

[Indexed as: **Bell Technical Solutions and Unifor, Local 46 (Beck), Re**]

BELL TECHNICAL SOLUTIONS (the “Employer”) and  
UNIFOR, LOCAL 46 (the “Union”)

Canada Arbitration

Docket: None given

Gail Misra Member

Heard: July 11, 2018; March 5, 2019

Judgment: April 12, 2019

**Management rights — Collective agreement limitations** — Temporary transfers — Parties clearly circumscribed employer’s right to temporarily transfer workers — Employer not entitled to exclude senior qualified volunteers because they were subject to a performance management plan.

**Skill and ability — Applications — Transfer** — Employer’s right to temporarily transfer workers limited to instances where work team failed to reach an agreement — Employer not permitted to disqualify senior workers on basis that they were subject to a performance management plan.

**Seniority — Applications** — Temporary transfers — Collective agreement limited employer’s role in choosing workers to instances where work team failed to reach an agreement — Prevailing practice to transfer senior qualified volunteer — Employer not entitled to insert performance management criterion. [See *Brown & Beatty*, 2:1202; 4:2310; 5:000; 6:2000; 6:2100; 6:3330]

**Cases considered by Gail Misra Member:**

*Alberta Health Services v. A.U.P.E.* (2009), 190 L.A.C. (4th) 243, 2009 CarswellAlta 2319, [2009] A.G.A.A. No. 61 (Alta. Arb.) — considered  
*Bell Technical Solutions v. C.E.P.* (2010), 2010 CarswellNat 5732, [2010] C.L.A.D. No. 413 (Can. Arb.) — considered  
*Board of School Trustees of School District No. 43 (Coquitlam) and CUPE, Local 561, Re* (1991), 1991 CarswellBC 3136 (B.C. Arb.) — considered  
*Clean Harbors Canada Inc. v. C.E.P., Local 914* (2012), 2012 CarswellOnt 2465, 216 L.A.C. (4th) 276 (Ont. Arb.) — referred to  
*New Westminster School District No. 40 v. C.U.P.E., Local 409* (2010), 200 L.A.C. (4th) 385, 2010 CarswellBC 4034, [2010] B.C.C.A.A.A. No. 164 (B.C. Arb.) — considered  
*Newfoundland and Labrador Housing Corp. and CUPE, Local 1860 (McDonald), Re* (2014), 2014 CarswellNfld 387, 248 L.A.C. (4th) 135 (N.L. Arb.) — referred to  
*St. Michael’s Hospital and ONA (201206035), Re* (2013), 2013 CarswellOnt 13067, 235 L.A.C. (4th) 389 (Ont. Arb.) — referred to

*Toronto Typographical Union, Local 91 v. Council of Printing Industries of Ontario* (1964), 15 L.A.C. 318, 1964 CarswellOnt 542 (Ont. Arb.)—considered

GRIEVANCES by union claiming that employer improperly denied grievors temporary transfer when they had requisite seniority to entitle them to transfers.

Frederic Henry, for Employer

Micheil Russell, for Union

***Gail Misra Member:***

- 1 I have been appointed pursuant to the collective agreement between the parties to hear two grievances. David Beck and Tyler Stenback filed grievances on February 15, 2017, claiming that the Employer (“BTS”) had improperly denied them a temporary transfer to Windsor when they had the requisite seniority to have entitled them to the transfers. Various violations of the collective agreement are claimed. The grievors seek full redress, which includes any wages, benefits or other monies to which they would have been entitled had the grievors been permitted to go on the temporary transfers to Windsor.
- 2 In response to the grievances, the Employer took the position that there was no violation of the collective agreement as the five technicians chosen to go to Windsor had been picked based on the following criteria: 1) seniority; 2) technicians must not be on a performance plan; and 3) technicians must be willing to change their schedules depending on where they would fall in seniority in the Windsor common locality. The Employer relied on Article 20.01(e) of the collective agreement. Messrs. Beck and Stenback were both on performance plans at the time, and therefore had not been accepted for the Windsor temporary transfer list.
- 3 The Union called Blair Stevens, David Beck, and Tyler Stenback as witnesses. Blair Stevens has been with Bell Canada, and now BTS, for 28 years, working as a technician in London. He is the Chief Steward for Local 46, which represents 124 technicians, cable pullers, and logistics attendants from BTS in the bargaining unit. Messrs. Beck and Stenback, the two grievors, are employed at BTS in London as installation repair technicians, trained in business and residential.
- 4 The Employer called Glenn Belmore and Luis Costa as its witnesses. Glenn Belmore has worked for BTS since 2011, starting out as a technician and moving through various roles to his current position as Senior

Manager, Workforce Management, at the BTS Head Office. He has five managers reporting to him, along with 43 employees. Prior to working in Workforce Management, he had held positions including as a Field Operations Manager, Manager of Dispatch in Toronto, and as the Senior Manager, Operations in 416 East.

- 5 Luis Costa had worked at Bell Canada before joining BTS in 2015. Between his tenure at Bell Canada and BTS, he has been employed with these companies for a total of 31 years. He started out as a field technician at Bell in 1987, and moved into management positions in 1992. At BTS, currently as the Director of Field Operations, Ontario Provincial as of December 2015, he has 70 Field Operations Managers reporting to him, with a total of 1650 technicians.

