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

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

NATREL (ONTARIO) INC.

- The Employer

-and-

MILK AND BREAD DRIVERS, DAIRY EMPLOYEES,
CATERERS AND ALLIED EMPLOYEES,
LOCAL UNION No. 647

- The Union

AND IN THE MATTER OF two grievances regarding bumping rights

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Douglas Sanderson	- Counsel
John Platz	- Industrial Relations Consultant
Rick Ward	- Plant Manager
Christine Lachance	- Human Resources Associate

On behalf of the Union:

Michael McCreary	- Counsel
Pat Powers	- Business Representative

Hearing held December 10, 1997 in London, Ontario.

AWARD

I. INTRODUCTION

This award deals with two bumping rights grievances. Employees at two plants owned by the same employer were represented by the Union. "In the event of closure or sale of either plant," those employees had the right to bump into, or displace employees from, the other plant.

The parties disagreed on the meaning of the above quoted phrase which triggered the exercise of bumping rights. The parties agreed that when one plant was sold the employees of that plant could bump into the other plant which was *not* being sold. In addition, the Union submitted that the reverse was also allowed - that is employees in the plant which was *not* being sold could bump into the sold plant.

II THE FACTS AND THE PROVISIONS OF THE AGREEMENT

The presentation of evidence proceeded in an informal manner. There was little factual dispute. The Employer had prepared a statement of the facts it intended to prove through its witnesses. The Union acknowledged the evidence would be as indicated in that statement. In the circumstances, the Union did not require the Employer to call its witnesses. The parties made submissions on the following fact situation, summarised from the Employer's statement.

Prior to January 2, 1997, Ault Foods Limited owned and operated two plants in London. One plant is located at 980 Wilton Grove Road (the "401 plant") and produces frozen dairy products such as ice cream. The other plant is located at 77 Bathurst Street (the "Bathurst plant") and produces refrigerated dairy products such as milk. The grievances involved

employees at the Bathurst plant.

Prior to the 1991-1993 collective agreement, all employees were entitled to use their seniority to bid on, or bump into, positions in either plant. Approximately 240 employees worked at the 401 plant and approximately 70 employees were employed at the Bathurst plant. As the 401 plant produced ice cream, production slowed in the winter months. Layoffs commonly occurred at the 401 plant in the winter, and when those layoffs occurred employees at the 401 plant exercised their seniority and claimed positions at the Bathurst plant. Due to the larger number of employees at the 401 plant, a significant number, frequently a majority, of employees who normally worked at the Bathurst plant were displaced each winter. When production increased again at the 401 plant, the employees who had bumped into positions at the Bathurst plant returned to the 401 plant and those employees who had been laid off from the Bathurst plant were recalled.

The movement of a large number of employees from the 401 plant to the Bathurst plant and the resulting displacement of employees at the Bathurst plant caused disruptions in production at the Bathurst plant. As a result, in the 1991-93 collective agreement Ault and the Union agreed to a Letter of Understanding limiting the ability of employees to exercise their seniority at the other plant. The text of that Letter was as follows:

LETTER OF UNDERSTANDING

> The Company and the Union agree that for the purposes of collective bargaining and administration the collective agreement will apply separately to the Bathurst Street and the 401 Plants. However, for the following specified events, the respective employees will have the following rights:
>
> (1) In the event of a permanent job reduction, the affected employee(s) shall exercise their seniority rights within their respective plant. The junior displaced employee(s) may exercise their seniority right(s) at the other plant, if applicable. This hsall [sic] apply until December 15, 1992.

(2) Employees may bid on positions at the other plant in accordance with the "bid Procedure". This shall apply until December 15, 1991.

(3) In the event of closure or sale of either plant, all employees acquiring seniority on, or before, December 31, 1990 shall exercise their seniority.

The same letter was included in both collective agreements.

In 1995 the Union and Ault concluded renewal agreements for both the 401 plant and the Bathurst plant. The renewal agreements covered the period 1994 through 1996. The text of the Letter of Understanding in both collective agreements was revised as follows:

LETTER OF UNDERSTANDING #2

The Company and the Union agree that for the purposes of collective bargaining and administration the collective agreement will apply separately to the Bathurst Street and the 401 Plants. However, for the following specified events, the respective employees will have the following rights:

(1) In the event of closure or sale of either plant, all employees shall exercise their seniority.

