1-13-1983

Re Island Telephone Co Ltd and International Brotherhood of Electrical Workers, Local 1030

Innis Christie

RE ISLAND TELEPHONE CO. LTD. AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1030

I. Christie. (Prince Edward Island) January 13, 1983.

EMPLOYEE GRIEVANCE alleging improper denial of promotion. Grievance dismissed.

P. J. D. Mullin and others, for the union.
L. St. Jean and *D. McLane*, for the employer.

AWARD

The parties agreed at the outset of the hearing in this matter that I was properly appointed under the collective agreement and that any time-limits were waived. There were no jurisdictional objections. Since the grievor here seeks the assignment to him of a job which he alleges was improperly awarded to another employee it must be noted that that other employee, Rodney MacLean, was advised of these proceedings by the company and chose not to attend or be represented individually.

On April 20, 1981, one of the company's five employees in the "P.B.X. and Special Service Repairman" category, Bernie MacIntyre, was promoted to foreman. The company's policy is that such management appointments are made on a six-month probationary basis so the vacancy created was not posted until November 6,

1981. In the meantime the present incumbent of the job, Rodney MacLean, was appointed on a temporary basis, which did not require the application of the seniority provisions of the collective agreement. There was no dispute that MacLean was selected because there was some excess manpower in the repair department where he was working at the time and because his experience equipped him to do the job in question with minimal training.

By agreement the parties put in evidence the following statement headed "Job Posting — Minimum Requirements":

PBX INSTALLER REPAIRMAN	1. Grade XI Education. 2. One year experience as Combination Repairman or Exchange Repairman or Loop and Station Installer or Central Office experience. 3. Basic Electricity or qualifying job experience and willing to take qualifying training. 4. Drivers License. 5. Generally good rating on present job.
SPECIAL SERVICES I & R	1. Grade XI Education. 2. Basic electricity or qualifying job experience and willing to take qualifying training. 3. Generally good rating on present job.

No evidence was offered with respect to the status of these "Minimum Requirements", apparently because there is no dispute that both the grievor and the current incumbent on the job satisfied them easily.

As there was a suggestion by at least some of the other job applicants that MacLean had been the beneficiary of improper favouritism right from the start, the company called evidence to demonstrate that there had been no foregone conclusion that MacLean would get the job in question permanently. Ray Livingstone, supervisor of repairs, testified to a conversation which he had had with Bernie MacIntyre at the time that MacLean was transferred to "P.B.X. and Special Services" with respect to a training course which Livingstone wanted MacLean to go on if he was going to be returning to the repairs department. There is no basis to doubt Livingstone's testimony that MacIntyre told him that it did not look as if MacLean would get the job permanently because of his lack of seniority. MacLean did, in fact, go on the course, which had nothing to do with his temporary job, and this, together with the fact that there was no direct evidence of any kind suggesting bad faith on the part of the company, leads me to

find that there was no improper favouritism involved in MacLean's initial appointment to the job in question.

In response to the posting of the job on November 6, 1981 (the propriety of which was not questioned before me) the company received eight applications, including that of MacLean, who got the job, that of Roger Ellsworth, who is the grievor here, and those of two other employees, David Cosh and Allison Ellis, who testified with respect to the selection procedure.

Allison Ellis also filed a grievance against the assignment of the job to MacLean, and his grievance went to arbitration as well. Indeed, these proceedings before me have been held in abeyance, awaiting the outcome of the Ellis arbitration. In an unpublished award in that matter, dated May 11, 1982, arbitrator G. Christopher Collier decided, at p. 9:

> On the evidence I am also completely satisfied that the method of selection of the successful candidate by the company was one which was fair to all candidates. The evidence establishes that the company went to great lengths to apply the same criteria to each of the candidates and the grievor has failed to establish anything improper or prejudicial to himself or any of the other candidates in the methods used by the company.

Arbitrator Collier also found, at p. 12:

> On the evidence presented before me there is no doubt that the ability and qualifications of the two candidates were not relatively equal for the purposes of the job which was the subject of the competition. There is no doubt whatsoever that for the purposes of this particular job Mr. MacLean is substantially more qualified and has substantially greater ability than the grievor.

