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Re United Brewery Workers, Local 173, and Carling Breweries Ltd

Innis Christie

RE UNITED BREWERY WORKERS, LOCAL 173, AND CARLING BREWERIES LTD.

I. Christie. *March 22, 1968.*

EMPLOYEE GRIEVANCE requesting assignment to vacant job.

M. Levinson and others for the union.
J.C. Adams, Q.C., and others for the company.

AWARD

The facts:

This grievance arises because the job of fork-lift truck mechanic was given to Lloyd LaCombe who had less seniority than does the grievor William Reidel. LaCombe was and is classified as a mechanic "B". Reidel is an oiler. John Futter, who had been the fork-lift truck mechanic for 11 years before he quit, was classified as a mechanic "B". The job is a desirable one because it is a steady day job.

The relevant seniority provision of the collective agreement is:

> "13.01 When a more desirable or higher rated job becomes vacant or a new job is established within a Department, it shall be filled where possible from within the Department *on the basis of qualifications, with preference to employees having the greatest seniority* according to the Departmental seniority list." (Italics added.)

The effect of this provision is that where the employee with the greatest seniority has the necessary qualifications he is entitled to the job in question. It is not a matter or comparing his qualifications with those of less senior employees so Mr. LaCombe's qualifications are not in issue. Furthermore, it is agreed that Mr. Reidel, the grievor, is senior to Mr. LaCombe.

The issue:

The issue, broadly stated, is whether the company was entitled under art. 13.01 to deny the grievor the fork-lift truck mechanic's job, on the basis of qualifications. Deciding that the grievor lacks the required qualifications really involves two decisions. In the first place the standard of qualifications required for the job must be determined, and secondly it must be decided whether the most senior employee meets that standard.

In the normal course of things, where the standard of qualifications is not set out in the collective agreement the company makes both decisions. On what basis can the company's decision on either of these matters be questioned in arbitration proceedings? The answer will of course depend on the collective agreement.

The relevant provision of the collective agreement before us is art. 3, the "management functions" article. It provides:

> "3.01 The Union acknowledges that it is the exclusive function of the Company to:

(b) hire, discharge, transfer, promote, demote or discipline employees . . .

"3.02 It is understood that in exercising these functions the Company must conform with all other clauses of this agreement. . . ."

The effect of this clause is that where the company has established a standard of qualification for a particular job an arbitrator should not question the standard established except on the very limited ground that management must be *genuinely* doing what it purports to do. In other words the company must ". . . act arbitrarily, unreasonably, or in bad faith, and use 'establishing qualifications' as a guise in defeating employee rights under the agreement." (*Re United Cork, Linoleum & Plastic Workers, Local 380, and Union Carbide Canada Ltd.* (1966), 17 L.A.C. 171 at p. 174 (I. Christie, chairman)).

I realize of course that the collective agreement before the board in the *Union Carbide* case was much more explicit in giving to management the right to determine job qualifications than is the one before me now. However, it seems to me that the right to determine the standard of qualifications necessary for a job is one which would be expected to inhere in management and which therefore, subject to some limitation in the agreement, flows from any standard management rights provision. That right must of course be exercised *bona fide*. The first issue then is whether the company has properly established a standard of qualifications necessary for the job of fork-lift truck mechanic.

The second decision, *i.e.*, whether a particular employee meets the standard set, is, under this collective agreement, properly a matter for consideration by the arbitrator. Article 3.02 qualifies art. 3.01(b), so art. 3.01(b) does not excuse the company where it is alleged that management has not applied 13.01 properly in accordance with the standards set. An arbitrator must, of course, realize that an employee's supervisors are in the best position to judge his qualifications and an arbitrator should for that reason hesitate to substitute his own judgment for that of the company. The task of assessing skills or qualification has been undertaken by boards of arbitration, where it is not given over to management by the collective agreement, in, for example, *Re Textile Workers, Local 755, and Dominion Fabrics Ltd.* (1963), 13 L.A.C. 201 (Judge W. Little, chairman); *Re Northern Electric Employee Ass'n and Northern Electric Co. Ltd.* (1965), 16 L.A.C. 278 (Judge W.S. Lane,

chairman); *Re Int'l Chemical Workers, Local 721, and Brockville Chemicals Ltd.* (1966), 16 L.A.C. 393 (J.F.W. Weatherill, chairman).

In the case before me Mr. Nelson, the plant manager, who was the only witness for the company, testified that in deciding who should get the fork-lift truck mechanic's job management did not even consider the grievor. Therefore it falls to me as arbitrator to decide whether the grievor has the qualifications necessary for the job.

The evidence:

Mr. Nelson testified that in deciding on the job in question management considered only employees in the mechanic "B" classification. The previous holder of the job, as has already been mentioned, was a mechanic "B".