In December, 1996 Ault informed the employees at the 401 plant that the 401 plant was to be sold to Nestlé Canada Inc. effective January, 1997. None of the employees at the 401 plant sought to exercise their seniority to claim positions at the Bathurst plant. However, a number of employees at the Bathurst plant sought to exercise their seniority and claim positions at the 401 plant, pursuant to their interpretation of the above Letter of Understanding. When those requests were denied, two grievances were lodged alleging a violation of the Letter of Understanding. The grievances were similar and requested the right to exercise seniority rights under the Letter. The essence of the issue raised in the grievances is this: Did the Letter of Understanding permit employees in the Bathurst plant which was *not* being sold to bump into the 401 plant sold to Nestlé?

On or about March 1, 1997 Ault sold the Bathurst plant to Natrel (Ontario) inc., the Employer in this proceeding. Thus at the time of the hearing Ault had sold both plants.

Finally, I note that the Employer advised that it had contacted Nestlé, the current owner of the 401 plant, and advised Nestlé of the hearing. Nestlé did not appear at the hearing.

III. POSITION OF THE UNION

The Union submitted that seniority rights were one of the most important benefits obtained by unions in collective bargaining and clear language was required to remove seniority rights under a collective agreement. The Union asserted that this case involved the exercise of seniority rights.

Bumping rights flowed from seniority rights. Senior employees were entitled to bump more junior employees. In this case the Union submitted that senior employees at the Bathurst plant should be entitled to exercise their seniority rights to bump more junior employees at the 401 plant. This would give effect to the principle of seniority which is so important to the collective bargaining system.

With respect to the text of the Letter of Understanding, the Union noted that the introductory paragraph was identical to that in the earlier collective agreement. That introductory paragraph notes that the parties were involved in an ongoing collective bargaining relationship. The Union then submitted that the reference to "the respective employees" referred to the employees at the two plants. Thus, in the event of the triggering of the Letter of Understanding through a closure or sale, employees at the two plants should have the same rights. In paragraph 1 of the Letter the reference is to "all" employees being entitled to exercise their seniority. The Union submitted that this also supported its interpretation

that employees of both facilities have the same rights in a sale.

The Union thus sought the following remedies:

1. A declaration that the collective agreement had been violated;
2. An order that the Employer allow the Bathurst employees to bump into the 401 plant; and,
3. That I remain seised to deal with any monetary damages.

In the alternative, the Union submitted that if I concluded the Letter of Understanding did not provide for the right of the Bathurst plant employees to bump into the 401 plant in this situation, I should nevertheless declare that if employees at the 401 plant had chosen to displace employees at the Bathurst plant, then those displaced Bathurst employees would, in turn, have been entitled to continue their employment in the 401 plant.

The Union relied upon the following awards: *Re United Electrical Workers, Local 512, and Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161 (Reville); *Re United Automobile Workers, Local 27, and Minnesota Mining and Manufacturing of Canada Ltd.* (1970), 21 L.A.C. 377 (O'Shea); *Re Camco Inc. and United Electrical, Radio & Machine Workers, Local 550* (1988), 33 L.A.C. (3d) 144 (Foisy); *Re Daycon Mechanical Ltd. and Sheet Metal Workers International Association, Local 397* (1991), 19 L.A.C. (4th) 129 (Davis); and *Re Windsor Hospital Linen Services Inc. and Service Employees Union, Local 210* (1990), 15 L.A.C. (4th) 281 (Dissanayake).

IV. POSITION OF THE EMPLOYER

The Employer submitted that the Union interpretation:

1) Was an unusual view of seniority rights;

2) Led to an absurd situation; and,

3) Was not supported by the language of the collective agreement.

The Employer submitted that its interpretation was to be preferred and asked that the grievances be dismissed.

In the Employer view, seniority rights were not absolute. Seniority rights were those which were included in the particular collective agreement.

The Employer submitted that seniority rights generally came into play when an event occurred which affected an employee's employment security. For example, seniority rights were often invoked when layoffs were necessary.

The Employer acknowledged that the Letter would have permitted employees at the 401 plant to exercise their seniority rights when Ault, the former employer of both plants, sold the 401 plant. Ault, the employer of long standing, disposed of the 401 plant and the seniority rights of the 401 plant employees with Ault were affected by the sale. Those 401 plant employees had a right to move from the 401 plant to the Bathurst plant and remain Ault employees. However, no employee exercised that right.

