IN THE MATTER OF AN ARBITRATION

BETWEEN:

CANADA SAFEWAY LIMITED
(the "Employer")

- and -

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 175
(the "Union")

GRIEVANCE OF J. MCGUIRE

ARBITRATOR: **Shari Novick**

APPEARANCES:

FOR THE UNION: **Ernest Coetzee (April 25), Counsel**
Joanne L. McMahon (August and September dates), Counsel
Colby Flank, Union Representative

FOR THE EMPLOYER: **Paul Young, Counsel**
Julie Sue Wood, District Manager
Shannon Pilon, Labour Relations Representative

Hearings in this matter were held in Thunder Bay on April 25, August 17,18 and September 13, and in Toronto on September 26, 2000

AWARD

This grievance arises out of the Employer's decision not to place the grievor, Judy McGuire, in a full-time meat cutter position at one of its grocery stores in Thunder Bay, Ontario. The Union claims that the Employer's decision not to fill a vacancy created by another employee's departure contravenes the parties' collective agreement, and it seeks a declaration both that a vacancy existed at the Employer's Court Street store at the relevant time, and that the grievor should be placed into the position.

Background

The Employer currently operates three grocery stores in Thunder Bay - store #664 is located on Court Street, store #681 is located on Arthur Street and store #682 on Dawson Road. Each store has a meat department consisting of a meat manager as well as various meat cutters and wrappers. Employees classified as meat cutters earn a higher wage rate than do meat wrappers. The collective agreement requires the Employer to schedule full-time employees to 37 hours of work per week, over the course of five shifts. The Employer's stores are open on Sundays, but Sunday work is optional and is scheduled over and above the regular work week. Part-time employees are generally scheduled on an "as needed" basis each week, and work up to a maximum of 24 hours per week unless they are replacing employees who are sick, on vacation or leave of absence.

The grievor has worked for the Employer since 1992. She began as a part-time meat wrapper in the Court Street store, and transferred to the larger Arthur Street store after a few months. She began working as a part-time meat cutter in 1995. In May of 1999 she requested a three-month leave of absence from her part-time duties in order to pursue a full-time employment opportunity elsewhere. In her letter to the store manager requesting the leave, Ms. McGuire stated that her request followed a period of several weeks during which she was not assigned any hours of work,

and indicated that she would gladly accept a full-time meat cutter position if one were to become available. Her request for a leave was granted, and she did not work any hours at the store during the summer of 1999 and only on a limited basis throughout the fall.

This grievance was filed in mid-February of 2000, in the aftermath of a series of departures and movement among meat cutters in the Employer's three stores. There is no dispute, with one exception, about the following events having taken place. In early May 1999 Earl Goodick, a full-time meat cutter at the Court Street store, became unable to perform his duties as a result of an injury. Mr. Goodick performed light duties in the grocery department for four weeks, after which he went off on sick leave. Pentti Nieminen, another full-time meat cutter at the Court Street store, went on sick leave in August 1999. Finally, Don Maley, a full-time meat cutter at the Employer's Dawson Road store, retired in early December 1999.

In May of 1999, Cindy MacLeod, a part-time wrapper in the meat department at the Court Street store, advised her store manager that she was interested in becoming a full-time meat cutter. Ms. MacLeod had worked at a butcher shop prior to being employed at Safeway and had been cutting moose and deer for her family for several years. The Employer accepted her request and scheduled her for full-time "training" hours starting June 13, 1999. She essentially worked full-time hours cutting meat from that date until the end of October 1999, at which point she returned to part-time wrapping duties. Ms. MacLeod's name appears one spot above the grievor's on the Employer's seniority list.

The Union asserted that Ms. MacLeod filled the full-time meat cutter position vacated by Earl Goodick's departure, but the Employer denied that this was the case. A review of subsequent facts and the parties' final submissions indicates that nothing turns on the parties' differing views on this point.

