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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CULINAR FOODS INC.
- The Employer

-and-

AMERICAN FEDERATION OF GRAIN MILLERS INTERNATIONAL UNION, Local 242
- The Union

AND IN THE MATTER OF individual grievances of Karen Brissette

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Frank A. Angeletti	- Counsel
Bruno Desilets	- Industrial Relations Manager
Lois Pincombe	- Production Manager

On behalf of the Union:

Michael Klug	- Counsel
Barbara Degaust	- President, Local 242
Jim Doyle	- Steward
Karen Brissette	- Grievor

Hearings held March 6 and April 18, 1997 in London, Ontario.

AWARD

I. INTRODUCTION

Two grievances were before me for decision. Both involved requests from Karen Brissette, the grievor, to work on the "mogul" machines.

The grievor had previously worked as a mogul operator but at the time of the grievances she worked in what is referred to as the "pan room." In the first grievance, the grievor contested her November 1995 lay-off while an employee with less seniority continued to work as a mogul operator. The grievor felt she was qualified to operate the mogul and, as she was the senior employee, she claimed that the collective agreement had been violated. In response to the first grievance the Employer raised concerns with respect to the grievor's personal safety as a mogul operator.

When the Employer later posted two mogul operator positions, the grievor applied. At that time she indicated that she was prepared to accept further training as a mogul operator to satisfy the Employer's safety concerns. The Employer declined to retrain the grievor and instead awarded the posted positions to two junior employees. The grievor filed a second grievance alleging that, as the senior employee, she should have been selected.

The Employer acknowledged that the grievor was senior to the other employees who worked as mogul operators and that under the provisions of the collective agreement she would ordinarily be entitled to the positions. The Employer's sole concern was one of safety. The Employer indicated that the grievor had had two serious accidents while working as a mogul operator and the Employer believed the grievor became flustered when operating the mogul machine. Because of its concern for the grievor's safety, the Employer declined to allow her to work as a mogul operator.

This issue was of practical importance to the grievor, as she wished to work steadily. There had been days when the grievor was laid off and suffered a loss of income. If she had been permitted to work as a mogul operator she could have exercised her seniority rights to bump, or replace, a junior mogul operator and thereby continued working.

The matter at issue, then, was whether the Employer's concern for the grievor's personal safety as a mogul operator justified its refusal to follow the provisions of the collective agreement.

II. THE EVIDENCE

I heard evidence from three witnesses. In addition to the grievor, Jim Doyle, a union steward and a member of the Health and Safety Committee, testified as did Lois Pincombe, the production manager. I also received various documents.

The Employer makes confectionery and biscuits in a London plant which has several "mogul" machines. The machines were all purchased from one manufacturer but they were purchased in different years so there are differences among the various mogul machines. In simple terms a mogul machine is a large complex machine in which confectionery is produced. It has many moving parts. Trays of product arrive on pallets at one end of the mogul and are processed through it. The empty pallets are dragged under the machine in order to receive the trays at the other end of the mogul. Many things can go wrong with a mogul - on a bad day a mogul may break down every three to five minutes. It is the mogul operator's responsibility to fix the machine and restore production.

The grievor has worked at Culinar since 1983. She became a mogul operator in January 1992, and worked as a mogul operator until February 1993 when she suffered her first injury

while operating the mogul machine.

This first injury occurred as the grievor and her lead hand were feeding trays into the mogul machine. Prior to the grievor's injury when trays had to be loaded into the mogul by hand, it was customary for two persons to load the trays, with one person standing at each side of the feeder. The grievor and her lead hand were following that customary approach at the time of her injury. As the grievor placed the trays on the feeder she had to ensure that the trays fit between little pins or "fingers" which then pulled the trays into the machine. While performing this task, the grievor caught her thumb between a tray and one of the pins. She lost the side and pad of her thumb, an injury for which she required a skin graft.