The Union interpretation, however, suggested that when Ault sold the 401 plant, the employees at the Bathurst plant which was not affected should have been able to exercise their seniority rights with Ault by bumping out of the plant which would continue to be owned by Ault and electing to work for a new employer. The Employer submitted that such an interpretation of seniority rights in the Letter of Understanding was unusual. The language used did not require that unusual interpretation.

The Employer submitted that I ought to apply the rule of interpretation that the provisions

of an agreement must be construed as a whole and that words and provisions were to be interpreted in light of the entire agreement. Thus, submitted the Employer, I should interpret the agreement in the way which best harmonized the Letter with the whole of the document. In this situation the Employer submitted that its interpretation was to be preferred.

Dealing with the language of the Letter of Understanding, the Employer made particular reference to the words "the respective employees". It was the Employer submission that respective meant "relating separately to each of several people or things" (relying on the *Collins College Dictionary*, Harper Collins, Publishers). As a result, when one plant was sold, only the employees of that plant were entitled to exercise their seniority by bumping.

The Employer also relied upon the rule of interpretation which suggested that where two possible interpretations were permitted by the language, an arbitrator should adopt that which was most reasonable and which did not lead to an absurdity. The Employer submitted that unless I ignored the word "closure", the Union interpretation led to an absurdity. The Employer submitted that the Union interpretation meant that if Ault had closed, rather than sold, the 401 plant, senior employees at the Bathurst plant would have had a right to bump into the closing 401 plant. Such an interpretation, in the Employer's view, was absurd. Nothing in this instance suggested that the absurd result of a senior employee seeking to bump into a closing plant, that is exercising a seniority right in order to ensure *unemployment,* was intended.

The Employer noted that the parties could have separated the two ideas of closure and sale and dealt with each of them separately. They did not do so and therefore the exercise of seniority rights in both a closure and a sale must be identical.

Finally, the Employer noted that the provision in the Letter of Understanding was unique and

that the circumstances which triggered the Letter have now occurred with the result that no further grievances can allege a violation of the Letter. Thus, in the Employer view, I ought to restrict my award to the situation which actually occurred and prompted these grievances. The question of whether displaced employees from the Bathurst plant would have been entitled to bump into the 401 plant did not arise and should not be addressed.

The Employer relied upon the following awards: *Re Burns Meats and United Food & Commercial Workers Union, Local 832* (1995), 50 L.A.C. (4th) 415 (Hamilton); and *Re Bingham Memorial Hospital and Canadian Union of Public Employees, Local 2558* (1991), 20 L.A.C. (4th) 434 (Marcotte).

V. CONCLUSIONS

These grievances require the interpretation of the Letter of Understanding. The parties agreed on the importance of seniority and agreed that bumping rights commonly flowed from the exercise of seniority. They differed as to whether bumping rights arose in this particular situation. As the parties agreed that the employees in the plant being sold (or closed) could have exercised their seniority rights to bump into the other plant, the narrow issue of interpretation is this:

> *Did the parties also intend to provide for the right of employees in the plant which would remain open and operating under Ault ownership to bump into the other plant which was being sold or closed?*

Clearly the Letter forms part of the collective agreement and in it Ault and the Union agreed that in a closure or sale of one plant employees would have certain seniority rights. Those seniority rights, who could exercise them, and in which circumstances, were expressed in general terms and the issue here is whether the parties intended that the Bathurst plant

employees would be able to exercise their seniority rights in this particular situation. It is my task as arbitrator to determine, from the words of the Letter, the precise extent of the employees' rights. An arbitrator must seek the parties' intention first by carefully examining the words used by the parties in the collective agreement. If the meaning can be found from an examination of the words directly, then that is the end of the inquiry.

For ease of reference, I repeat the disputed language:

> The Company and the Union agree that for the purposes of collective bargaining and administration the collective agreement will apply separately to the Bathurst Street and the 401 Plants. However, for the following specified events, the respective employees will have the following rights:
>
> (1) In the event of closure or sale of either plant, all employees shall exercise their seniority.

I begin with an examination of the words used.