Appendix 'B' to the parties' collective agreement outlines the rights and obligations of part-time

employees in the bargaining unit. The following article is germane to the issues in this case:

> **15.09** A part-time employee relieving a full-time employee absent due to sickness or leave of absence of three (3) consecutive months shall invoke the following clause:
>
> > (1) If such full-time employee is not expected to return to work (as determined by a duly qualified medical practitioner) within the next (3) months, such position shall be filled on a city-wide basis as referred to in 15.09 (3).
> >
> > (2) If such full-time employee is expected to return to work (as determined by a duly qualified medical practitioner) within the next three (3) months, such position will not be filled as referred to in 15.09 (3).
> >
> > (3) In the event of vacancy occurs [sic] in the full-time staff, the Company agrees to hire part-time employees to fill such vacancy on the basis of seniority providing the competing employees are relatively equal on the basis of skill and on the basis of merit, fitness and ability. In the event there is no qualified part-time employee available to perform the work, it is understood that the Company may fill the vacancy at it's discretion.

It is common ground that the medical assessment contemplated by the above provision did not take place three months after Mr. Goodick began his sick leave. However, as the six-month point approached, and as Mr. Maley's retirement loomed, the Union became aware that the Employer was considering placing a part-time meat cutter named Imad into one of the full-time positions. Imad had less seniority than both the grievor and Ms. MacLeod, but had gained some experience as a cutter in his previous job.

Article 16.10 of the parties' main agreement, outlining the rights and obligations of full-time employees at the Employer's stores, essentially mirrors the provision outlined above. It states:

16.10 In the event a full-time employee quits, retires or is terminated the Company agrees to hire part-time employees to fill such vacancy on the basis of seniority provided the competing employees are relatively equal on the basis of skill, and on the basis of merit, fitness, and ability within 21 days of the vacancy occurring. In the event there is no qualified part-time employee available to perform the work, it is understood that the Company may fill the vacancy at its discretion.

After some discussion, and after the grievor confirmed that she was interested in pursuing a full-time meat cutter position and was prepared to make herself available to work full-time hours, it was agreed that both the grievor and Ms. MacLeod would undergo an evaluation to determine whether or not they had the skill required to become full-time meat cutters. Colby Flank, the Union representative who had been involved in the discussions with the Employer on this issue, testified that it was understood by the parties that if either the grievor or Ms. MacLeod did not pass the evaluation, "Imad would step in". The following letters were sent to both Ms. McGuire and Ms. MacLeod from Julie Sue Wood, the Safeway district manager, in early December, 1999:

> *This letter is to inform you that your full-time position is based on an eight week probationary period.*
>
> *You will be carefully evaluated over the next eight weeks to determine your capability of performing all job functions associated with a full-time meat cutter.*
>
> *The probationary period will run from Monday, December 6, 1999 and end on Monday, January 24, 2000.*
>
> *Sincerely,*
> *Julie Sue Wood*

Both employees worked full-time hours during the period specified above. Toward the end of the evaluation period Ms. MacLeod was pronounced "skilled" and was awarded a full-time position as a meat cutter at the Employer's Dawson Road store to fill the vacancy created by Don Maley's retirement. Ms. McGuire was asked to undergo a further two-week assessment at

another store, after which she also was pronounced to be "skilled". However, Ms. McGuire was also advised at that time that there was no vacancy to fill and that she would therefore not be placed in a full-time position.

One final step was taken by the Employer. Don Maley had also filled the role of "second person" in the meat department at Dawson Road. It was explained that the employee in this role was responsible for filling in for the meat manager when he was away, and that none of the other meat cutters at that store were willing or able to take on that responsibility. As a result, the Employer transferred Dan Cross, an experienced cutter at the Court Street store, to Dawson Road to assume the "second person" role there. In exchange, Cindy MacLeod was transferred from Dawson Road to the Court Street store, where she had previously worked.

The net result of the events outlined above was that there were three full-time meat cutters at the Employer's Court Street store in late January or early February 2000, once Pentti Nieminen returned from a six-month sick leave, as opposed to the four cutters that had worked there prior to Earl Goodick's departure in the spring of 1999. The Dawson Road store retained its complement of four full-time cutters.

