9-21-1979

# Re Eastern Provincial Airways (1963) Ltd and Canadian Airline Employees' Association

Innis Christie

## RE EASTERN PROVINCIAL AIRWAYS (1963) LTD. AND CANADIAN AIRLINE EMPLOYEES' ASSOCIATION

*I. Christie. (Canada) September 21, 1979.*



UNION GRIEVANCE alleging improper filling of job vacancy.

*G. Beaulieu* and others, for the union.
*A. G. Lilly* and *N.S. Linn*, for the employer.

### AWARD

In the summer of 1978, Watters and Miller, traffic agents in Saint John, New Brunswick, applied for inter-base transfers to Montreal. That autumn a permanent vacancy occurred for which both Ms. Miller and Mr. Watters met all requirements except, possibly, the language requirement. Both were given a "test" by the employer and, in the result, neither was given the transfer requested. According to Watters' testimony, Ms. Miller initiated the grievance now before me but, as Watters put it, "it was explained to her [presumably by the union] that it would go in my name where I was the most senior person". At any rate, a letter of grievance was sent to the employer over the signature of Dan Carrier, Canadian Airline Employees' Association ("C.A.L.E.A.") chairman, which took the following form:

> P. O. Box 118
> Cocagne, N.B.
> 24 Feb. 79
>
> Mr. K. Howlett
> Manager of Personnel
> and Industrial Relations
> Eastern Provincial Airways
> Gander, Nfld.
>
> Ref. Article 15.05
> Alleged violation Art. 12.05 and other related articles.
> Whereby a valid inter base transfer was not actioned when a permanent vacancy occurred in the Montreal Base.
>
> Dear Mr. Howlett:
>
> In accordance with the collective agreement between Eastern Provincial Airways and its Traffic Agents as represented by the Canadian Air Line Employees Association a grievance is hereby initiated at the Step Two level of the

grievance procedure. The nature of this grievance is such that it involves inter base transfers which are handled at Headquarters level both Union and Company.

It is requested that all decisions and notices of hearings be forwarded to the undersigned and those copied below.

Yours truly,

Dan Carrier
CALEA Chairman

cc: Labour Relations, CALEA Headquarters
J. Crocker, CALEA Director

The employer responded on March 2nd, as follows:

Mr. Dan Carrier
C.A.L.E.A. Chairman
P.O. Box 118
Cogagne, New Brunswick
Dear Mr. Carrier:

RE: ARTICLE 15.05 — ALLEGED VIOLATION ARTICLE 12.05 WHEREBY VALID INTER BASE TRANSFER NOT ACTIONED WHEN A PERMANENT VACANCY OCCURRED IN MONTREAL

I have received the above alleged violation and find the following:

A. When the vacancy occurred, all employees having valid requests for inter-base transfers to Montreal were asked in order of seniority if they wished to fill the vacancy. The filling of the vacancy was conditional upon their meeting the language requirement as provided for in Article 12.05.

B. All employees with valid requests for transfer were then sent to Montreal, where they were tested to ascertain the competency in the French language. This was done in the presence of a Union Representative.

C. After the interviews were held, it was the opinion of the people who conducted the meeting, as well as that of the Union Representative, that none of the candidates were competent enough in French to work in Montreal.

Based on the above information, and in accordance with the provisions of Article 12.05, the Company denied existing employee the transfer to Montreal, and hired a qualified person to fill the vacancy.

Yours truly
EASTERN PROVINCIAL AIRWAYS (1963) LIMITED
Kevin C. Howlett
Manager, Personnel & Ind Relations

c.c. Mr. D.M. MacLean, Dir/Station Admin
c.c. Mr. R. Battcock, Station Manager, YUL
c.c. Mr. J. E. Crocker, Dir/Calea, Unit 4, YYT
c.c. Mr. P. DuBois, Chairman Calea, YUL
c.c. Calea Headquarters

At the outset of the hearing before me Mr. Lilly, on behalf of the employer, objected that the grievance did not properly put in issue the individual rights of Mr. Watters. He acknowledged the right of the union to bring a grievance on behalf of an individual but submitted that since Mr. Watters was nowhere referred to in the grievance and since no remedy was sought for him this could not be treated as an individual grievance. Mr. Lilly also stressed the fact that the collective agreement between the parties provides for three separate types of grievances. Article 15.04 provides for "Individual Grievances", which are to be submitted by the employee and/or the Union to "the immediate Supervisor or Designee" and may be appealed at Step 2 to the industrial relations director. Article 15.05 provides that "grievances of a General or Policy nature may be initiated by the Union at the Industrial Relations Step 2 level", and art. 16.01 provides for grievances involving discipline or discharge. This grievance, he submitted, is on its face a grievance "initiated at the Step 2 level" and is therefore a "General or Policy" grievance and an inappropriate vehicle for the determination of individual rights.

