C. O. Boiler
(iv) Maintenance
(v) Laboratory

. . .

14.11 (c) **Steam Plant (Utilities)** progression and promotion from phase to phase will be based on the following criteria:

(i) Phase 1 - Entry at basic pay level.
(ii) Phase 2 - Completed three months of continuous service in the Steam Plant Department, passed written and oral examinations, proven on-the-job knowledge, qualified as Assistant Operator - Water Treating.
(iii) Phase 3 - Completed three to twelve months of continuous service, passed written and oral examinations, qualified as Assistant Operator - Water Treating, has either qualified as Assistant Operator - Steam Plant, or has demonstrated job knowledge of Satellite Steam Plant, or has obtained 4th Class Stationary Engineer's certificate.

(iv) Phase 4 - Completed a maximum of twenty-four months of continuous service, passed written and oral examinations, qualified as Assistant Operator - Water Treating, has either qualified as Assistant Operator - Steam Plant, or has demonstrated job knowledge of Satellite Steam Plant, or has obtained 3rd Class Stationary Engineer's certificate.

(v) Phase 5 - Completed a maximum of thirty-six months of continuous service, passed written and oral examinations, qualified as Assistant Operator - Water Treating, Assistant Operator - Steam Plant and has demonstrated job knowledge of Satellite Steam Plant, has obtained 3rd Class Stationary Engineer's certificate.

(vi) Phase 6 - Completed a maximum of forty-eight months of continuous service and qualified as for Phase 5; progressed towards a 2nd Class Stationary Engineer's certificate (ie. three exams) or has successfully undertaken concentrated Satellite Steam Plant training under the direction of the Chief Stationary Engineer.

(vii) Phase 7 - Qualified as for Phase 6, or holds a 2nd class Stationary Engineer's certificate, plus demonstrated ability to operate in Main Steam Plant and Satellite Steam Plant, including the ability to train junior employees, plus operate and carry out operator duties upon request.

(viii) Utilities Operator - Promotion on vacancy with selection made from Phase 7 candidates who hold a 2nd Class Stationary Engineer's certificate, as per Clause 14.08 of the current Agreement.

(ix) Senior Utilities Operator - Has completed 24 months continuous service as Utilities Operator. Responsible for overtime holdover and call-ins when requested by the Dispatching/Utilities Shift Coordinator.

(d) A pool of additional Assistant Operators may be established in the Process, Dispatching and Steam Plant (Utilities) Departments for the purpose of providing relief for vacations, sickness or other reasons.

. . .

SCHEDULE "A" - WAGE RATES

. . .

STEAM PLANT	Feb. 1, 1996
Senior Utilities Operator	27.29
Utilities Operator	25.85
Assistant Utilities Operator - Phase 7	24.43
Assistant Utilities Operator - Phase 6	22.96
Assistant Utilities Operator - Phase 5	21.41
Assistant Utilities Operator	

- Phase 4	20.26
Assistant Utilities Operator	
- Phase 3	19.31
Assistant Utilities Operator	
- Phase 2	18.48
Assistant Utilities Operator	
- Phase 1	17.88

. . .

SWING JOB CLASSIFICATIONS

For the purpose of Schedule "A", swing job classifications will be regarded as additional job classifications and will be placed on the appropriate line of progression. Rates of pay for such positions to be those rates worked as per schedule.

IV. SUBMISSIONS OF THE UNION

The Union submitted that the grievor had applied for the swing assistant position and, after the deadline for applications, the Employer decided to award the job to someone who had not applied for the position. This had the effect of removing the opportunity from the grievor. The posting procedure used in this instance was a *bona fide* procedure similar to that which had been used in the past. It was unfair and discriminatory to fail to award the position to the person who had applied for it. The grievor applied and met the qualifications of swing assistant and should have been awarded the job. The position of swing assistant is recognized in the collective agreement, for example in Article 11.03(c) (ii). In addition the existence of swing jobs are recognized in the Appendix on Salary.

The Union referred to the following authorities: *Re Rothmans of Pall Mall Canada Ltd. and Tobacco Workers' International Union, Local 319* (1974), 6 L.A.C. (2d) 235 (Shime); *Re International Chemical Workers, Local 798, and Union Gas Co. of Canada Ltd.* (1972), 24 L.A.C. 159 (Lysyk); *Re Marks and the Crown in Right of Ontario (Ministry of Natural Resources* (1981), 30 L.A.C. (2d) 64 (Crown Employees Grievance Settlement Board - Weatherill); and *Re United Steelworkers and Int'l Nickel Co. of Canada Ltd.* (1965), 16 L.A.C. 216 (Lane). The Union submitted that each of these cases dealt with an employer

failure to follow the posting procedures in the collective agreement and that the situation here was similar.