At the second step of the grievance procedure the grievor met with Mr. Nelson, among others. In answer to the grievor's inquiry how he might qualify himself for the job Mr. Nelson told him that in order for him to become a mechanic "B" he would have to be able to do a lathe work to loose tolerances and some welding. Mr. Nelson's testimony was that he told the grievor that in order to qualify ultimately to be a mechanic "A" there were other skills that he should master. The grievor's testimony was that he subsequently told Mr. Nelson that he had enrolled in a night course to learn a machinist's skills and was then told that various other skills were also needed to become a mechanic "B"

Much of the evidence introduced on behalf of the union was directed to demonstrating that many mechanics "B" in the plant could not operate a lathe and I am satisfied that this is so. Moreover there is little doubt that the ability to operate a lathe has never been considered a necessary qualification for the job of fork-lift truck mechanic. It is obvious that the company was less than forthright in dealing with Mr. Reidel at step two of his grievance.

Under cross-examination Mr. Nelson admitted that had he been told that Mr. Reidel frequently did mechanical work without supervision he would have considered him for the fork-lift truck mechanic's job. This comment not only casts serious doubt on the suggestion that ability to do lathe work and welding are qualifications necessary for the job, it also makes clear just what qualifications management really looked for in making the selection. Only mechanics "B" were considered because what was wanted was a man who could do general mechanical work,

and who had demonstrated an ability to work without supervision.

There was some discrepancy in the evidence of the amount of time which the previous incumbent, Mr. Futter, had spent doing general mechanical work apart from work on the fork-lift truck. There was also a considerable discrepancy in the evidence as to the amount of time spent each day on the routine task of putting batteries on charge and replacing them in the trucks. It is clear however that the fork-lift truck mechanic spends an appreciable amount of time each day on mechanical maintenance work and that for a period of at least two weeks each year assists in general mechanical work in the shop.

Mr. Nelson testified that when he was told, in the course of the grievance proceedings, that the grievor had done considerable mechanical maintenance work on his own, without supervision, he checked with his foreman and was told that this was not so. The grievor testified that he spent about one-third of his time as a mechanics' helper, repairing all types of bottle shop machinery. He testified that on occasion he did minor jobs completely on his own, and that it was not unusual for him to finish a job on his own which he had commenced as assistant to a mechanic. The grievor testified that on several occasions he had taken over the fork-lift truck mechanic's job when Futter was on vacation one of the mechanics "B", rather than the grievor, was given the fork-lift truck job.

Decision:

The first question is: What qualifications did the company require for the fork-lift truck job, and did it act genuinely in setting them?

The company made the assumption that the job should be available only to mechanics "B", but it is clear that to be a "mechanic 'B'" is not a "qualification" as the term is used in art. 13.01 of the agreement. "Mechanic 'B'" is a job classification set out in art. 28.01 as a basis for wage rates. It is true that art. 28.03 provides that "in order to be classified as maintenance mechanic 'B', an employee must be able to do the general mechanical work ordinarily arising in the department, . . ." but it became clear at the hearing that employees with widely differing skills and qualifications are classified as mechanics "B". It also became clear that to be classified as a mechanic "B" an employee must not only be able to do the general mechanical work ordinarily arising in the department, he must also be able to do it on his own without supervision.

"Mechanic 'B'" is not a "qualification", it is a pay classification in which employees doing jobs demanding a certain level of skill and responsibility are placed.

In considering only mechanics "B" for the fork-lift truck mechanic's job, management acted honestly, but it must be considered to have acted arbitrarily because it is clear that "mechanic 'B'" is not a "qualification" in the sense that the word is used in art. 13.01. In setting ability to do lathe work as a qualification in answer to the grievance the company compounded its error, because lathe work has never been part of the fork-lift truck mechanical work. However, the problem remains: What are the qualifications necessary for the job? Mr. Nelson said that the most important qualification was the ability to work without supervision, in both the routine work on the fork-lift truck and other mechanical work that the fork-lift mechanic is called upon to do. There is no basis upon which I, as arbitrator, should say that this is other than a genuine qualification required for the job.

The final and most difficult question then is: Does Mr. Reidel have a demonstrated ability to work on his own without supervision on general mechanical tasks? Mr. Nelson testified, on the basis of inquiries of his foremen, that the grievor has not demonstrated this ability. The grievor testified that on his own he had done very minor mechanical tasks and has completed major tasks begun under supervision. On the wording of art. 13.01 the evidentiary burden of establishing his qualifications is on the grievor. He has not satisfied me that he has a demonstrated ability to do general mechanical work without supervision and I must therefore deny the grievance.