An arbitrator under a collective agreement must be reluctant to let form interfere with substance. Matters of general policy may be raised in individual grievances and grievances initiated as policy grievances may bear directly on individual employees. As is pointed out by arbitrator Shime in *Re Canadian Broadcasting Corp. and National Assoc. of Broadcast Employees & Technicians* (1973), 4 L.A.C. (2d) 263 at p. 266:

> (d) there is a hybrid type of grievance which is a combination of the policy grievance and the individual grievance. In this type of situation, although one individual may be affected, he may be affected in a way that is of concern to all members of the bargaining unit. Thus, the individual may grieve on the basis of how he is particularly affected while the union may also grieve citing the individual case as an example of how certain conduct may affect the members of the bargaining unit generally.

This, however, is not, on the face of it, such a case because there is no indication here that Watters has grieved at all.

Further, if I were satisfied that the employer had treated this as a grievance in the specific matter of Ronald Watters I might have been able to conclude that the employer had waived any right to object to the form of the grievance. However, the employer did not hold a hearing on this matter (and was not obliged to do so), and after receiving the employer's reply the union simply referred the matter directly to arbitration, with the result that

no evidence, documentary or otherwise, was put before me in connection with the preliminary issue to suggest that the matter was dealt with as being specific to Ronald Watters. I therefore felt constrained to rule on the preliminary objection that this matter could not be dealt with as an individual grievance resulting in a remedy for any particular employee.

After my ruling in respect to the preliminary objection the parties proceeded to call evidence relating to tests which Eastern Provincial Airlines ("E.P.A.") required Mr. Ronald Watters to undergo to determine if he met the bilingualism requirements for the Montreal station. No more was said about Ms. Miller except that Mr. Watters was senior to her and spoke better French. In his argument at the end of the hearing Mr. Beaulieu, for the union, requested a specific remedy for Mr. Watters, should I find that the test applied to him was not proper in the circumstances. Mr. Lilly objected to this, given the form of the grievance and my ruling on his preliminary objection before evidence was called. He had conducted the employer's case, he said, on the basis that no individual remedy was available and that what was being sought was a declaration as to the propriety of the test imposed upon Mr. Watters as guidance for future tests.

Under the circumstances, I must hold Mr. Lilly's position to be correct, although it may seem unfair to Mr. Watters that he should lose his remedy because no proper grievance was filed on his behalf.

What then is Mr. Watters' position, given my conclusion, set out below, that the employer's bilingualism test was not a proper one? It appears to me that his application for an inter-base transfer has never been properly disposed of. Thus, it seems to me that Mr. Watters has, and has had, a right to be considered for action under art. 12.05 in respect of any permanent vacancy occurring at the Montreal base. Subject to the time limitations in art. 15.04 for the filing of grievances, if those rights have not been respected, by failing to accord him a proper language test or otherwise, he should be in a position to file an individual grievance. That, however, is not the case before me, and I can only assume that Mr. Watters' rights would be respected without the necessity of any grievance being filed.

I turn now to the merits of the general or policy grievance before me. Was E.P.A. entitled to require bilingualism on the part of traffic agents working on reservations in its Montreal station? If so, is the employer's test of bilingualism, as illustrated by Mr. Watters' experience, a proper application of the requirement of bi-

lingualism? If not, what are the standards E.P.A. must attain for its test to be a proper one? I will attempt to address each of these questions in turn.

Article 12.05.01 of the collective agreement provides that selection for inter-base transfers

> . . . will be made based on the seniority of the employees whose applications have been received at least thirty (30) calendar days prior to the job becoming available.

Those seniority rights are, however, subject to four limitations set out in art. 12.05, three of which are not relevant here. The relevant limitation is a requirement that "the necessary physical and language requirements are met, if applicable".

Since management has the right, in the absence of some specific clause in the collective agreement to the contrary, "to determine the standard of qualifications necessary for a job" (*Re United Brewery Workers, Local 173, and Carling Breweries Ltd.* (1968), 19 L.A.C. 110 (Christie) at p. 112, and see Brown and Beatty, *Canadian Labour Arbitration* (1977), para. 6:3300, p. 267) it seems clear that the employer here could determine what "language requirements" are applicable. This is confirmed by "Letter of Understanding, No. 2" signed by both parties on August 21, 1975, and found appended to their collective agreement No. 1 effective April 1, 1975:

> . . . the language requirements referred to in Article 12.03.01.02 and 12.04.01.03 shall be determined by the Company after consultation with the Union at the Headquarters level.