### **THE FACTS**

- 6 Field Operations at BTS is responsible for completing the sale of products and services that a customer initiates, for a new service, additional service, or repairs. It carries out the installation or repair of the products and services. A Field Operations Manager is responsible for 26 technicians, if he or she has an experienced team, or, 18 technicians if it is a new hire group. Installation Repair Technicians are responsible for business and residential installation and repair.
- 7 Mr. Belmore explained the role of Workforce Management (“WFM”) within BTS. The WFM team organizes and forecasts the amount of work for Ontario, and then schedules the technicians for that load; it builds long term schedules for technicians, including 8 week scheduling; and performs payroll and training functions. If one area needs a greater number of technicians for a short time period, WFM texts out a call for volunteers in another part of the province that can afford to help out. These temporary transfers can be required very quickly if there is a high increase in sales or activations, or due to bad weather.
- 8 The process to staff temporary transfer requirements is that WFM must first identify that they require a transfer; it then puts out a page in the area that can afford to loan out technicians; sets a timeline to respond; once the deadline is reached, WFM considers the names of those who responded to the text message. It then sends the list of potential volunteers to the local Field Operations Managers to review. Once the list is returned to WFM, the technicians who have been approved for loan are contacted by email or text, and all travel arrangements are made for those technicians. The local area Field Operations Managers decide

which technicians can be sent out for temporary transfers. Mr. Belmore confirmed that after the local Field Operations Managers indicate a technician is eligible for a temporary transfer, people are chosen in order of their seniority, with the most senior being sent on the transfer. A same day assignment outside of a technician's regular territory is not considered a temporary transfer.

- 9 The Union's knowledge of the process utilized when the Employer needs to do temporary transfers of staff from London to some other location was basically consistent with the Employer's evidence in this regard. In Mr. Stevens' experience over many years, once the time to respond had passed, WFM picked the number of technicians it needed based on seniority. On occasion, fibre technicians may be chosen out of seniority order over regular technicians because of their particular skill set, should that be a requirement at the transfer location. Until the time of filing of these grievances in 2017, that had been the process in London.
- 10 Although Article 20.03 of the collective agreement states that "in the case of a temporary transfer, the work team shall agree on the choice of volunteers" and "if the work team cannot reach an agreement, the Company shall transfer an employee qualified to do the job having the least amount of seniority within the team", Mr. Stevens testified that in fact the established practice accepted by the Union for as long as he has been in London is that, for temporary transfers, the most senior volunteers who are qualified to do the work are to be chosen. To his knowledge that was the practice all across Ontario.
- 11 The local work team, which is comprised of the local bargaining unit members, has no role in who is chosen for temporary transfers. Based on the established practice as outlined by Mr. Stevens, it is WFM that selects and dispatches from among the volunteers for the particular call out. Mr. Belmore confirmed Mr. Stevens' evidence regarding the application of Article 20.03, that the local work team plays no role in selecting and dispatching technicians, other than to indicate their yes or no response to texts from WFM regarding temporary transfers.
- 12 Before the circumstances in these grievances, Mr. Stevens had never seen or been aware that WFM had applied as a condition of qualification for temporary transfer that a technician must not be on a performance management plan. In his 20 years as the Chief Steward, he had not heard of a junior person being sent on a temporary transfer, except if no senior people elected to go, or there was no senior qualified employee who had volunteered. In his experience, these grievances represent the first in-

stance of junior people being sent on temporary transfers when senior employees had volunteered to go, and were qualified for the work in question.

- 13 Performance Road Map (“PRM”) is a performance management program that BTS adopted system-wide in October 2016. I note that the Union has filed a Policy grievance contesting the validity of the PRM, and that grievance is proceeding to arbitration. As well, the PRM has been challenged in Quebec. The validity of the PRM program is not an issue in these grievances.
- 14 Mr. Costa gave detailed evidence about how technicians are evaluated on an ongoing basis. It is not necessary to go into the details of his evidence in this regard, but a basic review will be outlined in order to better understand the performance management program which informed the Employer’s decision not to authorize the grievors’ temporary transfers to Windsor in early 2017.
- 15 According to Mr. Costa, Field Operations Managers supervise their team of technicians through various online tools such as Horizon, which monitors daily, weekly and yearly results. They can see what a technician did during his or her day, and what work they have coming up. These managers also do quality inspections, drop ins, and ride alongs with their technicians, and hold meetings with them. Through Horizon, managers or technicians can look at their metrics, which include a technician’s effectiveness, their rework and other statistics. There are graphs that show how a particular technician is performing in relation to other colleagues, and how a manager is doing against the broader BTS team.
- 16 In 2017, when these grievances were filed, so long as a technician had done a minimum of 50 jobs in the previous six month period, BTS managers were looking at four metrics for those technicians in the areas of effectiveness, rework, percent complete, and GPS conformance, with different weightings for each metric. From these statistics, a composite rating was reached for each technician, and technicians were then ranked in reverse order. The bottom 25 per cent of all technicians would be put into the PRM program.
- 17 Mr. Costa and his team would go through those in the bottom quartile and decide who should be in the PRM program, as some technicians were excluded from the ranking based on medical issues or other known health-related matters. They would then advise the Field Operations Managers who on their team was going to be in the PRM program through a pre-PRM report issued 30 to 60 days before, so that the man-

ager could speak to an employee before they were in the PRM. After that, PRM led to a process by which the managers were expected to meet with the impugned technician, have a coaching session with them to tell them they were in the program, give them the statistics, and what they could do better. There were to be daily, weekly, or monthly meetings with the technician; discussions about what the technician may not be doing correctly; training opportunities may be offered; or the use of mentor rides. A technician was to be encouraged to call the BTS hotline for help; to use online tools and training modules; or to call the manager directly for help addressing concerns. Each manager was expected to meet with the PRM technician monthly, although Mr. Costa admitted that was not always possible due to vacations and other commitments, so a manager may do a drop in or a phone call instead.