The Union does not take issue with the Employer's decision to "flip" Dan Cross and Cindy MacLeod, but asserts that it is obliged under the collective agreement to fill the remaining vacancy created either by Earl Goodick's departure or Don Maley's retirement. The Employer claims that the grievor was not awarded a full-time position because the workload for cutters has decreased and there is not enough work to justify placing another full-time meat cutter at the Court Street store.

Both parties filed several documents and charts containing various figures in support of their respective positions, including the sales figures for the meat department at the Court Street store from early 1998 to the end of March of 2000, as well as work schedules and other documents

detailing the hours worked in the meat department there during the relevant period. I also heard oral evidence from a variety of witnesses regarding the introduction of various new products that were sold by the meat department during 1999 and whether they required more or less cutting time, as well as new policies implemented in the department that affected the cutters' duties. The evidence relating to each of these issues will be discussed in turn.

Sales figures - meat department

The Employer provided average weekly sales figures for the meat department at the Court Street store, divided into four-week periods, throughout 1998 and 1999. Sales figures were also provided for the first three periods of 2000. For the purpose of this grievance, the relevant period begins in May of 1999, when Earl Goodick leaves the meat department, and extends to February of 2000, when the grievance was filed. The figures indicate a decline in sales in each of the six periods encompassing May through October of 1999, as compared to these same periods in 1998. However, the last two four-week periods of 1999 attracted higher sales than those periods in 1998, and the trend towards increased sales continued through early 2000. The sales figures for the first three periods of 2000 indicate a significant increase over those periods in 1999.

I was advised, however, that these figures must be considered in light of certain external factors. Specifically, it was common ground that the City undertook an extensive construction project outside the Court Street store which caused the front entrance to the store to be blocked for several months during the summer and fall of 1999. This time frame corresponds with the period of decreasing sales referred to above. While an alternate entrance to the store was apparently constructed on an adjacent street, the evidence established that this construction had an adverse impact on sales in each of the store's departments over the period outlined.

I am not persuaded that these figures are determinative of the issues raised in this grievance. The Employer asserted that sales figures do not have a direct bearing on the number of hours employees are required to work in the meat department. Various witnesses made the point that

an increase in the volume of products sold with a higher "ring" (or price) would result in higher sales figures, but that these products might not require any cutting. Several new products were mentioned, and evidence provided regarding whether the effect of the introduction of these new products during the relevant period resulted in more or less cutting time. In my view, this evidence is more germane to the issues raised in this case and will be discussed below.

Introduction of new products and methods in the meat department

Several witnesses were asked about a variety of new products that were introduced for sale through the meat departments at the Employer's stores in mid to late 1999 and early 2000. The witnesses called by the Employer mentioned those that do not require any cutting, such as a line of "gourmet meat boxes" consisting of frozen finger foods and hors d'oeuvres, and marinated (or "vac pac") pork and chicken which comes pre-cut and wrapped. The witnesses called by the Union discussed the new products that do require cutting, such as "Rancher's Beef" and "Gourmet Gold Pork".

Jim Berlinquette, the meat manager at the Employer's Court Street store, conceded that some of the new products introduced do have to be cut, but stated that the majority of the new products that were introduced do not require cutting. However, neither he nor any of the Employer's witnesses were able to provide a breakdown or any further information to indicate whether sales of these new items that did not require any cutting were higher than those that did.

Mr. Berlinquette also testified that most meat products now arrive at the store in a more processed manner than they used to as a result of more cutting being done at the packing houses. He stated that smaller pieces are easier to cut and require less cutting time. While that would support the Employer's position that fewer cutter hours are required than in the past, this evidence was countered by that of subsequent witnesses to the effect that new methods have been adopted in the meat department that increase cutting time. Two witnesses called by the Union in reply testified that a new method of cutting sirloin so that the "cap" is removed and is

then sliced up for use in stir fry and kebob preparations results in a significant increase in cutting time. I was also advised that a new policy was instituted in mid-1999 requiring meat cutters to clean the grinder after each grind is completed, as opposed to the former practice of cleaning it once during each shift. Ms. MacLeod testified that it took ten to fifteen minutes to clean the grinder after grinding beef into burgers.