By art. 18.09.01 such a letter of understanding is deemed to be part of the current collective agreement. On December 22, 1976, over the signature of Kevin Howlett, then customer service supervisor, the employer advised the then president of C.A.L.E.A. as follows:

> Further to the letter of Understanding, No. 2, dealing with language, we endeavour to retain the following standards of bilingualism, versus unilingualism at the following stations:
>
> | | | | | |
> |---|---|---|---|---|
> | A) | Montreal | Reservations | 100% bilingual | |
> | | | Ticket Counter | 85% " | 15% unilingual |

This letter goes on to set out varying requirements of bilingualism at the employer's other stations. There was no evidence led to suggest that these language requirements were not introduced "after consultation", and the meaning of that term is, of course, nebulous at best.

Mr. Norman Linn, manager of station administration, testified that the employer does not adhere closely to these language requirements at some of its bases, but has done so at Montreal. If I were concerned about transfers to those other bases such inconsistency might be a factor, because qualifications on seniority which are in fact invoked only arbitrarily undercut the very concept of seniority, but there was no evidence to suggest that E.P.A. has not been consistent in upgrading bilingualism at its Montreal station to the stated levels.

Common sense suggests that traffic agents in the City of Montreal should be bilingual and the evidence amply justified the employer's requirements that its reservations staff be 100% bilingual, contrasted with the requirement that only 85% of those at the ticket counter be bilingual. Tasks are more easily interchanged at the ticket counter, assistance is more easily sought and it is far easier to understand a language in which one is not fluent when speaking face to face than when dealing over the telephone. I am well satisfied that the employer's determination that its reservations staff at the Montreal base be 100% bilingual is *bona fide* and reasonable.

The serious question is whether E.P.A.'s test for determining whether applicants for transfers were "bilingual" is a proper one. The circumstances under which Ronald Watters was tested were as follows. When Watters was passing through Montreal on a day off coincidentally, as far as Watters was concerned, he met Randy Battcock. I gather Battcock had been advised that Watters would be there. Battcock told Watters that as he was becoming station manager there would be a vacancy and that it had been arranged for Watters to meet with a Mr. LaRoche the following morning to make sure his French was adequate. Watters stayed over in Montreal and went to LaRoche's office at 9:00 the next morning. At the time Mr. Gilles LaRoche was sales manager in Montreal, having joined E.P.A. three months earlier. He is a bilingual francophone. Shortly after Watters arrived at LaRoche's office Mr. Norman Linn, the outgoing station manager, joined them as did Ms. Elizabeth Monballien. Mr. Linn is, in his own terms, "less bilingual than Watters". Ms. Monballien speaks both French and English very well. Mr. LaRoche informed Watters that his French would be tested by asking him in French the kinds of questions a customer might ask over the telephone of a traffic agent in reservations. He then asked five or six questions. Watters testified that he realized the test was important, "took his time answering" and went away satisfied that he had passed the test.

In fact, Mr. LaRoche and Ms. Monballien agreed that Watters' French "was not adequate" and they so advised Mr. Linn. He passed that advice on to head office, with the result that Mr. Watters' application for transfer was refused. Mr. Watters was not advised of the outcome so he called Mr. Howlett, the director of industrial relations, 10 days later. Subsequently, he heard that both he and Ms. Miller had been judged inadequate. He asked for a statement in writing to that effect but never received it.

I note that Watters had held various jobs in Montreal which had brought him into close contact with a francophone public and co-workers, and had worked for E.P.A. in Montreal for six months on temporary status, including 10 days in the reservations office. At the time of his test, however, he had been working for nearly a year in a unilingual English-speaking environment.

The question is whether such a test of bilingualism can be said to be "appropriate and fairly applied": *Re U.A.W., Local 35, and Canadian Filters Ltd.* (1970), 21 L.A.C. 219 (Weatherill) at p. 221. Although, in the absence of a collective agreement provision to the contrary, the employer may determine what ability is required for a particular job, as the arbitration board in *Re Canadian Brotherhood of Railway Transport & General Workers and St. Lawrence Seaway Authority* (1969), 23 L.A.C. 156 (Weiler) held at pp. 158 and 161:

> . . . the whole logic of seniority rights excludes a total management discretion to determine whether this ability actually exists in any particular case in dispute. To hold that management has such a discretion is to conclude that it has the power to grant seniority rights when and only when it wishes.
>
> . . . . . .
>
> Examinations furnish a relatively objective measure of an employee's qualifications and thus are a desirable means of minimizing employer discretion and rationalizing these kinds of judgments. The fact that tests as such are permissible, though, does not entail any blanket approval of any tests for any position. In the same way as for educational requirements, the employer must show that his tests are a real measure of the ability actually required for the job as it will be performed.

E.P.A.'s bilingualism test as described by its own witnesses, Mr. Linn, Mr. Gilles LaRoche and Ms. Elizabeth Monballien clearly failed to satisfy these broad criteria.

The main shortcoming was that no responsible person in the company determined what standard had to be met by applicants undergoing the test. Mr. Linn's evidence made it clear that Mr. LaRoche was selected to administer the test simply because he was a francophone member of management. He had no authority to determine the level of competence required. Yet, from Mr.