Insofar as the Collier award involved a comparison of the seniority, ability and qualifications of MacLean and Ellis it is, of course, of no significance here. On the other hand, while, strictly speaking, this is a different matter and I am not bound by the decision of another arbitrator, even acting under the same collective agreement, insofar as the Collier award is concerned with the procedure used to assess the relative ability and qualifications of applicants for the job it cannot be lightly disregarded. The same is true with respect to arbitrator Collier's interpretation of art. 5.3 of the collective agreement, to which I return below.

In any event, the relevant facts for my consideration are the nature of the job in question, the seniority, ability and qualifications of Ellsworth and MacLean and the procedure followed in choosing MacLean over Ellsworth for the job.

Appendix "C" of the collective agreement contains "Definitions of Classifications", including the following for P.B.X. and Special Service Repairman: "Those employees engaged in the installation

and maintenance of private branch exchange equipment, also teletype, mobile radio or other special station equipment." According to the evidence, the nature of the work done by employees in this classification has changed since that definition was originally adopted, to the point where one of the five employees in the classification is concerned wholly with data communications and the others almost exclusively with mobile radios, except when they are filling in for the "data" man.

When MacIntyre was promoted to foreman another employee, who had come to the job with data-related experience, took over that side of the function and MacLean, in his temporary assignment, joined the other three in working on mobile radios. At any rate, there was no real dispute that at least 70% to 80% of the work which the company would actually require the successful applicant to do would involve installation and maintenance of two-way radios. MacIntyre's evidence was that the equipment in question included mobile radios for police cars, ambulances and the like, and their base stations, repeaters for those systems, portable hand-held radios, pocket pagers, mobile telephones and some radio-telephone equipment. The job called for work on a number of different types of each of these, making in all, MacIntyre testified, between 50 and 55 different types of equipment.

The data communications work involves the installation, repair and maintenance of equipment on subscribers' premises, which might include video display terminals, printers, teletypes and data sets.

At the risk of oversimplifying, it may be said that according to the evidence what distinguishes the employees in the special services department from central office men, central office men (toll) and other repairmen is that the special services employees actually find the defect in a circuit board and replace or repair it rather than simply locating a defective module and replacing it, the defective module being sent back to the manufacturer for repair. The company's position is that this requires a knowledge of basic electronics, even to read the manuals upon which any new employee would have to rely in repairing these different types of equipment. With a similar risk of over-simplification, the union's position may be said to be that the central office should be regarded, in effect, as the circuit board of a mobile radio or a pocket pager writ large, with the same ability and qualifications required for locating and replacing defective modules as are called for on the special services work bench.

The grievor, Roger Ellsworth, took the basic electronics course at Holland College in 1972. He completed the first year but suffered a serious injury the following summer which kept him out of school for a year. He went back in the fall of 1974 but left to take a temporary job with the company. As the result of a test he was offered a permanent job which he accepted and he never went back to complete his electronics course. According to the evidence he was a satisfactory but not outstanding student at Holland College. On the other hand, the evidence before me suggests that he has been an excellent employee with the company. His present classification is that of central office man (toll) and he has worked on microwave radio, pulse coder modulater, data route, power room equipment, private line and special services circuit orders, multiplex equipment, installation and testing of message circuits and alarm systems. Over his time with the company he has taken 14 training courses, six dealing with data communications and none dealing with basic electronics or the installation, repair and maintenance of mobile radio equipment.

The incumbent on the job, Rodney MacLean, also attended Holland College and completed a course in electronics technology "achieving the occupational profile of an electronics technician". According to Jack Sorensen, who teaches at Holland College and who was called as a witness by the company, Rodney MacLean was very strong in both the practical and theoretical aspects of electronics, and was a very good student. He worked for the Bedford Institute of Oceanography as a radio watchman in the summer of 1975 and at Holland College repairing micro computers in 1975 and 1976. He was hired by the company as an installer in May of 1976, became a test man in September of 1977 and a repairman in the customer services department in May of 1979, where he remained until he took the temporary assignment as a P.B.X. and special services repairman on April 27, 1981. His hobby is electronics.

In June of 1981, a little more than a month after Bernie MacIntyre had become foreman of the P.B.X. and special services department, he asked the people in his department to take a written test on basic electronics, referred to as the Motorola test. He did this, he said, because it had occurred to him that the Motorola test might be useful as an objective measure of the ability and qualifications that he would be looking for in applicants for the job that would become available once his own position as foreman was confirmed, and he wanted to assess its relevance. One person working in the department made less than a pass

mark, which was 60%. The others all passed easily and MacLean, the temporary replacement, made 97%, the highest mark. MacIntyre testified that this confirmed his notion that the Motorola test would be useful, because the person who failed the test was in fact having considerable difficulty in handling the work of the department.