After the grievor's accident the Employer modified the mogul machines by placing a guard on one side. Now only one person places the trays on the feeder; now he or she must lift the trays in the middle. Because of this modification to the moguls, the injury suffered by the grievor cannot be repeated.

Following her injury, the grievor was absent from work for two months and then returned to work in May of 1993 as a mogul operator. The Employer raised no concerns at the time of the grievor's return regarding the reasons for her injury and gave no indication that she had done anything improper. The grievor worked as a mogul operator until November 1993 when she took a job in another part of the plant until February 1994. The grievor then worked as a mogul operator until she suffered her second injury in April 1994.

In April 1994 the grievor was operating the mogul machine and the trays became jammed. When the trays jammed the clutch disengaged and stopped the mogul. The grievor first fixed the tray jam and then began to reengage the clutch in order to restart the machine. There were two ways of reengaging the clutch. One was the proper way, but it was also the more

difficult way. The improper, and easier, way of reengaging the clutch was the method which the grievor used. Other mogul operators have frequently used the easier, but improper, way of reengaging the clutch, as the grievor did in this instance. The grievor had been trained to reengage the clutch using both methods and she said that she had used the improper method without incident some 500 times prior to her injury. This time the mogul started unexpectedly and the grievor lost the tip of her right ring finger and cut a tendon in her right middle finger.

The grievor returned to work on modified duties in January 1995 but her finger became infected and she left work again. The grievor returned to work in April 1995 and resumed full duties in May 1995 in the pan room.

When the grievor returned to work there were two meetings with management. (Although the grievor recalled only one meeting, Lois Pincombe - the production manager - testified that there were two meetings and I conclude that there were two meetings. While the grievor and Ms Pincombe do not recall the meetings in the same way, ultimately nothing turns on precisely what was said at the meetings.) A concern was raised about the grievor's safety as a mogul operator. However, as the grievor intended to return to work in the pan room, nothing was done about the Employer's safety concerns at this time.

In November 1995 the grievor was laid off from her pan room position. She wanted to continue working; in particular she wanted to bump a junior mogul operator but the Employer would not schedule her and instead scheduled a junior employee. The grievor filed her first grievance.

In January 1996 the Employer posted two mogul operator positions. The grievor applied for the mogul operator positions. She indicated that she was prepared to be retrained as a

mogul operator and that she hoped this retraining would satisfy the Employer's safety concerns which had been raised in response to the first grievance. The grievor was not selected for the positions; they were awarded to junior employees. She filed her second grievance.

The grievor testified that she felt comfortable operating the mogul machines and that she had no concerns regarding her personal safety. She agreed that the operation of the mogul was dangerous but she felt danger was inherent in many of the Employer's jobs.

The grievor also testified that in November 1995 she could have performed the mogul operator job without any re-familiarization or retraining. However, she indicated that modifications were made to the mogul machines on a regular basis and, as it had been several years since she had last operated the mogul machines, it might now be necessary for her to receive additional training or familiarization.

Finally, under the collective agreement the Employer maintains a job skills inventory, or JSI. In simple terms the Employer lists on the JSI all those positions which each employee is qualified to fill. The grievor's JSI included mogul operator throughout the period of the grievances. The Employer removed the position of "mogul operator" from the grievor's JSI in March, 1996.

Evidence of Jim Doyle

Jim Doyle has worked at Culinar for some 26 years. He works as a mogul trucker; he brings loads of confectionery to the mogul machines and then removes the confectionary. He worked with the grievor during the time that she had been a mogul operator. He had never observed the grievor have any difficulty while she was a mogul operator. He indicated that

he had no safety concerns about the grievor and would happily work with her if she returned as a mogul operator.

Mr. Doyle also serves both as a union steward and as a member of the Health and Safety Committee. He indicated that he had never heard any concerns expressed by any employee about the grievor's work as a mogul operator.