- 18 Once a technician was in the PRM program, a Field Operations Manager would look at a two month rolling window for that technician to see how they were doing. In order to get out of the program, a technician would have to have had 6 months of being out of the last quartile (what was referred to as being in the green zone, rather than in the red zone). If a technician had a green zone evaluation, they were told to keep up the good work, and it did not count as a step in the coaching process. Receiving an award did not help a person in the PRM program.
- 19 According to Mr. Costa, sometime in 2015 the PRM program was piloted in an area that included London. At that time, being in the PRM did not disqualify a technician from getting a temporary transfer. He made the decision in May 2016 to add as a condition of eligibility for temporary transfer that a technician not be on the PRM program. In October 2016 the PRM was adopted throughout BTS with this criterion added for temporary transfers.
- 20 Before it rolled out the PRM program, BTS had advised the Union about it, and included the Union in the roll out process. However, according to Mr. Stevens, neither he nor anyone in the Union, was made aware that PRM would have an impact on the temporary transfer rights of employees. Before the instances in this case, Mr. Stevens had never seen or been aware that WFM had applied as a condition of qualification for temporary transfer that a technician must not be on a performance management plan.
- 21 While Mr. Costa testified that there was no official notification to the Union about the addition of the PRM criterion into the temporary transfer process, he stated that management had spoken about its intent to do

so at the Labour Relations Committee. However, he could not recall when that had occurred, and could not confirm whether that discussion had occurred after the filing of these grievances in February 2017. He conceded that the discussion could have occurred between February 2017 and when he left the Committee some time later in 2017.

- 22 Mr. Belmore recalled that there had been roll out meetings regarding PRM in and around 2015 or 2016. He was not aware of what the temporary transfer conditions had been in 2014. He testified that for the duration of the current collective agreement, he believed that WFM has been applying the criterion that disqualifies anyone who is on PRM from eligibility for a temporary transfer. However, he conceded that the acronym “PRM” did not exist before the Performance Road Map process was first introduced by BTS. There is no dispute that the PRM was only introduced across BTS in October 2016, and the collective agreement between these parties has a term of May 6, 2011 to May 6, 2018. It would therefore be impossible for WFM to have been applying the PRM criterion prior to late 2016.
- 23 Mr. Belmore had last worked as a Field Operations Manager in 2016, in the Ottawa and Cornwall areas. While there, he had never had a call out for volunteer technicians from his area. As such, he had no experience regarding the criteria applied in choosing technicians for temporary transfers. He admitted he was not aware of when being on PRM became a condition that WFM began to apply to the temporary transfers of technicians, but indicated that someone in Field Operations would have directed that it be added to the conditions. He agreed with counsel for the Union that nothing in the text messages sent by WFM to employees seeking volunteers for temporary transfers would have alerted them to the PRM exclusion criterion.
- 24 Based on all of the evidence before me, I find that prior to the imposition of this criterion in October 2016, BTS had never advised the Union or its members that it would be disqualifying technicians from eligibility for temporary transfers because they were on the PRM program.
- 25 According to Mr. Costa, the PRM program has been replaced by a successor performance management program called “Coaching for Success”, using the acronym “CFS”. The CFS program has also been grieved by the Union, and a policy grievance is proceeding to arbitration in Atlantic Canada.
- 26 Mr. Costa testified that he had been told by his senior managers that being on a performance program had been a criterion in place for tempo-

rary transfers for a number of years on whatever the performance plan had been before he joined BTS in 2015. The Union objected to this hearsay evidence, and while I had allowed the testimony, I had reserved on the weight to be given to it. I accept that Mr. Costa may have been told by some unnamed persons that this was a criterion, but there is no objective evidence to support that there was in fact such a criterion. Since there was no other support for Mr. Costa's contention, for the reasons that follow, I have ultimately given this evidence no weight, and it cannot be allowed in for the truth of its content. Mr. Costa had been involved in managing field intelligence when he first joined BTS in 2015, so he had no involvement in field operations at that time, and had no first-hand knowledge of what criteria had been applied in choosing technicians for temporary transfers. As already noted, Mr. Belmore also had no specific knowledge of this criterion being applied prior to 2016. Finally, the Union was not aware of this being a condition in the London area, as this issue had never arisen before the circumstances that gave rise to the filing of these grievances in 2017.

- 27 Mr. Costa testified that the reason for his decision to impose the criterion was that management wanted to keep a technician on PRM close to their own manager rather than sending them to an area where they would lose their manager's support while they are supposed to be coached. Since the technician would be out of their area for a number of days at a time if temporarily transferred, the local manager in the new area would not know the technician or his or her issues, so could not provide coaching. As well, when technicians are transferred to an area, they may be part of a mixed group from all over the province, and the manager would not have the time to manage people on PRM. It would not be possible to do mentor rides or quality inspections in those circumstances, and according to Mr. Costa, BTS has determined that it does not want to ask a local manager to "manage" this aspect of a transferred technician.
- 28 On January 24, 2017 Mr. Beck received a text message from the Employer indicating that it was "looking for vols [volunteers] to be loaned to Windsor. Leaving Jan 26 - Feb 5". Mr. Beck responded before the January 25, 2017 8 a.m. deadline that he was interested in volunteering. He never heard back from the Employer.
- 29 Mr. Beck's seniority date was March 17, 2014. Through talking to other technicians, he learned that technicians junior to him would be going to Windsor. He therefore contacted Mr. Stevens to ask about the process for temporary transfers. Once Mr. Stevens had explained the pro-



cess, Mr. Beck advised him that junior technicians were being sent to Windsor on a temporary transfer when Mr. Beck had volunteered, and he asked that the Union look into it for him. When Mr. Stevens contacted management about the issue, he was told that because Messrs. Beck and Stenback were on PRMs, they had not been picked to go to Windsor.