The job here in question was, as I have said, posted on November 6, 1981, and there were eight applicants, including Rodney MacLean and Roger Ellsworth, the grievor here. Over the period from November 24th to December 3rd MacIntyre interviewed all eight applicants. He testified that he asked each of them a standard set of questions and rated them according to their responses. This is confirmed by the written forms which were tendered in evidence. He also had each applicant write the Motorola test, except MacLean, whose June results he decided to use. Both MacIntyre and his immediate superior, David McLane, the company's customer services manager, testified that they thought it more fair to use MacLean's June result because he had not at that time had the advantage, which he had by November, of having worked with the equipment involved in the special services job for some six months. That, however, does not appear to be an advantage he needed, having made 97% after only a few weeks on the job, and, of course, McLane and MacIntyre knew his mark when they decided not to re-test him.

The grievor and two other employees who were interviewed by MacIntyre testified that they did not understand that the Motorola test was going to be significant in determining who got the job. They said that they were told the test was voluntary, with at least the implication that its purpose was simply to identify the training they would need if they did in fact get the job. The grievor was given no official notice that he would be required to take the test although, under cross-examination, he did not deny that, being interviewed six days after the first applicant, he did, in fact, expect such a test. In the result, the grievor failed the Motorola test. Jack Sorensen, of Holland College, testified that the Motorola test was a good test of basic electronics, and that the grievor's failure appeared to be attributable to gaps in his knowledge which corresponded to the blocks in the Holland College course that he had not completed.

MacIntyre testified that McLane, the customer services manager, had told him that he could only rely on the Motorola test if all the applicants took it. He testified that he did not make the test mandatory and had any of the applicants refused to take it he

would not have relied upon it. However, they all wrote the test so he did in fact rely on it, as his careful assessment sheets compiled for both MacLean and Ellsworth demonstrate.

Some of the more senior applicants for the job withdrew after their interview with MacIntyre and, as I have already pointed out, at least one applicant grieved and carried the matter to arbitration. In any event, there is no doubt from the evidence that Bernie MacIntyre and his immediate superiors made a very careful decision in selecting Rodney MacLean over Roger Ellsworth, who had two more years of seniority. MacIntyre's testimony and the check sheets that he submitted in evidence make it quite clear that the factors that resulted in the job being awarded to MacLean were his superior performance on the Motorola test, his much better Holland College record and his pre-employment and hobby experience with electronic trouble shooting. MacIntyre did not rely on either the Holland College record or the Motorola tests "at large" but carefully analyzed the components of the Holland College training of both Ellsworth and MacLean and the questions on the Motorola test, focusing on those relevant to the job.

The issues

(1) The first issue is the interpretation to be given to the somewhat unusual seniority clause in this collective agreement:

> 5.3 When selecting employees to fill vacancies and/or new additional jobs covered by this Agreement the Company will recognize seniority, ability and qualifications. Where these factors are relatively equal the senior employee will be selected.
>
> . . . . .
>
> 5.6 The Company shall post for fifteen (15) days on the notice board in all locations where employees in the bargaining unit work, a notice specifying the minimum qualifications required for every vacant job including new additional jobs. At the time the job is posted, copies of the notice shall be sent to the Union Business Manager. . . .
>
> Within thirty (30) days of the closing of the job posting the Company will make the selection from the applicants (pursuant to Clause 5.3) having the minimum qualifications.

(2) The second issue is whether consideration of the seniority, ability and qualifications of MacLean and the grievor reveals grounds for interfering with the decision of the company to assign the P.B.X. and special services repairman job to MacLean.

(3) The third issue is whether the testing procedure relied upon by the company to choose MacLean over the grievor gives grounds for setting aside the assignment of the job to MacLean.

(4) If there are grounds for interfering with the company's decision, the fourth issue is whether the job should simply be given to the grievor or the matter reconsidered by the company in accordance with the terms of the collective agreement.