Mr. Doyle testified about the way trays were loaded on the mogul feeder when it had to be done by hand. He agreed that the previous practice had been for two employees to load, one standing on each side of the feeder. The trays would then be lifted off the pallet and placed on the track. He agreed that it was necessary to place the trays between the pins, or fingers, on the track. He also testified that, as a result of the grievor's injury, a modification had been made to the machine so that the trays can no longer be loaded in the manner that was used prior to the grievor's injury. Now one employee lifts the trays in the centre and places them between the pins, in such a way that there is no danger of catching a finger as the grievor did.

Mr. Doyle also testified about the ways in which the clutch can be reengaged on the mogul machine. He agreed that there were two ways of doing this. One involved a handle and the other involved the pulley method used by the grievor at the time of her second accident. He agreed that the proper practice was to use the handle method, but indicated that the pulley method was commonly used. He testified that, notwithstanding the grievor's accident, the improper method was still in use.

Both the grievor and Mr. Doyle testified with respect to accidents that other mogul operators had suffered while operating the mogul machine. They indicated that several other operators have suffered serious injuries; however, no other operator has suffered more than one serious injury. It is not necessary to provide further details of their evidence.

Evidence of Lois Pincombe

Lois Pincombe, the production manager, began her employment at Culinar in March 1993 shortly after the grievor's first injury. She testified that prior to the grievor's return to work she had "overheard" concerns expressed about the grievor as a mogul operator. As a result, Ms Pincombe made a point of observing the grievor after her return to work. Ms Pincombe indicated that her observations led her to the conclusion that the grievor knew what she was doing when operating the mogul machines and that she made minor adjustments as needed. However, Ms Pincombe indicated that when things went wrong on the moguls, and she acknowledged that there were many things which could go wrong, the grievor appeared to become flustered in terms of being uncertain as to what she ought to do first. Ms Pincombe's only action as a result of her concerns was to caution the grievor to be careful.

In November 1993 the grievor posted into the pan room and Ms Pincombe indicated that the situation became one of "out of sight, out of mind." The grievor then returned as a mogul operator in February 1994 and suffered her second injury in April.

Ms Pincombe indicated that she became very concerned about the grievor's safety after the April 1994 injury. While part of her concern flowed from her prior observations, she also realized that the grievor had used the improper procedure for reengaging the clutch. Ms Pincombe indicated that she felt it was not a good idea for the grievor to return to work as a mogul operator.

Ms Pincombe raised her concerns with the grievor when the grievor returned to work in April 1995. She testified that at their first meeting she indicated to the grievor that she was uncomfortable with the grievor returning as a mogul operator. Ms Pincombe thought the grievor agreed with this view. In the second meeting, when Ms Pincombe's concerns were

again discussed, Ms Pincombe stated the grievor expressed a different opinion. During the second meeting, the grievor said she was comfortable as a mogul operator and wished to return to work as a mogul operator. Ms Pincombe indicated her concern and told the grievor that she would advise the grievor of her decision shortly. Ms Pincombe acknowledged that following this meeting she did not communicate further with the grievor about her safety concerns, that she forgot to do so.

Ms Pincombe testified that the difficulties she observed with the grievor as a mogul operator were difficulties which could not be addressed through further training. Ms Pincombe felt that the grievor became flustered under stress and that this could not be corrected by training. Ms Pincombe acknowledged the grievor was a conscientious employee. She acknowledged that the grievor was a good operator in terms of technical operations and that the grievor understood how to operate the machine. However Ms Pincombe testified that the grievor's tendency to become flustered led to a dangerous situation. Ms Pincombe indicated that her concern was for the grievor's personal safety. She did not think that a mogul operator position was an appropriate one for the grievor.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

I was referred to a number of provisions in the collective agreement dealing with seniority, lay-offs and job postings. In light of the Employer's acknowledgement that the grievor would:

1) have been entitled to replace or bump a junior employee and thereby continue working; and,
2) have been successful in the job postings;

were it not for the safety concerns, I will reproduce only two sections. They are as follows:

Article 15 - LAY-OFFS

15.01 When employees are scheduled to be laid off from the plant, such lay-offs will be in order of reverse seniority.

. . .