- 30 Mr. Beck had been put on the PRM program in the Fall of 2016, and was on it for about six months. He believed he had been put on PRM because he had not hit certain numeric targets regarding how long it took him on a job, how many completes he had in a day, and the number of reworks he may have had.
- 31 From Mr. Beck's experience, his work day while on PRM had been no different from any other day, and he did not recall having received any additional coaching or mentoring while he had been in the program. His Field Operations Manager at the time, Steve Brown, had never come to his job sites to coach him, and Mr. Beck had not had any reason to call Mr. Brown regarding how to do his work. In cross-examination it was put to Mr. Beck that he had received three performance coachings with Mr. Brown on October 8, November 3 and November 24, 2016. The grievor could only recall having met the Field Operations Manager when he first came to London from another region, when they had gone on a short drive together. He had understood that to be an informal situation. Mr. Beck did recall meeting with Mr. Beck in January 2017, when he was told that his numbers were heading in the right direction, and that there was no need to correct anything or to send Mr. Beck on a ride along. Blair Stevens testified that he had been at the January 9, 2017 meeting with Dave Beck and Steve Brown. He recalled that Mr. Brown had told Mr. Beck was that he was doing great work, and to keep it up.
- 32 While on PRM, Mr. Beck had been dispatched to do work outside London for a day, although he could not recall the precise dates or locations. He had also received a merit award while he had been on PRM. The merit award, which he received in the third quarter of 2016, was for customer service excellence.
- 33 As with Mr. Beck, on January 24, 2017 Mr. Stenback had volunteered for the temporary transfer to Windsor for the period of January 26 to February 5, 2017. Prior to indicating his interest in the Windsor assignment, Mr. Stenback had spoken to Adam Smith, his Field Operations Manager, to tell him that Windsor was the grievor's home town, so he would not need a hotel, and could stay with his parents. His seniority date is August 1, 2014. Mr. Stenback did not receive a response from

WFM, but when he learned that technicians junior to him were going to Windsor, he asked Mr. Smith why he had not been allowed to go. Mr. Smith apologized to Mr. Stenback, but advised him that because he was on PRM, he was not allowed to go on the temporary transfer.

34 Mr. Stenback had been put on the PRM program in October 2016, at which time Mr. Smith had advised him it was because his numbers were not high enough and he had some areas he had to work on. While on PRM, he received no additional training, and the only ride-along he had was with Blair Stevens. His Manager dropped by his work sites on three occasions over the course of the one year that he was on the PRM.

35 Mr. Smith also talked to Mr. Stenback frequently about his numbers, but at the same time viewed this grievor as one of his technicians who could deal with an irate customer, difficult jobs, or repeat jobs, all of which caused Mr. Stenback to get stuck on jobs for longer periods of time, and therefore affected his numbers. In late 2017, just after the grievor came off PRM, Mr. Smith gave Mr. Stenback an award for being the “go to guy”, who on several occasions had gone out of his way to make sure that problem jobs were fixed, and for ensuring that he took control of situations and turned them into positive ones for customers.

36 Mr. Stevens had asked Ian Reece, the Regional Manager, if he could mentor some people on PRM to see what they were struggling with that would have got them into the PRM program. As a result, Mr. Stevens went on an eight hour ride- along with Tyler Stenback during the time the grievor was on PRM. He observed no issues with Mr. Stenback’s workmanship or customer service skills, and reported that back to the manager at the end of the ride.

37 During the approximately one year that he was on PRM, Mr. Stenback had been dispatched outside of London for the day on a few occasions. However, he could not recall the specific dates or locations.

38 Michael Caruso is a technician in London who was on the PRM program. Mr. Stevens had accompanied Mr. Caruso at the initial PRM meeting at which management told Mr. Caruso why he was being put on PRM. According to Mr. Stevens, during the week that the grievors in this case had wanted to be transferred to Windsor, Mr. Caruso was dispatched to work in Windsor for a day, even though he was on PRM.

39 Mr. Costa testified that he had done a search of the data for the period of the Windsor temporary transfer, and Mr. Caruso was never sent to Windsor for one day during that period. He indicated it would be highly unlikely that a technician from London would be sent to Windsor for the

day since that would entail about five hours of travel there and back, and would make for a very short work day in Windsor. As such, there was a low probability of that happening. Rather, he testified that technicians may be sent out of their area to places where the travel would amount to one or 1.5 hours. However, in cross-examination, Mr. Costa could not account for the fact that in February 2019, Mr. Beck, while on a performance management program, had been dispatched for the day from London to Windsor once, to Leamington twice, and to Kitchener-Waterloo once.