Article 11.03 (c) (ii) of the agreement required rotation of the swing positions where possible. The Employer was able to rotate the swing assistant position with little difficulty. It could, for example, simply have given the grievor the swing assistant position and assigned the person who had received the swing assistant position (Mr. McKay) to the vacation relief/day assistant position which had been assigned to the grievor.

The Union submitted that three of the five advertised positions were recognized by the collective agreement. Thus, the collective agreement posting provisions should apply. In the alternative, the Union noted that the practice of advertising these positions was one of long standing and that the Employer should be estopped from denying the applicability of the posting provisions.

The Union submitted that the grievor's application should have been treated as a promotion in the same manner as Mr. Wojtaszek's. In response to the same general posting, Mr. Wojtaszek had applied for and obtained the position of operator on crew 1.

V. SUBMISSIONS OF THE EMPLOYER

I note that the Employer indicated at the beginning of the hearing that the grievor was a valued employee and that its decision not to award him the swing assistant position reflected no lack of confidence in his abilities, nor was it in any way disciplinary.

The Employer acknowledged that the filling of the position of operator on crew 1 properly fell under the provisions of the collective agreement dealing with promotions. However, the

Employer submitted that the annual assignments to the swing and vacation relief positions were a matter of managerial discretion. There had been a lengthy practice in which the swing and vacation relief positions were posted and employees were invited to apply. But the posting was one which was done outside of the requirements of the provisions of the collective agreement.

The Employer submitted that the process of filling these swing and vacation relief positions involved establishing the qualifications, advertising, and applying certain rules for the filling of positions, but it was necessary to look at the entire process. The Employer posted all four positions and filled the four positions at one time as any reasonable Employer would. The Employer had to consider all four positions as a package and could not reasonably fill one of the four positions without knowing who would fill the other three positions. Merely by expressing a preference for the swing assistant position, the grievor could not prevent the Employer from assigning him to the unpopular vacation relief/day assistant position. The evidence was uncontradicted that the vacation relief/day assistant position was filled on the basis of qualifications and reverse seniority.

What should management do if no one applied for an unpopular position? The Employer submitted that it was a matter of management rights. Management had developed a practice of filling positions that no one wanted through the use of reverse seniority. That practice had been used for a number of years and was well known. The practice was acknowledged by Mr. Hennaert, the Treasurer of the Union.

The Employer acknowledged that the collective agreement required that swing positions be rotated if possible. The collective agreement did not specify exactly how that rotation was to be done, nor did it indicate that any particular person should get the position when it was rotated. There was simply a general right of the Union to insist on rotation "where possible".

There have been years in which the swing positions were not rotated.

The Employer submitted that rotation was not possible for 1997. If the Employer had rotated the swing position in 1997 it would have, in effect, violated its own seniority practices by giving a senior person the less desirable vacation relief/day assistant position. The grievor was the most junior person qualified to fill the position. In this situation the Employer submitted that, in a labour relations sense, it was not possible for the Employer to rotate the swing assistant position. If the Employer had adopted the best of the alternatives available to it, it would have rotated the position of swing assistant but the grievor would still have been assigned to the vacation relief/day assistant position. Thus the Employer asked me to look at the entire practice and to conclude that the Employer's decision in this instance was reasonable. If the practice was reasonable, then it was *not possible* to rotate the swing assistant position.

The Employer referred me to the following authorities: *Canadian Labour Arbitration* (3rd edition - looseleaf) by Donald J. M. Brown and David M. Beatty, Paragraph Number 5:3224; *Re Int'l Union, United Plant Guard Workers, Local 1962, and Ford Motor Co. of Canada Ltd.* (1966), 17 L.A.C. 417 (Reville); *Re United Electrical Workers, Local 512, and Square D Co. Canada Ltd*. (1965), 16 L.A.C. 348 (Reville); *Re The Tribune (Division of Cariboo Press Ltd.) and Communication Workers of America, Local 226* (1989), 4 L.A.C. (4th) 390 (Chertkow); and *Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees, Local 43* (1983), 13 L.A.C. (3d) 58 (Teplitsky).

The Employer submitted that these authorities indicated that "possible" in a labour relations context was similar in meaning to "practicable" and that the use of possible permits this Employer to take into consideration its operational requirements and exercise a business judgment.