Decision

(1) Article 5.3 of the collective agreement, set out above, contains the seniority rights of employees in the bargaining unit. The two types of seniority provisions commonly found in collective agreements were distinguished by Professor Laskin, as he then was, in his oft-quoted statement in *Re U.A.W. and Westeel Products Ltd.* (1960), 11 L.A.C. 199 at p. 199:

> Two alternative themes are generally found in seniority articles. Under one, seniority is qualified in greater or lesser degree by a requirement of ability or competence to do the required work. In such case, a senior man who is equal to the job is entitled to it, although there may be a junior applicant who can do it better. The other theme involves a contest between competing applicants, and seniority governs only when their competence or ability is relatively equal.

Article 5.6, set out above, makes it clear that here the job applicant must have the minimum qualifications posted. There is no dispute that both MacLean and the grievor had whatever minimum qualifications can be said to have been required. This is not, however, a "minimum qualifications" seniority clause because it does not stop there. The difficulty is with art. 5.3. Because seniority is mentioned both as a factor in conjunction with ability and qualifications *and* as the governing factor where "these factors" are relatively equal art. 5.3 of this collective agreement does not appear to be a standard "contest" seniority clause either.

It was submitted on behalf of the company, and not disputed by the union, that a literal interpretation of art. 5.3 produces an absurdity. To say that where seniority as well as ability and qualifications "are relatively equal the senior employee will be selected" makes sense, but the implied opposite proposition, that where seniority is not relatively equal the senior employee will not be selected simply cannot be what the parties intended. For this reason in his award on the Ellis grievance referred to above arbitrator Collier held (at pp. 11-2): ". . . that the proper interpretation of art. 5.3 of the collective agreement is that where the ability and qualifications of the candidates are relatively equal then the senior employee will be selected". With respect, I think it must be regarded as significant that the collective agreement in effect between the parties from 1973 to 1975 reflected a change in the wording of the seniority clause. In the 1971-73 collective agreement art. 5.3 read as follows:

> 5.3 Promotions and re-engagements are made on merit as determined by the Company. Other things being relatively equal, the employee with the most service will be given first consideration.

The 1973-75 collective agreement, however, contained the following words, which have remained part of the collective agreements between the parties ever since:

> 5.3 When selecting employees for promotion the Company will recognize seniority, ability and qualifications. Where these factors are relatively equal the senior employee will be selected.

This change in wording puts it beyond doubt that the parties intended that seniority should be weighted more heavily than it had been up to that point. They appear to have intended to depart from a standard "contest" seniority clause without going all the way to a standard "minimum requirement of competence" clause. They have not stated their mutual intent unambiguously but the evidence of both Carl Simpson, the union business agent and David McLane, the company's customer service manager, reflected an understanding that seniority is to weigh more heavily than it does in the standard "contest" type of clause.

I agree with arbitrator Collier, and with the submission on behalf of the company that a literal application of art. 5.3 produces an absurdity in a case where the seniority of two competing applicants for a job is not "relatively equal". However, I suggest that the effect of art. 5.3 is not, therefore, simply that of the standard "contest" seniority clause. Rather, it is the company's obligation to "recognize seniority, ability and qualifications" as a composite, or package, weighing and balancing each of these factors off against one another in the case of each competing job applicant. The judgment to be made is whether the three-factor package of one employee clearly outweighs the three-factor package of the other. If it does not, that is where the packages "are relatively equal" then "the senior employee will be selected". While art. 5.3 does not specifically say so, the clear implication is that if, upon recognition of these three factors as a package, one employee clearly outweighs the other he or she is entitled to the job. The difficulty with this, of course, is that art. 5.3 assigns no relative weights to seniority, ability and qualifications in assessing each job applicant. However, even the standard forms of seniority clause call for difficult judgments by management. It must suffice to say here that seniority cannot be weighed so lightly that art. 5.3 becomes, in effect, a standard "contest" clause, nor so heavily that it becomes a standard "minimum requirements" clause. Quite evidently, the parties intended neither of those.

(2) The application of art. 5.3 to the facts here involves, first, consideration of the appropriate role of the arbitrator in relation to management decisions in respect of ability and qualifications and, second, an assessment of the evidence with respect to "seniority, ability and qualifications".