Notice requirements:

The union alleged that the grievor, William Reidel, has the "qualifications" necessary for the job of fork-lift truck mechanic and that he should have been given seniority preference over Lloyd LaCombe who was given the job. The effect of upholding the grievance would have been that Mr. LaCombe would have lost this desirable job. The grievance has been denied so there is no reason to be concerned about notice to Mr. LaCombe. This, however, is obviously *ex post facto* justification and I wish therefore to make some comments on the notice requirements in a case such as this.

The legal requirements of notice to employees who may be affected by an arbitration decision are to be found in *Re Bradley*

et al. and Ottawa Professional Fire Fighters Ass'n (1967), 63 D.L.R. (2d) 376, [1967] 2 O.R. 311, a judgment of the Ontario Court of Appeal delivered by Laskin, J.A. The *Bradley* decision has now been approved by the Supreme Court of Canada in *Hoogendoorn v. Greening Metal Products and Screening Equipment Company* (1967), C.C.H. 67 C.L.L.C., para. 14,064.

In the case before me Mr. LaCombe was given some informal notice which may have been incomplete. If in future I were faced with a similar case I would adjourn the hearing in order to better satisfy myself that notice in accordance with the direction given by Mr. Justice Laskin in the *Bradley* case had been served on an employee in Mr. La Combe's position.

On p. 382 of 63 D.L.R. (2d), Mr. Justice Laskin states the nature of required notice.

> "Preferably, it should be in writing indicating the issue or issues to be arbitrated as involving the possible diminution of the collective agreement benefits being enjoyed by the persons entitled to the notice; and it should advise of the date, time and place of hearing, of the right to be represented by counsel or otherwise, and should be served personally or by registered mail sufficiently in advance of the date fixed for the hearing to give the notified persons a reasonable opportunity to prepare their submissions if they decide to appear. I should think that if there is any question of the proper length of notice it would be one for the arbitrator to settle in the first instance."

Earlier, on p. 379, Mr. Justice Laskin says, however, that it is unnecessary in the case before him to foreclose ". . . the possibility that required notice may be sufficient even if not given formally, or that it may not even be necessary if an affected person becomes aware of a pending issue that may affect him and has an opportunity to seek audience . . .". Nevertheless, as arbitrator I would in future be reluctant to proceed without proof of reasonably formal and complete notice.

On the question of who has the primary duty to give notice to affected employees, I think it is clear that in Mr. Justice Laskin's opinion it is the company. In the *Bradley* case His Lordship says at p. 383 of 63 D.L.R. (2d):

> ". . . I would regard it as of course for the city [*i.e.*, the employer] to advise the promoted employees of the jeopardy to their enhanced status by reason of the pending arbitration

> proceedings. . . . . The union too may be expected to tell the promoted employees that their promotions were being challenged in an arbitration proceeding."

In the following paragraph Mr. Justice Laskin makes it clear that the arbitrator or arbitration tribunal does not have the duty to give notice but "... must also be alert to refrain from adjudicating on the collective agreement benefits of unrepresented employees unless they have been given proper notice." This must mean that where the company has not given notice, unless the union has done so, there must be an adjournment. The result of failure by both parties will be delay and increased expense.

On the matter of to whom notice must be given, according to the *Bradley* decision the only employees entitled to notice are those who may be stripped by the arbitrator's award of benefits under the collective agreement which have been accorded to them in competition with the grievor or grievors. The principle of the case is stated by Mr. Justice Laskin as follows [p. 377]:

> "... Where two employees or two groups of employees covered by the same collective agreement compete for benefits thereunder which are accorded by the employer to one or to one group only and the disappointed employee or group invoke the grievance machinery to seek redress and their case is taken to arbitration by their bargaining agent (the union party to the collective agreement), it is reversible error on *certiorari* for the arbitrator to make an award in their favour which strips the other employee or group of the benefits in question if the latter have not been given timely notice that the benefits conferred upon them by the employer would be brought directly into question at the arbitration hearing and might be lost as a result thereof."

In the case before me, therefore, only Mr. LaCombe had any right to notice. The right to notice established by the *Bradley* judgment does not extend to employees who have not seen fit to grieve, even though their entitlement to the job in question would, on the face of the collective agreement, seem as great as the grievor's.

The *Bradley* judgment makes it clear that the arbitrator is not entitled to disregard the requirement of notice to an employee in Mr. LaCombe's position on the ground that his interest appears to be co-extensive with the company's so that there would be nothing left for him to add in argument. Mr. Justice Laskin stated (at p. 381) "It is my view that it is not an answer to a

challenge to the [employer's] action to say that it alone must be left to protect the position of the employees whom it has selected for preferment." To say that there is no necessity of notice because the company will "put the whole case" against the grievance is to deny the *Bradley* decision any real effect.

Because I have seen fit to deny the grievance in this case my comments on the application of the *Bradley* decision are gratuitous. I offer them, however, as an indication of the position that I may be expected to take in any future arbitration in which I am involved.