The Employer suggested that the cases relied upon by the Union were all distinguishable. In one case the employer had accepted a late application. In other cases the employer had withdrawn postings. The processes involved in those cases, however, were quite different from an annual assignment of employees to fill positions.

Finally, the Employer submitted that if I concluded rotation of the swing assistant position was possible, I should not award that position to the grievor but rather remit the matter to the Employer. All employees should know the process to be used in filling the positions. If the swing position had to be rotated, all employees should have an opportunity to express a preference for the various positions. Rotation did not necessarily mean the grievor would receive the swing position.

VI. CONCLUSIONS

As the Employer and the Union disagreed on which collective agreement articles governed this process, the resolution of that issue is the first matter to be addressed. I then consider whether the Employer has done what is required under the applicable provisions in the agreement.

1. Which provisions of the collective agreement applied to the Employer when it filled the positions of swing assistant and vacation relief/day assistant for 1997?

It is clear from Article 14.11(c) (viii), *supra*, that the movement from a phase 7 position to the position of utilities operator on crew 1 is a promotion and must be made in accordance with Article 14.08. The movement is to take place "on vacancy with selection made from the Phase 7 candidates . . . as per Clause 14.08 . . ." (Article 14.11 (c) (viii)). Thus filling the position which Mr. Wojtaszek obtained is governed by the promotion provisions in

Article 14.08.

The progression within the Steam Plant (Utilities) from Phase 1 to Phase 7 is set out in Article 14.11(c). The grievor had moved through that progression and occupied a Phase 7 position. The movement through the various Phases is not viewed as a series of promotions which are to be governed by Article 14.08.

Vacation relief positions appear to have been recognized by the parties in Article 14.11(d). Such positions have, in any event, existed for years. The Employer has followed a practice of assigning the pool of additional operators on a yearly basis to the vacation and swing positions. Thus a person with a Phase 7 qualification, such as the grievor, may spend a number of years without being assigned to one of the four crews. The practice has been to permit employees to seek one of the swing or vacation positions.

The notion of rotation of the swing jobs is explicitly recognized in Article 11.03(c) (ii). The parties have developed an expectation that, along with the swing positions, the vacation relief positions will be rotated.

However, the requirement to rotate the swing jobs is inconsistent with a requirement that the position of swing assistant be filled as a *promotion* under Article 14.08, in the way that the position obtained by Mr. Wojtaszek was filled. I am unable to find anything in the parties' agreement which suggests that the process by which the Employer filled these positions was regarded as a promotion which was to be dealt with under Article 14.08 of the collective agreement. That is so even though employees are asked by the Employer to express an interest in one or other of these available positions, and even though that expression of interest is referred to as an "application". Thus I conclude that Article 14.08 does not apply to this process.

The Union also submitted that the Employer should be estopped from denying that the process by which the Employer filled these positions was governed by the promotion provisions (Article 14.08) of the collective agreement.

At the most basic level, the doctrine of estoppel requires three things:

- a contractual relationship,
- a representation by one party that it will not exercise its contractual rights, and
- detrimental reliance on that representation by the other party to the contract.

If the first party later reverses its position and seeks to assert its full contractual rights, the principle of estoppel may prevent it from doing so, may prevent it from engaging in this sort of unfair conduct.

The facts do not support the application of the doctrine of estoppel here. While there was a contractual relationship (the first requirement), the evidence does not support the second or third requirement. Regarding the second requirement, there was no clear representation by the Employer to the effect that these positions would be filled in accordance with the promotion provisions of the agreement. A practice of seeking and accommodating employee preferences does not amount to a representation that the process of filling the positions will be dealt with as if the process was one of promotion conducted pursuant to Article 14.08. Thus the second requirement above, a representation by one party that it will not exercise its contractual rights, did not occur here. In addition, the third requirement was not met as there was no evidence of any detrimental reliance on the part of the Union. I therefore find no basis for an estoppel. It follows that there is nothing which estops, or prevents, the Employer from denying that the process of filling these positions was regulated by Article 14.08.

There is no process specified in the agreement governing the manner by which these positions are to be filled. Thus under this agreement, the filling of the position of swing

assistant, the position sought by the grievor, is a matter which is left to management under the Management Rights Article, Article 5.

The Employer's exercise of its management rights is of course subject to the restrictions in the agreement. The only collective agreement restriction on the Employer in filling the positions is the following - "The swing jobs are to be rotated where possible . . ." - Article 11.03 (c) (ii).