Article 16 - POSTING OF JOB VACANCIES

16.01 ...

b) Applications will be considered first by area, then department then total plant. The successful applicant will have the greatest seniority and be capable to perform the work or be given a fair trial or training period which length is determined in Schedule 1. . . .

I was also referred to Section 25(2) of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O. 1, as amended, which reads as follows:

> Without limiting the strict duty imposed by subsection (1), an employer shall,
>
> . . .
>
> (h) take every precaution reasonable in the circumstances for the protection of a worker;
>
> . . .

IV. POSITION OF THE UNION

The Union reviewed the collective agreement provisions dealing with seniority, lay-offs and job postings. It is unnecessary for me to record those submissions as the Employer acknowledged that, other than for the safety concern, the grievor would have been entitled to work as a mogul operator.

With respect to the safety concerns, the Union raised several difficulties. The Union submitted that the Employer's duty under the *Occupational Health and Safety Act* focused on machine safety and proper training. There was no credible evidence that the grievor was predisposed to injuries. Although the grievor was injured twice in a short time while working as a mogul operator, there was no evidence to indicate that she was likely to be injured again in the future.

Ms Pincombe's evidence that the grievor became flustered was very impressionistic and that evidence should not be used to overcome the clear provisions of the collective agreement. Ms Pincombe acknowledged the grievor was conscientious and a good worker. The Union submitted that to disentitle the grievor from the rights she would otherwise have under the collective agreement because of safety concerns arising from her accidents would be a situation of blaming the victim.

The Union noted that Mr. Doyle had no concern with respect to working with the grievor. Mr. Doyle had further indicated that he had heard no concerns from any employees about the grievor as a mogul operator.

With respect to the remedy in relation to the first grievance, the Union indicated that if the grievor had bumped into the position of mogul operator in November 1995, she would have continued to work and thus she would not have lost several days' pay due to her lay-off. While the grievor testified that in November 1995 she needed no familiarization or training, she acknowledged that now she would need further familiarization or training. The Union thus asked for the following remedies for the first grievance:

1) A declaration that the grievor had the right under the collective agreement to work as a mogul operator;
2) An order that the Employer provide the needed training or familiarization in order for the grievor to perform these duties competently and safely; and
3) That I remain seised with respect to compensation.

Regarding the remedy for the second grievance, the Union submitted that if the grievor had been allowed to bump in November 1995 she would not have been in a situation of applying for the posting in January. However she did apply and was the senior employee. If she had been selected for the posting she would have received an additional two months training and

the Union submitted that it strains credulity to conclude that the grievor could not operate the mogul machines with that additional training.

For the second grievance, the Union asked that I direct:

1) That the grievor succeed in her posting as a mogul operator; and,
2) That the grievor receive sixty days training.

V. POSITION OF THE EMPLOYER

The Employer submitted that this case was not about the terms of the collective agreement itself, but rather about the grievor's safety. While the Employer can provide training to employees, the Employer is unable to ensure that the grievor would be able to competently and safely perform as a mogul operator. The Employer's actions were taken to fulfil its responsibilities under Section 25(2)(h) of the *Occupational Health and Safety Act*.

The Employer noted that in the second accident the grievor was using the improper procedure. If the proper procedure had been used there would have been no accident. By the grievor's own evidence she had used the improper procedure some 500 times. She had thus placed herself at risk some 500 times which gave the Employer serious concerns with respect to the grievor's own safety.

The Employer referred me to four arbitration cases as follows: *Re University Hospital of London and London & District Building Service Workers Union, Local 220* (1973), 4 L.A.C. (2d) 16 (Simmons); *Re Robertson Irwin Ltd. and International Association of Bridge, Structural and Ornamental Iron Workers, Local 734* (1974), 6 L.A.C. (2d) 410 (H.D. Brown); *Re Kimberly-Clark of Canada Ltd. and International Chemical Workers Union, Local 813* (1978), 18 L.A.C. (2d) 248 (Burkett); *Re Canadian Canners Ltd. and*

International Assoc. of Machinists, Lodge 863 (1975), 9 L.A.C. (2d) 396 (Shime).