40 In any event, Mr. Costa testified that a technician on PRM may be sent out of their dispatch area for one day at a time because they would be returning to their home base at the end of the day and could continue to be supported by their local manager. Mr. Belmore confirmed the Union's evidence regarding assignments outside of a technician's regular area: He indicated that it was common for technicians to be sent out of their locality for work, and that it happens almost every day in Ontario.

41 On January 25, 2017 Cindy Leon Gamarra, a Workforce Manager, sent the local London Field Operations Managers a list of the names of the ten technicians from London who had volunteered for the transfer to Windsor. The names were listed in order of seniority. Ms. Gamarra noted that five would be selected, and that the conditions to be applied to the names on the list were that the technicians must not be on a PRM and they must be willing to change their schedules depending on where they fell in seniority in the Windsor common locality. Due to the urgent need, the managers were urged to respond immediately.

42 There is no dispute that of the ten technicians on the list who had volunteered to be sent to Windsor for the January 26 to February 5, 2017 temporary transfer, Messrs. Beck and Stenback were numbers 2 and 4 on the list in terms of their respective seniority. Since five people were being recruited, but for the PRM issue, the two grievors would have been among those sent to Windsor for that transfer. Technicians on a temporary transfer are provided with accommodations and are paid \$55 per day for all other expenses. On their days off while on a temporary transfer, employees have their accommodations paid for, and are paid the per diem.

43 Mr. Costa had no knowledge of whether either of the grievors had his Field Operations Manager go on a ride along with a grievor, or do a drop in on a job they were on in the London area between January 26 and February 5, 2017, the period of the temporary transfer to Windsor. He

conceded that Messrs. Beck and Stenback were both qualified to do the technician work required in Windsor.

### **THE COLLECTIVE AGREEMENT**

44 Article 20, which addresses “Transfers”, states as follows:

#### **ARTICLE 20 - TRANSFERS**

##### ***PERMANENT TRANSFER PROCEDURE***

###### **20.01**

- a) Once a year, during the entire month of January, Full-Time and Senior Part-Time employees may put their names on the transfer list through written notice to their Operations Manager, using the form designed for this purpose.
- b) Full-Time and Senior Part-Time employees shall identify to their Operations Manager two (2) Transfer Territories (as per “Appendix E”) and/or Service Territories to which they would like to be transferred.
- c) A copy of these updated lists shall be provided to Union Stewards, upon request.
- d) Where the Company has a vacant Full-Time or Senior Part-Time position in a Transfer Territory, it shall give priority to the employee with the most seniority on the transfer list for this Transfer Territory, as long as this employee has more seniority than the next Part-Time employee eligible for upgrade in the same Team Territory.
- e) It is expressly understood that transfer requests will only be considered for employees whose performance on their existing job meets requirements.
- f) The transfer list prepared as per paragraph a) will be considered prior to both upgrade processes, in March and October.
- g) Transfer costs are borne by the employee.
- h) Where a Full-Time or Senior Part-Time employee is transferred as a result of one of his requests, his second request shall become null and void.

##### ***TEMPORARY TRANSFERS***

###### **20.02**

A temporary transfer shall not exceed ninety (90) calendar days. However, if the parties agree during the application of Article 10 (Force Adjustment - Full-Time employees), a temporary transfer may exceed ninety (90) calendar days.

## 20.03

In the case of a temporary transfer, the work team shall agree on the choice of volunteers. If the team cannot reach an agreement, the Company shall transfer an employee qualified to do the job having the least amount of seniority within the team.

**ARGUMENTS**

- 45 The Union argues that the Employer has violated the terms of the collective agreement by improperly denying the grievors the temporary transfer to Windsor in early 2017. It states that the facts are not really in dispute, but the issue is the interpretation of the collective agreement.
- 46 Based on the Union's evidence, it is argued that the local work team agreement is that the senior volunteer for a temporary transfer will go so long as he or she is qualified to do the work needed. At no point before the circumstances giving rise to these grievances had the Union ever been aware that in 2016 the Employer had started applying the criterion that a senior volunteer would be disqualified from being sent on a temporary transfer if he or she was on PRM. The Union argues this is a restriction that has been imported into the collective agreement contrary to the express provisions of the agreement.
- 47 According to the Union, the parties have differentiated between how permanent transfers and temporary transfers are to be conducted. They have agreed on a detailed code to govern the permanent transfer process, but there is a much less formal process for temporary transfers.
- 48 In addition, the Union points out that when the collective agreement was bargained in 2011, the PRM program did not exist, so it could not have been in the minds of either the Employer or the Union. In any event, it is only in the permanent transfer procedure that the parties have agreed that permanent "transfer requests will only be considered for employees whose performance on their existing job meets requirements" (Art. 20.01(e)). The Union notes that in its July 7, 2017 Step 3 Grievance response regarding both grievances, the Employer indicated it was relying on Article 20.01(e). The Union does not concede that the PRM is a valid measure of whether an employee is meeting their job requirements, but that is not the issue in this case.
- 49 Pursuant to Article 20.03, which governs temporary transfers, the Union argues that the evidence in this case is that the work team has a long-established practice that reflects their agreement that it is the senior qualified volunteer who is assigned to a temporary transfer. Only if there

are no volunteers, would the Employer have the right to temporarily transfer the least senior qualified employee. The Employer in this instance did not have the agreement of the work team that it could disqualify a senior qualified volunteer on the basis of the individual being on a performance management program.