Similarly, the process for filling the vacation relief/day assistant position, the position to which the grievor was assigned, is not specified in the agreement. However, unlike the swing assistant position which must be rotated where possible, there is no similar explicit restriction on the Employer regulating the filling of the vacation relief/day assistant position.

2. I thus move to the second question to be addressed:
Was the Employer's decision, a decision which did not result in the rotation of the swing assistant position, a violation of the collective agreement?

As noted, under this agreement the filling of the swing assistant, swing operator and vacation relief positions is a matter left to management, constrained only by the Employer's responsibility to rotate the swing positions "where possible".

The Employer did not rotate the swing assistant position and the Employer submitted that it was *not possible* to rotate the position for 1997. I thus first consider whether it was possible to rotate the position.

Clearly there were enough qualified employees such that the position could have been rotated. It was theoretically possible. Did, however, the parties intend that the position be

rotated whenever there was another qualified person?

Utilities has eighteen (18) employees, and has had a similar number of employees for many years. Most are qualified to fill the position of swing assistant. In terms of simply the number of qualified employees, rotation would always be possible. In this case it was possible to rotate the swing assistant position without involving any employees on the four crews, but it would, I believe, always be possible if one considered the additional employees on the crews, as the Employer did in some of the options which it considered but rejected for 1997. Thus if the parties intended to require rotation whenever the numbers permitted, that is whenever there was another qualified person, they could have simply directed rotation "always". Instead they used "where possible". I do not believe that the parties would have used "where possible" if they intended to require rotation in every instance in which there was another qualified employee.

There have been years in which the positions were not rotated although, in terms of qualified employees, it was possible to do so. While the use of "where possible" provides a clear direction as to the conclusion the Employer should attempt to reach, I think the parties intended to permit, through their use of this phrase, an element of Employer decision making.

In other words, for rotation to be possible under this agreement it must be possible in some sense beyond the existence of another qualified employee. However, beyond my general conclusion that there would be some allowance for Employer decision making, I see nothing else in the agreement to provide precise guidance as to the parties' intention. I thus look at the arbitral authorities provided by the parties. When parties have used a word in their agreement that has developed a particular meaning in arbitral decisions, I think it is probable that the parties intended to adopt not simply the word but also the meaning assigned to it by arbitrators.

The Union relied on several arbitration cases in support of its argument that the promotion provisions (Article 14.08) had been violated. Those decisions each deal with a promotion situation similar to that which would occur under Article 14.08 of this collective agreement, but I have concluded that Article 14.08 does not apply to this situation. The cases relied upon by the Union are of no assistance in determining the parties intention when they used "where possible" in relation to the rotation of the swing assistant position.

The authorities relied upon by the Employer are of greater assistance. Those decisions suggest that "possible" includes an element of practicality and that whether something is possible includes an element of business judgment. The word "possible" is more commonly found in collective agreements in the clauses dealing with the distribution of overtime. In that context, the word "possible" has been equated with the word "practicable" - see Brown and Beatty, *supra, Re Square D, supra*, and *Re Ford Motor, supra*. Of more direct application is *Re The Tribune, supra,* where the collective agreement required the filling of positions with internal candidates by way of promotion "wherever practical." An internal candidate had grieved her failure to obtain a promotion. Arbitrator Chertkow reviewed various decisions on the meaning of "wherever practical" and noted that it had been interpreted as "business-wise, or economically practical as well as physically practical" - at page 393, quoting from *Re Canadian Car* (1958), 8 L.A.C. 313 (Cooper) - and that wherever practical " . . . was intended to allow the company reasonable scope for judgements based on economic factors or considerations" and ". . . 'wherever practical' must be taken to mean 'wherever practical *to the company*' " - at page 393, quoting from *Pacific Brewers Distributors Ltd.* (March 3, 1986) unreported (Munroe).

Based on these decisions, and while not attempting to precisely define "possible" in this context, I conclude that while the parties intended to *promote* rotation they did not intend to *require* rotation of the swing positions if rotation would necessitate the Employer ignoring

valid operational concerns. In other words, rotation would have to be possible in light of the Employer's business or operational concerns.

I thus turn next to the issue of whether there were valid business or operational reasons not to rotate the swing position. I note that the question is not whether the Employer had a valid reason to assign the grievor to the vacation relief/day assistant position. The "where possible" direction applies to rotating the swing position, not to the filling of the vacation relief/day assistant position.