The Employer said that those cases all dealt with situations in which other employers had taken actions because of a concern that an employee created a greater risk. In this case this Employer submitted it, too, had taken a decision because of a concern of a risk - a safety risk for the grievor. The Employer submitted that it had acted responsibly. The decision was not one made out of ill will or based on any factor other than the safety of the grievor.

With respect to remedy the Employer submitted that even if I were to decide that the grievor had a right to bump, I should consider Ms Pincombe's concern that the issue could not be addressed through training. The Employer submitted that I had an opportunity to take a different approach. The Employer submitted that I should fashion an alternative remedy that would provide the grievor with additional training in other job areas. These additional qualifications would enable the grievor to bump into additional positions and thereby meet her concern of maintaining steady work.

In summary, the Employer submitted that it had made the "hard" decision. It would have been very easy for the Employer to have permitted the grievor to return as a mogul operator. It was only the Employer's real concern for the grievor's safety which had prompted the Employer to take this action. The Employer thus asked me to uphold its decision.

VI. CONCLUSIONS

While the Employer suggested these grievances were not about the collective agreement, my jurisdiction and my authority flow from that document. The Employer acknowledged that, absent its safety concerns, the grievor was entitled to the positions, was entitled to succeed in her grievances.

But the Employer argued that its safety concerns justified a different outcome. It relied in part on the *Occupational Health and Safety Act, supra.* That *Act* requires, among other things, that an Employer "take every precaution reasonable in the circumstances for the protection of a worker". The issue is what would constitute a precaution that is "reasonable" in the particular circumstances? Clearly some precautions are not reasonable. In my view before that provision can possibly be relied upon to invalidate an outcome which would otherwise flow from a collective agreement, there would have to be a clear factual basis for the safety concern. Without a clear factual basis for a safety concern the precaution could not be said to be reasonable. If there is a valid concern about the grievor's safety, then there is a second and entirely separate question as to whether, or in which circumstances, the *Act* can be used to invalidate the outcome which would otherwise flow from the provisions of the collective agreement.

Given the Employer's concession that the grievor would be entitled to work as a mogul operator were it not for the safety concerns, there are two questions to be considered. They are as follows:

1. Is there a valid safety concern with respect to the grievor working as a mogul operator?
2. If yes, then does the safety concern allow the Employer to override the result which would otherwise flow from the collective agreement?

I deal with each question in turn:

1. Is there a valid safety concern with respect to the grievor working as a mogul operator?

The work of a mogul operator is dangerous work. There is thus a safety concern with any employee who performs this job. The question before me is not whether there is any safety

concern, but rather whether there is a greater than normal safety risk when the grievor operates the moguls, as compared with the safety concerns which arise with other operators, several of whom have been seriously injured.

The safety concerns arose from two sources. Firstly, the grievor had been involved in two serious accidents in a short period of time. Secondly, Lois Pincombe, the production manager, testified that as a result of her observation of the grievor she had reached the conclusion that in difficult situations the grievor became "flustered." I will address each of those separately.

The grievor's first injury involved her placing trays on the feeder portion of the mogul machine. In so doing she was following the standard operating procedure at that time. She was working with her lead hand. There had been no safety concern raised by anyone in the plant with respect to this manner of operation until after the grievor suffered her injury. As a result of her injury the machines were modified so that no other employee could be injured in the same way. Nothing about this injury would suggest that the grievor is prone to injury or prone to operating the machine in an unsafe way. Thus, other than the fact of the injury, the first accident provides no support for a conclusion that there is a greater than normal risk in allowing the grievor to work as a mogul operator.