50 The Union relied on the following jurisprudence in support of its arguments: *Toronto Typographical Union, Local 91 v. Council of Printing Industries of Ontario* (1964), 15 L.A.C. 318 (Ont. Arb.) (R. W. Reville); *Bell Technical Solutions v. C.E.P.* (2010), 104 C.L.A.S. 175 (Can. Arb.) [2010 CarswellNat 5732 (Can. Arb.)] (P. Picher); *Clean Harbors Canada Inc. v. C.E.P., Local 914* (2012), 216 L.A.C. (4th) 276 (Ont. Arb.) (P. Knopf); and, *St. Michael's Hospital and ONA (201206035), Re* (2013), 235 L.A.C. (4th) 389 (Ont. Arb.) (J. Stout).

51 By way of remedies, the Union is seeking a declaration of violation of the collective agreement; a finding that the Employer cannot import the PRM restriction (which program is now called the CFS); an order for compensation to the grievors for all their losses; and the Union requests that the arbitrator remain seized of any disputes that may arise out of the implementation of the award.

52 The Employer argues that BTS must be able to exercise its management rights to direct its workforce in order to improve the efficiency of its operations, with the aim of providing the best customer service at the lowest cost. It relies on the company's right to manage its enterprise, which may also require it to implement changes to adapt to pressures the company may be facing. BTS argues that the evidence supports its assertion that it has legitimate business reasons for excluding the grievors from the temporary transfer in this case.

53 BTS also asserts that it was acting in the best interests of the grievors by not transferring them to Windsor, so that they would remain close to their regular managers, who could support them in their work. The Employer conceded that there was no evidence that the grievors had in fact received any support at all from their managers during the period in question, but BTS states that it would be impossible to know in advance whether they would have needed support had they run into any problems on site. It also maintains that when a technician is temporarily transferred to another area, the Field Operations Managers in those areas have to take on about five extra technicians each, so that in light of the short period of a transfer, it would be unrealistic to manage their performance during that time.

- 54 With respect to technicians on PRM being sent out of their area for one day, BTS argues that is irrelevant to the issue in this case. Such a technician is out of area for just one day, and remains under the authority of their regular manager, so can be monitored and assisted as needed.
- 55 The Employer argues that the work team did not sit down to decide who would be transferred, and that Mr. Stevens' evidence is only a claim about what the Union's long standing agreement on temporary transfers should be. Even assuming that the Employer has to rely on the Union's tacit agreement, BTS argues it is not precluded from applying other criteria for temporary transfers. In addition, BTS argues that Mr. Stevens' evidence is insufficient to find a long standing practice, which was known to, and acquiesced in by, the Employer.
- 56 BTS does not question Mr. Stevens' credibility, but asserts that he has limited knowledge and understanding of the process used for selecting and dispatching technicians for temporary transfers because that process is not handled by the Union. The Employer posits that the only role for a union member is to indicate yes or no to a temporary transfer offer sent by text to the employee's cell phone.
- 57 The Employer argues that nothing in Article 20.03 suggests that the senior qualified employee should be sent on a temporary transfer, and states that the language does not support such an interpretation. BTS outlined a number of articles where the parties have agreed that seniority plays a role, e.g. 9.06, 10.06, 10.13, 16.01(e), and 17.03, and notes by contrast that 20.03 does not make it explicit that seniority governs.
- 58 BTS states that the grievances should be dismissed. In the event that they are upheld, the Employer asks that no reference be made to the new performance management program, CFS, as it was not the subject matter of these grievances.
- 59 The Employer relies on the following jurisprudence in support of its arguments: *Brown & Beatty Canadian Labour Arbitration*, Chapter 5:0000; *Alberta Health Services v. A.U.P.E.*, 2009 CarswellAlta 2319 (Alta. Arb.) (J. Leslie Wallace); *New Westminster School District No. 40 v. C.U.P.E., Local 409* [2010 CarswellBC 4034 (B.C. Arb.)] [Board of Education], (Unreported decision of Arbitrator Emily M. Burke, November 15, 2010); and, *Newfoundland and Labrador Housing Corp. and CUPE, Local 1860 (McDonald), Re*, 2014 CarswellNfld 387 (N.L. Arb.) (James C. Oakley).
- 60 In reply, the Union noted that this collective agreement contains no management rights clause. With respect to Article 20.03, the Union ar-

gued that *it* is the voice of the local work team, and Mr. Stevens, as the Chief Steward in London, has testified about the long-established local practice of the senior qualified volunteer being sent on temporary transfers. The Union asked, rhetorically, whether the Employer really wanted each work team locally to decide on who would be sent on time-sensitive temporary transfers? Rather, the 20 year practice in London is how this work team has agreed that the Employer can manage temporary transfers.

- 61 With respect to the Employer position that no findings should be made regarding CFS, the Union states that the issue in these grievances is whether being on a performance management program can bar an otherwise senior qualified employee from being sent on a temporary transfer. The issue is not simply about the PRM program.