In substance, the Employer argued that it had other valid concerns which prevented rotation. The Employer argued that its decision to assign the grievor as it did was consistent with the approach which has been used throughout the entire complex. This approach has been to fill unpopular assignments by use of reverse seniority, subject to certain qualifications not here relevant. While the Employer's decision on this was consistent with the practice outlined in evidence and referred to above, it does not address whether the swing assistant position could have been rotated. The Employer next argued that its decision was consistent with the written 1986 directive indicating that day assistant positions would be filled on the basis of necessary qualifications and lowest seniority when no employee volunteered. While the decision was consistent with the 1986 directive, again it does not address the rotation of the swing assistant position. The Employer also suggested that its decision was consistent with general notions of seniority. Among employees who are covered by a collective agreement, it is commonly expected that those with greater seniority will have better jobs or at least they will have preferred access to the desirable jobs. It would thus follow that, if there is an unpopular job, a senior person would not be as likely as a junior person to fill that unpopular job. At that level, the Employer's decision, in this instance, was consistent with general notions of seniority and the preference in job assignments which would flow from that. Again this does not assist in determining whether the swing assistant position could have

been rotated.

The Employer outlined the various factors and options it considered in filling the four positions. However, the Employer's main concern was most of the options, options which it considered but rejected, required a more senior person than the grievor to do the least popular job. Assigning a more senior person to the least popular job would violate its practice of recognizing seniority. There is no explicit collective agreement provision requiring that the Employer recognize seniority in this instance but it is quite understandable that the Employer would wish to do so. On the basis of these considerations, the approach followed by the Employer in assigning the vacation relief/day assistant position to the grievor was, in and of itself, reasonable.

Mr. McKay held the swing assistant position in 1996. If the only way the Employer could rotate the swing assistant position for 1997 required the Employer to assign Mr. McKay to the vacation relief/day assistant position, I would have to decide whether the Employer's concern for seniority was a valid business or operational reason justifying the Employer's failure to rotate the swing assistant position in this instance. However, it was not necessary to assign Mr. McKay to the unpopular position.

The Employer considered and rejected at least one proposal which both rotated the swing assistant position and allowed it to assign the junior employee (the grievor) to the unpopular position. In particular, the Employer considered putting Mr. McKay on one of the crews and moving Mr. Hall into the swing assistant position. I heard no business or operational reason for rejecting this proposal.

Apparently the Employer concluded that the package of assignments which met both its desire to assign the junior person to the unpopular position and its obligation to rotate the

swing position was not as desirable as the one which the Employer adopted. However, the Employer is not free to simply make those assignments which it thinks best from a business or operational standpoint. It has agreed with the Union that it will rotate the swing assistant position "where possible". In my view the Employer failed to give adequate consideration to its collective agreement obligation to rotate the swing assistant position "where possible".

As there was at least one approach which accomplished the rotation of the swing assistant position and which the Employer considered but provided no business or operational reason for rejecting, I have concluded that there was no persuasive operational reason preventing rotation of the swing assistant position. It was thus "possible" to rotate the swing assistant position. It follows that the Employer has failed to meet its obligation under the collective agreement. More precisely, the Employer violated the collective agreement by assigning the position of swing assistant for 1997 to Mr. McKay, the employee who had filled that job the previous year. To be clear, the Employer did not breach the collective agreement in assigning the grievor to the position of vacation relief/day assistant.

The conclusion that it was possible to rotate the swing assistant position requires me to address the question of remedy. The grievor sought the swing assistant position. However, rotation of the swing assistant position would not necessarily have meant that the grievor would have been assigned to that position. While the grievor may have been assigned the swing assistant position, there were other proposals for the assignment of employees which would have resulted in the required rotation but which would not have given the grievor the swing assistant position.

In these circumstances, I refer the matter back to the Employer. I direct the Employer to reconsider the annual assignments and make new assignments which include the rotation of the swing assistant position. In its reconsideration the Employer is not restricted to those

proposals considered in the fall of 1996.

The grievor might not receive the swing assistant position when it is rotated, but that is because the obligation imposed on the Employer is to rotate the swing assistant position, not to give it to the one employee who expressed an interest in it.

In summary:

1. The annual assignments to the swing and vacation relief positions are not regulated by Article 14.08 as promotions.
2. Those assignments are a matter generally of management right, subject to the obligation to rotate the swing positions "*where possible*".
3. It was *possible* to rotate the swing assistant position for 1997.
4. If the swing assistant position had been rotated, the grievor would not necessarily have obtained the swing assistant position.
5. The Employer is directed to review the assignments for 1997 and to make new assignments which include the rotation of the swing assistant position.

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

Dated in London, Ontario, this _____ day of February, 1997.

Howard Snow, Arbitrator