I turn now to the second injury. The grievor suffered this injury while reengaging the clutch in the improper manner. While there was a proper manner of reengaging the clutch, the grievor had been trained by the Employer to do this both properly and improperly. The grievor testified that she had used the improper method some 500 times prior to her injury. The evidence also disclosed that other mogul operators had used the improper method many times. I note that even following the grievor's injury using the improper method, mogul operators still occasionally reengage the clutch in this improper fashion. Finally, while the

precise cause of the mogul's unexpected start was not clear, it appears that the machine did start in an unexpected manner which no operator would have foreseen, and that this unexpected start led to the injury. While the grievor used the improper approach, in these circumstances where she had been trained to use this approach by the Employer and as the approach was in such common use, I do not think she can be held at fault for her use of this method. Thus, there was nothing in the evidence regarding the second injury which would indicate that the grievor is an unsafe worker or that the grievor has a propensity to injure herself. I conclude that there is nothing beyond the fact of the second accident itself which would support a conclusion that there is a greater than normal risk in the grievor working as a mogul operator.

The other basis for the Employer's concern was Lois Pincombe's observations of the grievor. Ms Pincombe had observed the grievor because she had overheard concerns expressed about the grievor as a mogul operator. (None of those persons who expressed concerns testified.) Ms Pincombe observed the grievor in the period following the grievor's return to work after her first injury. Ms Pincombe testified that she concluded that the grievor became flustered when the grievor was confronted by difficulties which in turn caused Ms Pincombe to have safety concerns.

Ms Pincombe did not, however, indicate what the grievor did which led her to the conclusion that the grievor became flustered. Ms Pincombe did not indicate the number of her observations, nor the length of time during which she actually observed the grievor operating the moguls, nor any details as to her observations. She did, however, indicate that her observations were on an occasional basis as she visited the various parts of the plant.

I have several difficulties in relying on this evidence alone as a basis for a valid safety concern. They are as follows:

1. Ms Pincombe's observations were not systematic and her conclusions were impressionistic.
2. I note that she began her observations of the grievor because of the concerns that she had overheard. I think it possible that her conclusions were influenced by these concerns.
3. In my experience some employees become nervous when a member of management watches them work. I do not know how obvious Ms Pincombe was in her observations of the grievor but, assuming that the grievor thought that she was being watched, it is possible that Ms Pincombe was observing a nervousness brought on by the fact that the grievor was being watched.
4. Ms Pincombe admits that at the time she first reached these conclusions she did nothing as a result of her conclusions other than advise the grievor in a general way to be careful. On two occasions where she might have addressed this issue she failed to pursue the matter. (In November, 1993 the grievor posted into the pan room and Ms Pincombe said the situation was one of "out of sight, out of mind"; in May, 1995 when the grievor returned to work and concerns were raised Ms Pincombe was to advise the grievor of her decision but she forgot to do so.)

Nevertheless, Ms Pincombe's evidence might partially support a conclusion that the grievor is prone to becoming flustered when the mogul machines break down and that this creates a greater than normal safety concern; but her evidence is not sufficient on its own to demonstrate the point.

On a related point, I note that the Employer maintains a JSI which lists those positions an employee is qualified to fill and, notwithstanding these concerns, the Employer did not change the grievor's JSI until March 1996, after the two grievances.

On the other side of this issue, I have the views of Mr. Doyle, a mogul trucker, a shop

steward and a member of the Health and Safety Committee. I found Mr. Doyle to be a safety conscious employee. He indicated that at no time had he received concerns from other employees with respect to the grievor's conduct as a mogul operator. Mr. Doyle indicated that he would be quite prepared to work with the grievor again if she were to return as a mogul operator.

In the cases relied upon by the Employer, the evidence of safety concerns was considerably stronger. For example, in the *University Hospital* case there was clear medical evidence indicating a greater than normal risk that the grievor in that case would commit arson. Similarly, in the *Robertson Irwin* case the evidence indicated both that the grievor had quite limited eyesight and also that reasonable eyesight would be necessary to operate a crane, something which was part of the grievor's job.