### DECISION

- 62 The question in this case is whether BTS had the authority, under the terms of the collective agreement, to impose as a condition of eligibility for a temporary transfer that an employee not be on a performance management plan.
- 63 The principles of collective agreement interpretation have been honed through jurisprudence (*Clean Harbors Canada Inc.*, cited above, paras. 23 - 24) to the following:
- a) Consider the entire context of the collective agreement;
  - b) Read the words of a collective agreement,
    - In their entire context,
    - In their grammatical and ordinary meaning;
  - c) Read the words of a collective agreement harmoniously,
    - With the scheme of the agreement,
    - With the object of the agreement,
    - With the intention of the parties;
  - d) An interpretation that leads to an absurdity should be rejected.
- 64 The parties to this collective agreement have used headings for articles, often followed by sub-headings to delineate more specific matters. As an example, in Article 6, which addresses “Time Off for Union Business”, there are sub-headings for Grievances, Other Union Business, and General, each with their own sub-sections of the Article. Similarly, in Article 9, which addresses “Seniority”, the parties have a sub-heading for



what appears to be a definition of Seniority, and other sub-headings and article sub-sections for Seniority List by Team Territory, Notice to the Union, Return to the Bargaining Unit, and Recalling Part-Time Employees. The entire collective agreement is characterized by the use of sub-headings within articles to structure the document.

- 65 As already reproduced above, Article 20 addresses “Transfers”, and is the subject of these grievances. It is divided into two sub-headings: Permanent Transfer Procedure and Temporary Transfers. The Temporary Transfer provisions govern the circumstances in this case, and according to Article 20.03, the parties have agreed that “in the case of a temporary transfer, the work team shall agree on the choice of volunteers”. The Union’s evidence is that for at least the last 20 years, in the London area, the bargaining unit members’ accepted practice for temporary transfers has been that senior qualified volunteers will get temporary transfers, and only if there is no qualified senior volunteer, will a more junior qualified person be assigned.
- 66 While BTS argued that there is insufficient evidence to that effect, I am satisfied that the Chief Steward’s evidence is compelling. Mr. Stevens has been working in London as a technician for 28 years. In his long experience, technicians have been chosen for temporary transfers based on qualifications and seniority. It seems obvious that was the accepted practice as it was only when the two grievors realized that junior technicians had been chosen over them that they complained. They had clearly expected to be chosen so long as there were not enough technicians more senior to them who had volunteered for the temporary transfers.
- 67 By contrast, the Employer had no evidence at all to contradict the Union in this regard. Mr. Belmore did not know what the eligibility conditions for temporary transfers had been, even though he had been a Field Operations Manager. Mr. Costa only joined BTS in 2015, and had no first-hand knowledge of what the practice had been. Despite his assertion that his managers had told him that an employee being on a performance management plan had been a disqualifying criterion in the past, there is simply no evidentiary support for that hearsay evidence. It is noteworthy that it is Mr. Costa’s evidence that it was *his* decision to add this criterion to the temporary transfer protocol when the PRM program was rolled out in BTS in 2016. Based on the evidence before me, Mr. Costa did not advise the Union he was doing so before the roll out, and

he did not seek the Union's approval for this addition, so it cannot be said that the "work team" agreed to this criterion.

68 Article 20.03 does not give the Employer any rights to decide on who is chosen for temporary transfers unless the work team *cannot* reach an agreement, and even in that event, the parties have agreed that the Employer must then transfer a qualified employee with the least seniority within the team. There is simply no mention of consideration of performance. Thus, even if I was to accept the BTS argument that there had been no agreement of the work team on the choice of volunteers, then WFM would have to have chosen the five most junior qualified technicians for the temporary transfer to Windsor.

69 It did not do that in this instance. WFM sent its Field Operations Managers in London the names of ten volunteers, in their order of seniority from highest to lowest, and asked the managers to vet the list based on whether a technician was on PRM and willing to change their schedules depending on where they would fall in seniority in the Windsor area. The latter qualification is not in issue here. Ultimately, BTS sent the five most senior qualified technicians to Windsor, with the exception of the two grievors, because they were on the PRM program.

70 The Employer response to these grievances is instructive: It believed it had the right to disqualify a senior volunteer under Article 20.01(e). Article 20.01 addresses permanent transfers, not temporary transfers. So to the extent that 20.01(e) may encompass the PRM program, and I make no findings in that regard as it is unnecessary to do so in this case, that provision is not applicable to temporary transfers. Had the parties wished to include a provision to that effect in the Temporary Transfers section, they could have done so, as they were dealing with both types of transfers in the same Article.

71 In order to interpret the collective agreement before me, I must look at the words the parties used in Article 20 in its entire context. I am satisfied that the parties meant the sub-headings to have meaning. As Arbitrator Reville wrote in the *Toronto Typographical Union* decision, cited above, at p. 322:

The board is further fortified in this interpretation by the heading of art. 6, "Struck Work Clause". Headings are used in documents to explain the section or group of sections placed under them (see *Martins v. Fowler*, [1926] A.C. 746), and have been said to be a better guide to construction than a preamble (see *Eastern Counties and London*

*and Blackwall Railway Cos. v. Marriage* (1860), 9 H.L. Cas. 32, 11 E.R. 639).