An important fact is that the definition of the classification of "P.B.X. and Special Service Repairman" contained in Appendix "C" of the collective agreement does not reflect the actual requirements of the job here in question. For some years private branch exchange equipment and teletype have not been significant parts of the job here in question. It involves mobile radio and data communications but, because the data side of the work has been assigned to one employee, the actual job is 70% to 80% involved with mobile radios, in one form or another. It was submitted on behalf of the company that the "definitions" of classifications in Appendix "C" were not job descriptions and that in accordance with the arbitral jurisprudence, the company is not precluded from altering job content. Counsel for the company quoted passages from Brown and Beatty, *Canadian Labour Arbitration* (1977), at para. 5:2200, pp. 192 and 194, where the authors state:

> . . . it is generally accepted that the existence of a wage schedule or job classification scheme in a collective agreement does not restrict or inhibit management's right to reorganize the work force by freezing the number of qualifications or by preventing the assignment of duties from one to another. . . .
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> . . . there do not appear to be any reported instances where arbitrators have expressly held that the presence of job descriptions *per se* restricted management from reorganizing or altering the content of the jobs.

In my view this quotation of authority somewhat misconceives the issue here. I agree that the purpose of Appendix "C" appears to be to define job classifications for the application of the wage schedules, not to restrict management in the assignment of work, but I think the real issue here, which counsel for the company did, of course, also address, is management's right to determine the ability and qualifications required for a job, and to change those requirements as the job demands change.

There are few issues more extensively considered in the arbitral jurisprudence than that of review by arbitrators of management determinations with respect to qualifications, skill or ability. In the award of the board in *Re Textile Workers Union and Lady Galt Towels Ltd.* (1969), 20 L.A.C. 382 (Christie), I expressed my view that any such management determination involves two decisions: first, the setting of a standard of qualifications, skills or

abilities and second, the measurement of the employee, or employees, as the case may be, depending on the type of seniority clause in issue, against that standard. The decision as to the qualifications required is inherently and necessarily a management decision unless management's power to determine qualifications is explicitly limited by the collective agreement. It is not a decision with which an arbitrator should readily interfere. As I said in *Lady Galt Towels* (at p. 383),

> . . . management may unilaterally establish the standard against which employees are to be judged and an arbitrator should not question the standard established, except on the very limited basis that management must be *genuinely* doing what it purports to do. In other words the company must not "act arbitrarily, unreasonably or in bad faith, and use 'established qualifications' as a guise in defeating employee rights under the agreement."

According to Brown and Beatty, *Canadian Labour Arbitration*, at para. 3:3100, p. 115, that is the view of most arbitrators in Canada, although it has since been elaborated somewhat, in terms to which I subscribe. In *Re Reynolds Aluminum Co. of Canada Ltd. and Int'l Molders & Allied Workers Union, Local 28* (1974), 5 L.A.C. (2d) 251, chairman S. A. Schiff stated at p. 254:

> In the ordinary exercise of management functions employers may determine in the first instance what specific qualifications are necessary for a particular job and what relative weight should be given to each of the chosen qualifications. After the employer has made the determination, arbitrators should honour the managerial decisions except in one or both of two circumstances: First, the employer in bad faith manipulated the purported job qualifications in order to subvert the just claims of employees for job advancement under the terms of the collective agreement. See *Re United Brewery Workers, Local 173, and Carling Breweries Ltd.* (1968), 19 L.A.C. 110 (Christie); *Re Textile Workers Union and Lady Galt Towels Ltd.* (1969), 20 L.A.C. 382 (Christie); *Re Canadian Trailmobile Ltd. and U.A.W., Local 397* (1973), 2 L.A.C. (2d) 13 (Brown). Secondly, whether or not the employer had acted in good faith, the chosen qualifications bear no reasonable relation to the work to be done. See *Re U.A.W., Local 707, and Ford Motor Co. of Canada Ltd.* (1970), 21 L.A.C. 61 (Weatherill); *Re Oil, Chemical & Atomic Workers, Local 9-14, and Polymer Corp. Ltd.* (1972), 24 L.A.C. 277 (O'Shea).

I refer also to my own recent award in *New Brunswick Broadcasting Co. Ltd.* (1982, unreported).

In this case I am fully satisfied that in emphasizing the mobile radio aspects of the job in question the company was genuinely doing what it purported to do. There was no bad faith and the chosen qualifications did bear a reasonable relationship to the work to be done. I therefore turn to the second decision involved in the company's determination, the measurement of the grievor and MacLean against the requirement of abilities and qualifications that the company had set.