LaRoche's evidence it is clear that he set a standard based on his own notion of what was expedient from a political as well as a business point of view. It may have been quite proper for the standard to be set with a sensitive eye to current developments in the Province of Quebec but those were considerations which should have been taken into account before the test was administered. There should have been a predetermined standard against which Mr. Watters' and Ms. Miller's performances could be judged. In fact they are assessed on almost subconscious factors, apparently never articulated until this proceeding, with the result that Mr. LaRoche and Ms. Monballien made highly subjective judgments which were transmitted to management by Mr. Linn.

There were other shortcomings as well. Mr. Watters never knew what was expected of him, in terms of comprehension or speaking ability, or the speed with which he should respond. Even when in Mr. LaRoche's mind Watters was clearly failing the test he was not advised that he was taking too long to answer. Beyond that, fairness would seem to require reasonable advance notice of such a test. In Watters' case, for example, reasonable notice would have enabled him to spend some time in advance in a French-speaking environment.

The test given to Watters and, presumably, to Ms. Miller clearly did relate to the job they were being tested for, but it seems to me that with very little additional effort a more appropriate test could have been devised.

Where the appropriateness and fairness of a test goes to arbitration it is normally the function of the arbitrator to determine whether the test constitutes a "reasonable" application of the requirements set by the employer for the job; it is not normally for the arbitrator to prescribe "an acceptable" or "the best" test. However, in this case I have been invited to elaborate on the criteria of a fair and appropriate test for bilingualism and I do so by setting out the following seven criteria:

(1) The employer, acting through appropriate responsible officials, should set the standard of bilingualism required to be met by an applicant for transfer to a bilingual station. That standard could be a simple one such as "is able to understand and respond readily to virtually all questions normally asked by customers, but may speak with a marked accent", or it could be more complex. The standard can be set to make the test as easy or as difficult as the employer reasonably considers appropriate. The testers, the people who actually give the test, should then simply determine how

the applicant measures up against that predetermined standard. It should not be left to them individually to set the standard. It should also be made clear to the testers that under this collective agreement the language test is not a competition. It is not a question of which applicant speaks French best. Rather, the most senior of the applicants who meets the employer's standard is entitled to fill the vacancy.

(2) The applicant should know what standards his performance is being measured against. If he knows in advance what is required of him it is probably not necessary that he be told during the course of the test if he is failing to attain the required standard, but anything that ensures that the applicant knows what he should be trying to do increases the fairness of the test.

(3) Usually, the applicant should be given reasonable advance notice of the test. There may be circumstances in which ability to perform without any opportunity for prior preparation is relevant to the job but such cases must be rare. In Mr. Watters' situation, for example, had he been transferred to Montreal he would have gone to work each day attuned to a bilingual environment. Such was not on the day of the test, when he had just come from a holiday in the southern United States and before that from Saint John, New Brunswick.

(4) As far as practical the test applied should be uniform and should be given under similar conditions. The same questions need not be asked each time but they should be thought out in advance so that the same linguistic abilities are tested in each case.

(5) There should be a predetermined tester or group of testers all of whom are given similar instructions, and in any test the role of each person participating should be understood. If there is to be a management observer who, like Mr. Linn, is not competent to assess bilingualism his role should be understood. If there is to be a union observer that role too should be understood. There is no requirement of which I am aware that a union officer or official must observe the test, but if one of the participants is held out as being a union representative that person should at least understand that his function purports to be to protect the interests of the person undergoing the test. In the case of Mr. Watters' test Ms. Monballien clearly did not understand that to be her role and, given her non-membership in the union, it would not have been an appropriate role for her.

(6) The test should be made as relevant as possible to the work in question. In Mr. Watters' case, for example, Mr. LaRoche could have asked his questions over the telephone. On the face of

it this would be a more difficult test for an anglophone although, of course, the employer could adjust its requirements of comprehension and response. The point is simply that the closer the test approximates to the actual work situation in issue the more appropriate it is.

(7) Though probably not an aspect of the appropriateness or fairness of the test, common courtesy and good employee relations would seem to demand that all applicants tested be advised of the result as soon as possible.

*Summary and conclusion*

As I ruled in the course of the hearing, the form and substance of the grievance in this matter does not permit me to make an order to the benefit of any individual. The parties proceeded on the basis that this was a policy or general grievance against E.P.A.'s requirement of bilingualism, as applied through the test administered, for example, to Mr. Ronald Watters. In my view the employer acted within its rights in requiring that all traffic agents transferring to "reservations" in its Montreal station be bilingual. However, the test for bilingualism that the employer has been applying, as illustrated by the test taken by Ronald Watters, is not fair and appropriate and thus endangers seniority rights under art. 12.05.01 of the collective agreement.