It is clear from the evidence outlined above that the new products introduced, as well as the new methods adopted in the meat department during the relevant period had a significant impact on the level of work performed by the meat cutters. However, it was not clear whether the combined effect of these changes is a net increase or decrease in meat cutter hours. Accordingly, absent clear evidence about which products are more popular and whether the time saved by having smaller pieces of meat to cut is offset by the longer time it takes to cut sirloin or clean the grinder, I do not find this evidence to be determinative of the issue raised.

In the final analysis, I am persuaded that the best way to approach the question of whether a vacancy exists for a cutter in the meat department at the Court Street store is to examine the evidence filed regarding the number of hours worked by the meat cutters during the relevant period. Both the work schedules for the meat department for 1999 and the first few months of 2000 as well as a summary of payroll records for the relevant employees were filed by the parties, and charts were developed summarising the information. In order to place this evidence into the appropriate context, I will first set out the accepted principles and arbitral jurisprudence addressing the issue of whether or not a vacancy exists, as well as the relevant provisions of the parties' collective agreement and the manner in which they have been interpreted in other cases.

When does a vacancy exist?

The general view among arbitrators is that the mere existence of a vacant position is not sufficient to require an employer to fill it with another employee. The cases refer to the requirement that adequate work exist, in the employer's opinion, to justify filling the position.

[See *Re Oil, Chemical & Atomic Workers, Local 9-599 and Tidewater Oil Co. (Canada) Ltd.* (1963), 14 L.A.C. 233 , *Re Horton Steel Work Ltd. and United Steelworkers, Local 3598* (1973) 3 L.A.C. (2d) 54 (Rayner), *Re Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers, Local 9-14* (1974), 5 L.A.C. (2d) 344 (Rayner), *Re Municipality of Metropolitan Toronto and C.U.P.E., Local 43* (1975), 10 L.A.C. (2d) 247 (Adams), *Re Pilkington Brothers Canada Ltd. and United Glass & Ceramic Workers* (1976), 13 L.A.C. (2d) 287 (Burkett), *Re Beacon Hill Lodges of Canada Ltd. and Service Employees Union, Local 210* (1985), 20 L.A.C. (3d) 316 (McLaren), *Re Town of Lincoln and C. U. P. E. Local 1287* (2000), 85 L.A.C. (4th) 144 (Verity).]

The Employer's right in this regard is not unfettered, however. The decisions cited above establish that it is subject to the proviso that a decision not to fill a vacancy must be made for valid business reasons, and be based on a reasonable view of the objective facts as they exist at the time the vacancy is alleged to exist. The decision must also not have been based upon considerations other than the availability of work for the position in question, such as the employer's financial position.

Much time was spent during the parties' final submissions addressing the issue of who bears the onus of proof in this case. The Union asserted that a vacancy has existed in the meat department since Don Maley's retirement in December 1999, and that given that Article 16.10 of the collective agreement mandates the Employer to fill the position within 21 days, the onus rests on the Employer to demonstrate clear business reasons why the position that has been vacated need not be filled. Union counsel relied on the decisions in *Caressant Care Nursing Home, Listowel and UFCW, Local 175* (1988), 3 L.A.C. (4th) 236 (Joliffe), in which the arbitrator found that the redistribution of an employee's full-time hours to two part-time employees was not a valid exercise of management rights, and in *Re Corporation of City of Toronto and C.U.P.E., Local 79* (1994) 42 L.A.C. (4th) 411 (Abbott), in which it was found that an employer bears the onus of establishing that a vacancy no longer exists in cases where a job posting has been withdrawn.

The Employer argues that the Union bears the onus of proving that a vacancy exists in the meat department in the Court Street store and that to do so, it must present clear evidence of the same number of hours being worked by the complement of meat cutters at the time of the grievance as when there were four full-time cutters. Counsel referred to the arbitrator's statement to this effect in *Stelco Inc. and United Steelworkers of America, Local 1005* (unreported decision of A. Barrett, October 14, 1999), and asserts that this notion is also implied in the *Horton Steel Work, supra,* and *Beacon Hill Lodges, supra,* decisions cited above.