On this aspect of the case I can do no better than reiterate what I said in my *New Brunswick Broadcasting Co. Ltd.* award, at pp. 8-10:

> The question of whether a particular employee "meets" the qualifications is, it seems to me, a fact to be determined from the evidence. My view has always been that the ultimate question is whether the employee is judged correctly against the standard established by management, but, as I stated in *Re United Brewery Workers, Local 173 and Carling Breweries Ltd.* (1968), 19 L.A.C. 110 as well as in *Lady Galt Towels* [p. 112]:
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> > "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."
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> Many arbitrators, however, explicitly "deferred to management's application of the relevant criteria for a particular job where it is established they have applied those standards fairly, honestly and without malice or ill will toward any of the candidates": see Brown and Beatty, para. 6:3100, pp. 257-8.
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> The current debate is whether the latter view has been cast into disrepute by the decision of the Ontario Divisional Court in *Re Great Atlantic & Pacific Co. of Canada Ltd. and Canadian Food & Allied Workers, Local 175* (1976), 13 L.A.C. (2d) 211*n*, 76 C.L.L.C. para. 14,056 (leave to appeal refused 13 L.A.C. (2d) 211*n*). There are those who maintain that the decision of the court is consistent with the requirement that management's application of standards should be simply, fair, honest and without malice or ill will. See for example *Re Canadian Broadcasting Corp. and National Assoc. of Broadcast Employees & Technicians* (1980), 26 L.A.C. (2d) 34 (where, incidentally, arbitrator O'Shea stated that he could find no merit in the argument that the *Great A & P* decision had no application because the corporation with which he was dealing fell under federal rather than provincial jurisdiction. In that I agree with him). There are other arbitrators, however, who suggest that the case does make a change. See for example *Re Governing Council of the University of Toronto and Service Employees Union, Local 204* (1981), 30 L.A.C. (2d) 187 (Palmer, chairman). In my view the *Great A & P* case stands for the proposition that the ultimate question to be determined by the arbitrator is whether or not management's decision was correct. It is not enough that management applied its standards without *mala fides*. On the other hand there is nothing to preclude the sort of deference to management's opinion that I found appropriate in *Carling Breweries* and *Lady Galt Towels*. Mr. Justice Cory's decision for the Ontario Divisional Court concludes [pp. 334-5 C.L.L.C.]:
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> > "The [arbitration] board as a creature of the collective agreement must then see to it that the provisions of the collective agreement have been complied with; its role cannot be more or less than this. The honesty and lack of *malafides* in making the decision are factors to be taken into account. So, too, is the question of whether or not the employer has acted unreasonably. Indeed, in determining the 'reasonableness' of the employer's decision, the board may go a long way to determine the issues submitted to it. However, once the collective agreement makes provisions as to the method of selection of employees for promotions, then the board must see to it that those provisions have been complied with and

> in so doing, *it cannot restrict itself to determining whether the employer acted honestly and reasonably.* If the board is not to make such a decision, then the parties in the collective agreement should ensure that management's right in this regard is unfettered.
>
> (emphasis added.)

Against this background I turn now to assess the evidence here. Counsel for the union purported to summarize the evidence as disclosing that while MacLean had greater ability and qualifications with respect to electronics and its application to mobile radio installation and repairs, the grievor had greater ability and qualifications with respect to data communications, mainly because of the training courses he had taken while in the employ of the company. Therefore, since in his submission the job properly required a balance of the two areas of competence, MacLean and the grievor were "relatively equal" and, being the senior employee the grievor was entitled to the job. I am unable to accept this because, as I have just said, the company was entitled to treat the job as requiring basic electronics and ability to deal with mobile radio much more than experience with or ability to deal with data communications. That in itself must result in the conclusion that MacLean was more qualified and had significantly greater ability than the grievor to do the job here in question. Beyond that, however, the submission on behalf of the union is an oversimplification. It is clear that, except for the grievor's exposure to data communication installation and maintenance courses, MacLean has greater ability and is much more qualified for the job here in question. Even if data communication installation and repair were a bigger part of the job, I am not satisfied that it could be said that the ability and qualifications of the grievor and MacLean were so obviously "relatively equal" that I should interfere with management's decision to the contrary.