- 72 What BTS is essentially asking me to do is to read into the collective agreement a provision that is not there. At Article 14.03 of the collective agreement the parties have agreed that “the Arbitrator has no jurisdiction to modify, strike out or add to the Agreement”.
- 73 In *Bell Technical Solutions v. C.E.P.*, cited above, Arbitrator Pam Picher addressed an employer argument that a phrase be read into an hours of work provision in the collective agreement. The arbitrator noted, at para. 29, that to add a phrase to a critical clause as suggested by counsel for BTS “would be for the Arbitrator to add to the language of the collective agreement. As set out in Article 14.04 of the agreement, however, “[t]he Arbitrator has no jurisdiction to modify, strike out or add to the Agreement””, and she declined to do so. That is the same language that is before me in this case, and it is beyond my jurisdiction to read into Article 20.03 that the Employer can consider whether an employee seeking a temporary transfer is meeting their existing job requirements, or is on a performance management program. I agree with Arbitrator Picher’s analysis (at para. 33 of that decision), which when applied to the facts before me suggests that since the parties did not include the criterion of “performance on their existing job meets requirements” in the temporary transfer provision, even though they had it for permanent transfers (at Article 20.01(e)), they must be taken to have excluded it intentionally.
- 74 Reading the language of Article 20 in its entirety, it is clear that while the parties negotiated a comprehensive process to govern permanent transfers, they had a much different process for temporary transfers, one that was largely driven by what the bargaining unit members wanted.
- 75 BTS argues that it has management rights which permit it to impose the criterion that an employee in a performance management plan will be excluded from consideration for a temporary transfer. This collective agreement contains no “Management Rights” clause. The Employer argued that even though there is no specific management rights provision, it nonetheless retains the right to manage its enterprise and adapt to pressures the enterprise is facing.
- 76 The excerpt the Employer relied on from the *Brown & Beatty* text, cited above, outlines that whether or not there is an express provision in a collective agreement giving management the power to initiate changes in its enterprise, it has been recognized that management has such authority flowing from its responsibility to manage the enterprise. However,

*Brown & Beatty* goes on to note that most, if not all, collective agreements do not permit managerial discretion to remain unfettered, and generally include provisions that bear directly on the extent to which management may react to the pressures a company may face. Specific collective agreement provisions may impinge upon the exercise of management's initiative in dealing with changing conditions and work requirements in the workplace.

77 I have not found the jurisprudence relied upon by BTS to be helpful in deciding this case. In *Alberta Health Services*, cited above, there was a strong management rights clause. In addition, the transfer and vacancy provision in that collective agreement required the employer to consider "the most requisite job related skills, training, knowledge, and other relevant attributes, and where these factors are considered by the Employer to be equal and satisfactory, seniority shall be the deciding factor" (at para. 15). The collective agreement before me has no management rights clause, and the temporary transfer provision contains language that is nothing like that in the *Alberta Health Services* decision. Unlike that case, (at para. 37), Article 20.03 contains unequivocal language that would overcome any basic management rights to organize or deploy the BTS workforce.

78 In this case the parties have only given management the right to decide how to temporarily transfer workers where there is no agreement by the work team of bargaining unit members about how to do so. Since I have accepted that there was a long-established practice accepted by the Union in London that it was senior, qualified volunteers who would be temporarily transferred, there was no default left to the Employer to allow it to decide how to do temporary transfers. In any event, even if BTS had the default right to temporarily transfer workers, the parties had agreed on what that process would look like: BTS would have to "transfer the employee qualified to do the job having the least amount of seniority within the team" (Article 20.03). That is not what the Employer did at any time or in any circumstances about which I have heard evidence: Until late 2016, when Mr. Costa inserted the criterion of excluding senior qualified volunteers if they were on a performance management plan, the Employer practice had been to transfer the senior qualified volunteer.

79 In *Board of Education of School District No. 40 (New Westminster)*, cited above, the collective agreement contained a management rights clause and a clause regarding "Board Initiated Transfers", which only

applied where there was a vacancy. The school board had created temporary teams of custodians from various schools to do deep cleaning of schools during the summer, which the union claimed was a violation of the collective agreement. In that case the arbitrator stated at p. 25 as follows:

I note first that restrictions on an employer's management rights to organize must be clearly and unambiguously bargained for. The Union in this case must be able to identify a restriction which circumscribes management's right to re-organize the workforce.

80 In this instance, as outlined earlier, I have found that the parties have clearly and unambiguously bargained a restriction that circumscribes BTS' right to temporarily transfer its workers. As such, I cite with approval from an excerpt at p. 28 in the *Board of Education* case, from a decision in *Board of School Trustees of School District No. 43 (Coquitlam) and CUPE, Local 561, Re* (1991), 23 C.L.A.S. 118 (B.C. Arb.) [1991 CarswellBC 3136 (B.C. Arb.)], which states as follows:

The fundamental proposition in the Employer's argument is that there is nothing in the collective agreement that limits its right to transfer employees and therefore it retains the right to transfer employees as a matter of management rights. We accept the proposition that the right to initiate a transfer is a right traditional to management and in the absence of a contractual provision restricting that right an employer will be deemed to have retained it. See *Corporation of the City of Victoria and Canadian Union of Public Employees, Local 50* (1982), 2 L.A.C. (3d) 368 (Brown) and *Wire Rope Industries Ltd. and United Steelworkers, Local 3910* (1982), 4 L.A.C. (3d) 323 (Chertkow). The question remains however, whether the parties have agreed to a provision restricting that right by use of the word "position" in the collective agreement and the meaning that is to be attributed to that term.

81 While it is BTS' right as the manager of its enterprise to determine when and from where it may need to temporarily transfer its employees, the collective agreement before me restricts the right of the Employer to decide who may be chosen for temporary transfers.

82 For all of the reasons outlined above, the grievances are upheld. I find that the Employer breached Article 20.03 of the collective agreement when it disqualified Messrs. Beck and Stenback from being temporarily transferred to Windsor between January 26 and February 5, 2017, on the basis that they were on the PRM program at the time. As such, the Employer is directed to compensate the grievors for all their losses incurred

as a result of the loss of the transfer opportunity. I will remain seized of any disputes that may arise out of the implementation of this award.

*Grievances allowed.*