The evidence before me is not of similar quality. The grievor had been injured twice. In neither case was there any evidence that suggests the grievor is prone to accidents; while she used the "improper" method for reengaging the clutch, this was a method she was taught to use and does not demonstrate work habits which are particularly unsafe in comparison with the work habits of other mogul operators. Ms Pincombe felt the grievor became flustered but her evidence is of limited value. On the other hand, I heard from Mr. Doyle who gave evidence to the contrary. On a consideration of all the evidence, I am unable to conclude that the evidence demonstrates that there is a valid concern with respect to the grievor's safety. I have concluded, on a balance of probabilities, that there was no reasonable basis to assert that the grievor presents a greater than normal safety risk.

I am not saying that if the grievor works as a mogul operator she will not suffer another injury. She may well do so. I am simply indicating that on the evidence before me I am of the view that there is no greater risk of the grievor injuring herself than is normal for this

position. All the evidence suggests the work of a mogul operator is dangerous.

2. *Do those safety concerns allow the Employer to override the result which would otherwise flow from the collective agreement?*

In light of my conclusion on the first question, it is not necessary for me to consider the question of whether the Employer is entitled to act on its safety concern and decline to employ the grievor as a mogul operator. The Employer submissions were based on a concern for the grievor's personal safety but, as I have concluded that the risk to her safety is not appreciably greater than the risk for any other mogul operator, there is no basis on which I might find that the Employer can override the result which would otherwise flow from the collective agreement.

Remedy

I now move on to consider the question of remedy.

I begin with the first grievance. It follows from my conclusions above that the grievor had the right to bump into the mogul operator position in November 1995. I so declare. At that time the grievor was familiar with the mogul operator position. However, given the time that has now elapsed since the grievor last worked as a mogul operator, the grievor will require additional training or familiarization before she next works as a mogul operator. I am confident that the Employer will provide the appropriate training, and I direct the Employer to do so. The Employer is also directed to compensate the grievor for the work which she missed because she was not allowed to bump.

I now turn to the second grievance which dealt with the job posting. If the grievor had been

allowed to bump as a mogul operator in November, as I have decided she should have been, she would not have applied for these positions. She would have been recognised by the Employer as a mogul operator. However, she was not so recognised and she did apply. In those circumstances it is sufficient for me to declare that the safety reason advanced by the Employer for not selecting the grievor as the senior employee did not justify its refusal to select her. Given the result in the first grievance no further remedy is needed.

Prior to concluding I wish to comment briefly on the Employer's suggestion of an alternative remedy. The Employer suggested that I order the Employer to provide the grievor with additional training in other positions.

I was impressed with the sincerity of all witnesses. It seemed clear that the parties have an excellent working relationship. In addition, I was left with the impression that the grievor does not necessarily want to work as a mogul operator. She does, however, wish to maintain her mogul operator qualification so that if she is confronted with another lay-off she might be in a position to continue to work.

My role as an arbitrator is to interpret and enforce the collective agreement; under this agreement I have found that the grievor is entitled to work as a mogul operator.

There have been days on which the grievor would have been entitled to continue working because of her mogul operator qualification, days on which she was laid off. A similar situation may well arise in the future where the grievor would be subject to lay-off were it not for her mogul operator qualification. I understand the grievor's concern to maintain steady work, to maintain a steady income. On the other hand, the Employer was sincere in its concern for the grievor's safety, and thus the suggestion as to alternative remedy. The Employer's suggestion of training in other positions may be one approach which would

permit the grievor to continue to work, in the same way that her qualifications as a mogul operator would permit her to continue to work. It may be possible even at this late date for the Employer and the Union/grievor to make an arrangement by which both the grievor's and the Employer's concerns are met. The parties now have this award; they are free to negotiate another solution to replace that which I have found arises under the terms of their collective agreement.

The parties asked me to remain seised to deal with any issues of compensation which might arise. I will remain seised to deal with any questions of compensation and to deal with any other issues which may arise in the implementation of this award.

Dated at London, Ontario this _____ day of May, 1997.

_____

Howard Snow, Arbitrator