In my view, while the Union generally bears the onus of proof in this type of grievance, the cases speak of an employer's obligation to show that its decision not to fill a vacancy is based on valid business reasons. Practically speaking, the information that is germane to this issue is not usually available to unions or other parties, and is generally provided by the employer. In this case, details of the meat department's operations were provided by the Employer and analysed by both parties. Ultimately, I must examine this information in order to determine whether the Employer's decision not to fill the vacancy in its Court Street store was reasonable, and made for valid business reasons. As opposed to imposing a burden of proof, I prefer to express the parties responsibilities as follows - the Union continues to bear the general onus of proving its case, while the Employer must provide sufficient information to enable a review of its decision not to fill the vacancy to be conducted in order to determine whether its decision was reasonable.

Prior arbitration decisions involving these parties

The Employer brought three decisions involving these parties and addressing similar issues to my attention. The *Perry* grievance (unreported decision of Rayner, May 12, 1994) arose out of a reorganization in the "bulk food" section of one of the Employer's stores. A part-time employee had taken over the full-time hours of another employee in that section, following his going off on sick leave. After approximately three months, the grievor was advised that her hours would be reduced back to 24 hours per week, as a result of a reorganization of the bulk food section. The full-time employee whose hours she had assumed never returned to work. The

question became whether the grievor was entitled to permanently step into the shoes of this full-time employee, in light of the Employer's decision to reduce the number of hours worked in that section. The arbitrator reviewed Article 16.07 of the parties' agreement, which states:

> **16.07** It shall be the sole decision of the Company to decide the size and type of working force required to operate its stores. The Company in exercising this right, agrees not to layoff or reduce to part-time, a regular full-time employee in a store and replace his regular weekly work schedule with part-time or casual employees.

He found that this provision neither guarantees full-time jobs nor requires the Employer to maintain a set full-time complement. He also stated that existing full-time jobs need only be maintained when "there is sufficient work to constitute a vacancy within the meaning of Article 16.10." That article, set out earlier in this decision, provides that the Employer agrees to hire part-time employees to fill a vacancy created by a full-time employee quitting, retiring or being terminated on the basis of seniority provided the competing employees are relatively equal on the basis of skill, merit and ability.

Arbitrator Rayner then went on to consider Article 15.09 (3) [then Art. 15.10] of the agreement. This provision appears in the part of the agreement addressing part-time employees, and is also reproduced above. He found that before this article becomes operative "one must find that a vacancy has occurred". He then analysed the evidence tendered regarding the hours worked in the bulk food section after the reorganization, and found that it did not support the Union's contention that a full-time employee's work week of 37 hours continued to exist (beyond the 24 hours worked by the grievor after her hours were reduced). He estimated that the weekly hours worked fell somewhere between 29 and 33, and that this was insufficient to find that a full-time vacancy existed.

The Employer also filed the decision of Arbitrator Rayner in the *De Wolfe* grievance

(unreported, May 11, 1994). I find the facts of that case sufficiently distinguishable from the instant matter, and consequently do not consider the decision to be of use in this context.

Finally, I was provided with a copy of Arbitrator Picher's award in the *Melville* and *Brescacin* grievances, which were chosen as representative of a series of grievances filed by the Union in the wake of the reduction of several full-time employees' hours of work to part-time. While the arbitrator considered the provisions of the collective agreement referred to above, and reviewed Arbitrator Rayner's comments in the *Perry* grievance, the question posed to him was fundamentally different from the one raised in this case and accordingly, I do not find his comments to be instructive.

Evidence regarding hours worked in the meat department

I turn now to the evidence regarding the hours worked by meat cutters at the Employer's Court Street store during the relevant period. The Union compiled a chart summarising information gleaned from the Employer's payroll records for all meat department employees during 1999 and the first two months of 2000. In addition, a copy of the weekly work schedules posted in the department setting out the hours each employee was scheduled to work during 1999 and from January to April 2000 was filed.

It became apparent as these documents were reviewed by various witnesses that there were many discrepancies between the hours employees were scheduled to work, and those that they actually worked according to the payroll records. This was partly explained by Mr. Berlinquette's statement that the work schedules are prepared and posted on Thursday for the following week and that while he tries to note any changes in an employee's hours as a result of sickness or other unanticipated absence on the schedule, this was not always done. A more extensive comparison of the work schedules and the payroll summary reveals almost regular discrepancies over the entire period in question. I find the payroll records to be more reliable evidence of the hours worked by employees in the meat department, and will rely on those over the hours marked on

the schedules whenever they conflict.