With respect to the introductory sentences, the Employer submitted that the use of "the respective employees" was designed to limit the exercise of seniority to those employees in the plant which was being closed or sold. However, the Union submitted the same words should lead me to the opposite conclusion. In my view, the use of the words "the respective employees" does not clearly support either of the interpretations urged upon me by the parties. The parties could have used these words whether they intended to provide for bumping in both directions or only from the plant being sold (or closed). As for the remaining words in the introductory sentences, they also provide no clear assistance in resolving this particular difference.

This brings me to the language of paragraph (1) of the Letter. Like the language of the introductory sentences, the words used in this paragraph are unclear, would allow for either intention, and thus do not lead me to support either interpretation.

Frequently the examination of the words in the collective agreement does not provide a clear answer; in this case it did not. It is thus necessary to consider other approaches, or other methods, for determining the intention of the parties when they agreed to these specific words. The parties suggested several ways which they felt would assist in determining their intention and I have considered all of them.

One way of determining intention which is sometimes helpful is to consider what was said by the parties in the negotiations when the provision was discussed or to consider how the provision has been applied to similar cases in the past. However, the parties agreed that there was no evidence concerning the actual negotiations that would be of assistance to me in interpreting the Letter. Similarly the parties agreed that there was no past practice, that is there were no previous occasions in which this Letter was applied.

Another approach to determining intention when dealing with an issue such as seniority, a concept which is addressed in many collective agreements and in many arbitration awards, is to consider the issue within the context of commonly accepted arbitral opinion as it is generally assumed that if parties did not wish to adopt that common opinion they would have expressed that desire clearly. I note that this is a different use of arbitration awards than the usual. It is more common to use arbitration awards which interpret similar language in other collective agreements for their persuasive value; the reasoning from those awards is often helpful when called upon to interpret a similar provision. However the use of arbitration awards suggested here is different.

An example of this less common use of arbitration awards may be useful. Arbitrators have consistently expressed the view that in a dismissal grievance under a just cause provision the employer should proceed first and lead evidence to justify the dismissal, although it may have been the Union which grieved. This is so because the employer took dismissal action,

knows why it did so, and the hearing will proceed more efficiently if the employer first explains the basis for its action. Suppose that an employer were to assert that an ambiguous provision in its collective agreement required the union to proceed first in a dismissal grievance. An arbitrator might well rely upon this common and well-known arbitral expression of the preferred order of proceeding in a dismissal case and assume that if the parties had intended to reject this common approach they would have expressed their intention in clear words and not left it to be derived from an ambiguous provision.

In this case my examination of this use of arbitral opinion begins with the following statement cited by the Union, a statement which is often quoted and relied upon by arbitrators. In the *Tung-Sol* case, *supra*, arbitrator Reville wrote as follows:

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement. (at p. 162)

While other awards cited above stress the importance of seniority rights they add nothing of importance to the *Tung-Sol* quotation for purposes of the question of interpretation of the Letter raised in these grievances. In this commonly cited *Tung-Sol* statement it is clear that seniority is accepted as an important concept which is used to enhance security of employment and to provide certain employment benefits. The key point however is this - if the parties intend that the amount of an employee's seniority should be reduced or even eliminated by certain events, then that intention should be expressed in clear language because the effect of reduced seniority for an employee is so great.

Thus the *Tung-Sol* approach might be of assistance if the question before me was one of

calculating an employees seniority. But it is not. The question here is whether employees could bump out of their plant into a plant which was being sold. Nothing in the *Tung-Sol* statement suggests an answer to that question, and there is thus no result which I might presume the parties intended to adopt for this case through their failure to clearly express another outcome. This method of determining intention does not assist me in determining the parties' intention in this case.

An additional method of determining what the parties intended is to consider the words in a much broader context. I began above with a careful examination of the words of the agreement. Under this method, it is suggested I should look much more broadly and purposively at the provision, and try to consider from the general purpose and whatever is known specifically about the parties' intention in agreeing to this language, what they intended as the result in the situation which confronts me. This method accepts that the parties to a collective agreement cannot predict every issue which could arise in the administration of that agreement. Thus the parties express their intention in general words, words which will then have to be considered when a problem arises and the solution derived from what was expressed in general terms in the agreement. In essence my task here is to determine the answer which the parties would have given to the question before me if they had more specifically addressed this question in the agreement. In this instance there are two relevant items upon which there was no dispute:

1. The importance and general purpose of seniority in the collective bargaining process, and,
2. The parties' general intention in agreeing to this Letter.