I need not consider whether the company could properly take into account the ability and qualifications that MacLean gained by working on the job in question for six months on a temporary basis because the evidence is that MacIntyre made every effort to exclude that factor from his determination and, moreover, it is clear that even at the start of the temporary assignment MacLean was much more qualified and able to perform this job than the grievor would have been in November, 1981 when the job was posted.

In November, 1981, the grievor had approximately seven years' seniority and MacLean had five years' seniority. Since neither is a very long-term employee the two years' difference in seniority is

not insignificant but it is not great enough to justify finding that management was wrong in deciding that the grievor's seniority, ability and qualifications taken together were not "relatively equal" to MacLean's seniority, ability and qualifications taken together. In other words, applying the interpretation of art. 5.3 set out above, there is no basis for me to interfere with the company's decision not to select the senior employee for this job.

It must be noted that had I accepted the view of arbitrator Collier, that art. 5.3 must be interpreted as a standard "contest" seniority clause, there would be even less basis for suggesting that the company's decision to award the job to MacLean should be interfered with.

(3) With respect to the application of the Motorola test counsel for the union quoted the requirements for tests set out in Brown and Beatty, *Canadian Labour Arbitration*, para. 6:3340, pp. 270-1:

> In order to determine the relative ability and qualifications of employees for a particular job, it is quite proper for an employer to require the applicants to submit to examinations and other tests to demonstrate their skill and ability. Those tests, however, must be administered fairly, without bias and meet certain standards of relevance, reliability and validity. More specifically, in order that such tests may be said to reasonably reflect an employee's ability and qualifications, arbitrators may inquire as to: the reason for the institution of the test, the adequacy of the preparation that was afforded to the employee prior to the test, the method under which the test was administered, the reliability of the marking of the test, and the relevance of the test to the work to be performed. Thus, if it were determined that a test was not administered consistently, in that different questions were asked of each employee, that the test or parts of it were not designed to elicit any information relevant to the job in question, or that there were no fixed levels established within the test which an employee had to meet to demonstrate sufficient ability, a decision by an employer based on such tests as to the relative abilities of the applicants, would be found to be unreasonable and improper.

No authority was cited to me and I am aware of none for the proposition that the company was bound by a past practice of not using written tests. The question is not whether the test has been used before. In the absence of any express provision in the collective agreement the question is simply whether the test was a fair basis for determining ability and qualifications. I am satisfied that here Bernie MacIntyre instituted the test as an objective way of distinguishing between a number of applicants with quite different sets of experience. While the grievor was not provided an opportunity to prepare for the test, that was true for all of the job applicants. Since the purpose of the test was to ascertain that the applicants had an understanding of basic electronics, unless

notice was going to take the form of providing an opportunity for people to take a basic electronics course, it would not have made much sense. I am satisfied on the evidence of Jack Sorensen, who teaches electronics at Holland College, and from MacIntyre's evidence about the application of the Motorola test to the people already working in his department that the test was relevant to the work to be performed. The test was administered consistently and there was no suggestion that the marking was not reliable.

My only reservation about the application of the test arises from the fact that the job applicants were not told that it would be a significant factor in determining who got the job. MacIntyre's approach appears to have been dictated by the fact that he thought that if anyone refused the test he could not then rely on it at all, so he was anxious to persuade all the job applicants to take it. In my opinion it would have been better if management had recognized its right to require the job applicants to take such a test and simply told them that anyone who wanted the job had to write the test, which would be a significant factor in the determination, together with seniority and any other indicators of ability and qualifications upon which management chose to rely. However, in spite of my reservations on this score, I am not prepared to disagree with arbitrator Collier "that the method of selection of the successful candidate by the Company was one which was fair to all candidates". Specifically, I am not satisfied that the grievor was prejudiced in his approach to the Motorola test by any idea that it did not matter.

In sum, with respect to the application of the Motorola test, the company was entitled to use such a test, the Motorola test was a proper one and the method of its application provides no grounds for interfering with management decision to award the job to MacLean rather than the grievor.

Conclusion

Article 5.3 of the collective agreement between the parties gives greater weight to seniority than does a standard "contest" seniority clause but there is no basis upon which I should interfere with the company's decision to assign the job of P.B.X. and special service repairman to Rodney MacLean rather than to the grievor, notwithstanding the grievor's greater seniority. The company's use and application of the Motorola test was not improper or prejudicial to the grievor. The grievance is therefore dismissed and it is unnecessary for me to consider the remedy issue.