The Employer also filed a document described as a Variable Report Summary that relates to all of the hours worked in the meat department at the Court Street store during 1999 and the first three months of 2000. Ms. Wood, the Employer's District Manager for Winnipeg and Thunder Bay, testified that the figures on this document were generated by the "STAR system", a system the company began using approximately five years ago. She explained that this system relies on time studies conducted by industrial engineers to calculate a variable for each job classification, from which a target number of hours is obtained for every department in the store. She explained that factors such as tonnage of product, product mix, seasonality, customer preferences, sales and promotions and price per pound of product are all taken into account to arrive at a target number of employee hours required to be scheduled. Ms. Wood stated that this is an efficient method of scheduling work, emphasizing that a mere increase in a department's sales does not automatically translate into an increased need for hours of work.

An examination of this document reveals a fluctuation in the number of meat cutter hours projected for the last half of 1999, and a marked and steady decrease in projected hours over the first three months of 2000. While some relatively minor discrepancies were noted between the projected hours of work on this report and the payroll summary reflecting the actual hours worked, this was not explored in any depth during Ms. Wood's cross-examination. It is fair to say that this document evidences a clear intention on the Employer's part, based on the information generated by the process that takes into account the factors listed above, to reduce the number of hours worked by meat cutters at the Court Street store.

Interestingly, a review of the work schedules filed indicates that the total number of hours worked in the meat department at the Court Street store actually increased over the first three months of 2000. A closer look, however, reveals that the hours assigned to meat wrappers increased, while those assigned to meat cutters declined. An examination of the payroll records

also bears this out. While I do not intend to set out all of the figures for the fourteen month period that this information was provided for, this evidence is fundamental to the determination of the question before me and I will therefore attempt to summarise it, grouped into various periods.

The first three months of 1999 featured four meat cutters working full-time hours. I note that one of these four employees, or the meat manager, took a week-long vacation during 7 of these 14 weeks, and that no part-time replacements were called in to make up these hours.

April and May also indicate full-time hours, or fewer, being worked by the four regular cutters. When Earl Goodick went on sick leave and Pentti Nieminen took a two-week vacation during the first half of June, Imad, the part-time meat cutter who worked at the Arthur Street store, was brought in for one week of full-time hours and one week of 24 hours. The period from late June to the end of July 1999 featured Cindy MacLeod's training hours making up for the full-time hours Earl Goodick no longer worked. I note, however, that a full-time cutter took vacation during almost every one of these weeks, and that these hours were not replaced by a part-timer.

The period from August through early November 1999 was characterised by Earl and Pentti both being absent, and the two remaining full-time cutters as well as Jim Berlinquette, the meat manager, each taking two weeks of vacation. The evidence indicates that Ms. MacLeod continued to work full-time hours throughout this period, although the schedules show that she worked exclusively as a meat wrapper for a few weeks during this period, and that her time some weeks was split between wrapping and cutting duties. Imad filled in during many weeks of this period, working varied hours. There were no instances, however, in which all of the full-time hours were replaced.

Once more, during the period from early November to the start of the evaluation undertaken of the grievor and Cindy McLeod in early December, two of the full-time cutter positions remained

vacant. The schedules indicate that Ms. McLeod was mainly assigned wrapping duties during this period. I note that the number of hours devoted to cutting over these four weeks was especially low, despite the fact that sales began to pick up after the construction outside the store ceased.

The evaluation process spanned eight weeks from early December 1999 to late January of 2000. While various people shifted among the three stores as a result of this process, and the holiday period intervened, the general trend toward not replacing all of the full-time hours of the former four meat cutters continued. The records indicate that on average, somewhere between one and one and one-half of the four full-time positions remained unfilled. Or, putting it another way, one-quarter to one-third of the full-time cutting hours were not being worked.