The parties agreed that seniority rights are very important. As for the general purpose of seniority, seniority rights are commonly designed to protect and prolong an employment relationship, to enhance employment security. Thus the exercise of seniority often arises in

layoffs and in recall from layoff.

The parties' general intention in adopting the 1991-93 Letter was to restrict the exercise of seniority rights and the bumping by employees from one plant into the other plant. Thus as of December 15, 1991, the parties extinguished the right of employees to bid into jobs in the other plant. In addition, the parties limited the rights of employees who were laid off due to permanent job reductions in their own plant. As of December 15, 1992, those employees ceased to be able to exercise their seniority rights to bump into the other plant. Finally, there was a provision dealing with closure or sale of either plant, a provision similar to the current Letter. In 1995 when the parties revised the collective agreement for 1994-96, the dates (1991 and 1992) in the first two numbered paragraphs had long since passed and, apparently because of that, they were deleted. What had been paragraph 3 was revised and retained in the current collective agreement as paragraph 1. The introductory paragraph was not changed, and the parties' general intention to restrict bumping rights was retained.

In this Letter the parties used the same words to express employee seniority rights in the event of a closure as they used to express employee seniority rights in the event of a sale. In fact the rights are dealt with in the same sentence with the same words and thus the inescapable conclusion is that the parties intended that the rights were to be identical in the two situations of closure and sale. It follows that if the employees at the Bathurst plant were entitled to bump into the 401 plant in a sale, then they had the identical right in a closure. While the rights are identical, the question which I posed above:

> *Did the parties also intend to provide for the right of employees in the plant which would remain open and operating under Ault ownership to bump into the other plant which was being sold or closed?*

is easier to address in the situation of a closure.

Did the parties intend, in the event of the *closure* of one plant, that employees from the plant

kept in operation would be entitled to exercise seniority rights to bump into the *closing* plant? The effect of an employee using seniority to bump into a closing plant would be to ensure that particular employee's unemployment, not to protect that employee's continued employment. I agree with the Employer that this would be a very unusual interpretation of the language. For the parties to have intended such a result makes no sense from either a Union or an Employer perspective, and is contrary to the common purpose of seniority provisions as a means of enhancing job security.

When there are two possible interpretations of a provision in a collective agreement but one interpretation would lead to an absurdity or to an unusual result and the second interpretation would not, it is common to select the second interpretation. When seeking the parties' intention it is common to assume, as I do here, that the parties intended the interpretation which makes sense; in this dispute I assume that the parties intended the interpretation which is consistent with the common use of seniority. It follows that, in a closure of one of the plants, I believe the parties intended that senior employees of Ault would have been entitled to use their seniority with Ault in order to ensure the continuation of their employment with Ault, not to ensure the end of that employment.

My conclusion above is reinforced by the fact that the parties' intention in the Letter was to restrict bumping rights. Of the two interpretations, the one I have preferred is more consistent with the parties' general intention.

As noted, under this Letter the seniority rights of employees in a sale are provided through the same words as are used for the rights in a closure and I view the rights as identical. Thus I conclude that the triggering event for the exercise of seniority rights by employees under this Letter was intended to be the sale or closure of an employee's *own* plant. If one plant was sold, then employees in that plant were entitled to exercise their seniority. In the

situation which prompted the grievances, employees at the 401 plant were entitled to exercise their seniority to bump employees in the Bathurst plant. However, employees at the Bathurst plant, which was neither closed nor sold, were not entitled to exercise their seniority to bump into the 401 plant.

The Union asked that I provide an interpretation with respect to the right of any employees who *might* have been displaced from the Bathurst plant *if* employees at the 401 plant had bumped into the Bathurst plant. However, given that no employee from the 401 plant sought to bump into the Bathurst plant, and given that no Bathurst plant employee was displaced in this way, and given that both the Bathurst and the 401 plants have now been sold by Ault, I can see no benefit in pursuing this issue. While seniority rights are important, this particular issue did not arise in these grievances and I decline to address it.

For the above reasons the two grievances are denied.

Dated at London, Ontario this 7th day of January, 1998.

Howard Snow, Arbitrator