The final period for which this type of information was provided was from late January, after the evaluation ended, to early March 2000. These figures are perhaps the most telling of all, partly because they follow the evaluation and the resulting movement of various cutters among stores that it precipitated. As well, the grievance was filed in the midst of this period, making this information the most "current" and relevant. The records indicate that the average number of hours worked per week over this six-week period by the meat cutters and the meat manager amounts to 150, whereas the weekly hours worked with a complement of four full-time cutters (again, including the meat manager) equals 188. Imad was called in to work part-time hours during only two of these six weeks, for two shifts (not counting Sunday work).

A detailed analysis of the figures outlined above leads me to the inescapable conclusion that the full-time hours worked by Earl Goodick up until May of 1999 are largely no longer being worked. They have not been divided up among part-time employees, nor otherwise scheduled in a manner contrary to the collective agreement. While I find Professor Rayner's finding in the *Perry* grievance that 33 extra hours each week is insufficient to find that a vacancy remains to be a bit harsh, the evidence in this case points to no more than 16 of the full-time shift of 37 hours

being worked by a part-time employee during only two of the last six weeks in question. If the six-month period predating the filing of the grievance is examined, there are only three occasions (the two weeks just mentioned and one other) in which some of the 37 hours previously worked each week by Mr. Goodick (or the fourth full-time cutter, to speak more generally) are assigned to a part-time employee.

I can certainly understand the grievor's disappointment after participating in an evaluation for several weeks with the expectation that she would ultimately be granted a full-time position, only to be told after successfully completing it that the vacancy will not be filled. I can similarly appreciate the Union's frustration in having its expectation of how the whole process would unfold reversed, when many signs pointed to both vacancies created by the departure of Messrs. Goodick and Maley being filled. A reasonable reading of the letter sent to the grievor (and to Ms. MacLeod) prior to the beginning of the evaluation stating "your full-time position being based on an eight week probationary period" would lead to the expectation that as long as she performed satisfactorily during the evaluation period, she would be awarded a full-time job.

I am also puzzled as to why, if it was clear to the Employer in early December (as was stated) that they would likely not be filling both vacancies created, they would arrange for both the grievor and Ms. MacLeod to be evaluated to determine if they had the requisite skill to become full-time meat cutters. Ms. MacLeod was more senior than the grievor and had the benefit of having already undergone a few months of training in the position, leaving the grievor virtually no chance of obtaining the position under the competitive terms of Articles 15.09 (3) or 16.10.

Ultimately, it must be kept in mind that Article 16.07 of the collective agreement provides the Employer with sole discretion to decide the size of the work force it requires to operate its stores. In view of this fact, I agree with the decisions of the other arbitrators cited above who have found that both Articles 15.09 (3) and 16.10 are only triggered once a determination is made that a vacancy exists. And, according to the clear arbitral jurisprudence on the issue, a

vacancy can only can be said to exist when an employer determines that there is sufficient work available to justify filling it. My review of the evidence filed, especially the record of hours worked by meat cutters at the Court Street store outlined above for the relevant period, satisfies me that the Employer's decision in this regard meets the reasonableness standard and was based on valid business reasons.

Accordingly, the grievance must be dismissed.

Request for costs of first day of hearing

One final matter remains. The Union advised at the outset of the first day of hearing that it required the payroll records from the Court Street store for 1999 and early 2000 in order to determine whether the full-time hours no longer being worked by Earl Goodick had been assigned to part-time employees. Union counsel advised that these records had been requested before, but had not been provided. He stated that he had received a summary sheet prepared by counsel for the Employer setting out some of the hours worked, but that it did not include any of the hours worked by Cindy MacLeod and that it was necessary for the Union to review the payroll records in order to "fill the gap".

Employer counsel advised that he was not prepared to produce the records requested. He stated that if his client took the steps required to gather this information, the hearing day scheduled would be lost. He stated that no formal request for the documents had been made, and suggested that it was open to the Union to have either issued a subpoena for the records in question or to Ms. MacLeod, who would likely have some documentation evidencing the hours that she worked.

I determined that the records being sought by the Union were relevant to the issues raised by the grievance, and ordered them to be produced by the Employer. I agreed that I would hear

submissions from the Employer at the end of the case regarding its request that costs be awarded against the Union for the loss of hearing time occasioned by their request. The hearing was then adjourned until later in the day to permit the Employer to obtain the records from the store. Ultimately, the parties spent the afternoon reviewing a large volume of documents, as the Employer indicated that they needed to be returned to the store the following day. My notes indicate that Union counsel had proposed that the grievor's evidence be tendered that afternoon, but that this suggestion was not considered once the Employer advised that the records had to be returned the following day.

In his final submissions, counsel for the Employer sought an order that the Union bear the expense associated with our attendance in Thunder Bay on the first day of the hearing. He contended that the Union's late request for the payroll records resulted in the day being lost. Counsel suggested that the delay that ensued from my order could have been avoided if the Union had made an advance request for the payroll records, and relied on the decision in *Re Hawker Siddeley Canada Inc. and International Association of Machinists, Lodge 1922* (1989), 7 L.A.C. (4th) 172 (Gorsky). The arbitrator in that case adjourned a hearing that had been convened under section 45 (now section 49) of the *Labour Relations Act* at the employer's request, as a result of the unavailability of two of its witnesses who were on vacation. After hearing evidence in support of the employer's need for an adjournment, he found that the delay occasioned by the witnesses' unavailability was not beyond the employer's control. As a term of the adjournment, the arbitrator required the employer to pay his fees for the lost day and any expenses associated with that day of hearing.

I am not prepared to make an order requiring the Union to bear any costs related to the first day of hearing in this matter. While it is unfortunate that no evidence was called that day and that the travel costs for two counsel and an arbitrator flying in from Toronto are close to prohibitive, I am not persuaded that the blame for this should lay solely at the feet of the Union.

As a first matter, I was advised by Union counsel at the time that the records in question had been requested in advance of the hearing, but had not been provided. While this contradicts the Employer's statement that no formal request had been made, I did not hear any evidence on this point and am left with two contradictory statements of what transpired prior to the hearing. I was also led to understand that the Union had requested that the relevant sales figures be produced in advance of the hearing in response to the Employer's response that the vacancy had not been filled as a result of declining sales. When those documents were finally produced, and the fact revealed that the meat department's sales had actually increased, it appeared that the Employer then responded by stating that it would be relying on the fact that the full-time hours worked by Mr. Goodick had not been reassigned. Again, I heard no evidence on this point and hesitate to draw any conclusions; however, I must consider the Employer's request for a costs order against this backdrop.

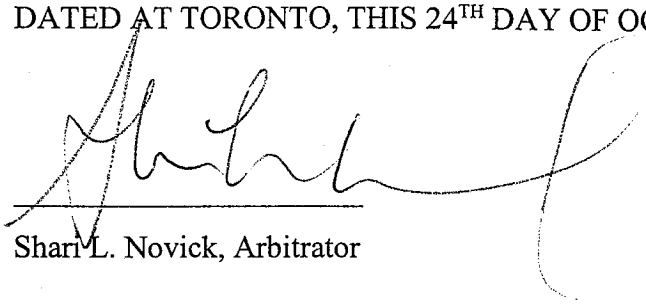
I also note the finding of Arbitrator Wacyk in *Birssa Holdings c.o.b. as East Side Mario's and UFCW, Local 175* (policy grievance, dated April 6, 2000) that arbitrators appointed pursuant to section 49(9) of the *Labour Relations Act* do not have the authority to order that their fees and expenses be borne only by one party. Section 49(9) of the *Act* provides:

> Where the Minister has appointed an arbitrator under subsection (4), each of the parties shall pay one-half of the remuneration and expenses of the person appointed.

I agree with this finding. While this provision does not address an arbitrator's authority to order one party to pay the legal fees and expenses incurred by the other party in circumstances that may warrant a departure from the usual rule that costs incurred in the labour arbitration context are borne equally by both parties, in the absence of any evidence of a lack of diligence on the Union's part in preparing for this hearing I decline to make the order requested.

As set out above, the grievance is dismissed.

DATED AT TORONTO, THIS 24TH DAY OF OCTOBER, 2000.



Shari L. Novick, Arbitrator