

Subject - Job Competition

**ARBITRATION AWARD**

BETWEEN:

TRANSPORT AND ALLIED WORKERS UNION,  
LOCAL 855  
(hereinafter called the "Union")

AND:

TOWN OF HARBOUR GRACE  
(hereinafter called the "Employer" or the "Town")

GRIEVOR: Fred Reynolds

COUNSEL: For the Union  
Stuart A. Morris  
For the Employer  
Dan Power

ARBITRATOR: James C. Oakley

The Arbitration hearing was held at St. John's on June 18, 2007. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter following publication of the Award in the event there was a question of interpretation or compensation arising from the Award.
5. The persons who were potentially affected by the outcome of the Award had received adequate notice of the hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Harbour Grace Town Council and Transport and Allied Workers Union, Local 855, affiliated with the International Brotherhood of Teamsters, dated January 1, 2005 to December 31, 2007
- Consent 2 - Grievance Form dated December 15, 2006
- Consent 3 - Job posting for heavy equipment operator and letter from Town of Harbour Grace to successful applicant, Sean Jordan, dated December 8, 2006
- Consent 4 - Operating Engineers College Report of Assessment for Heavy Equipment Operators, Evaluation and Training for the Town of Harbour Grace
- RG - 1 Seniority list for bargaining unit members
- FR - 1 Letter dated February 6, 1997 from Town of Harbour Grace to Fred Reynolds
- FR - 2 Driver's license of Fred Reynolds
- DP - 1 Resume of Dan Power

**Nature of the Grievance**

The Union grieves that the Employer violated Article 9.07 of the Collective Agreement when it failed to appoint the Grievor, Fred Reynolds to the position of heavy equipment operator (temporary). The Employer awarded the job to Sean Jordan, an employee with less seniority than the Grievor. The Employer submitted that Sean Jordan was awarded the position on the basis of his ability and qualifications.

**Collective Agreement**

The relative articles of the Collective Agreement are as follows:

Article 9 - Seniority

9.01 Seniority shall be based on length of continuous service with the Council and applied on the basis of classification within the bargaining unit.

...

9.07 In the matter of promotions, demotions, filling of vacancies, lay-off and rehire, ability and qualifications shall be the governing factors, however, where these factors are equal, seniority shall govern. An Employee's seniority status may change by arbitration under the provisions of the Agreement.

...

Article 24 - Job Postings

24.01 When a vacancy or new job opening occurs for a position, the Employer will post notices, with all pertinent information, for a minimum of 5 days and consider applicants from within the bargaining unit before advertising outside. Applicants from within the bargaining unit will be considered and a decision made before applicants from outside are considered. In the event the successful applicant proves unsatisfactory in the position during trial period, or if the Employee is unable to perform the duties of the new job classification, he shall be returned to his former position and salary level consistent with his former position without loss of seniority.

**Evidence**

The witnesses called by the Union were Richard Gill, business agent, Vic McCarthy, maintenance worker and Fred Reynolds, the Grievor. The witness called by the Employer was Dan Power, works supervisor.

The Employer, the Town of Harbour Grace, posted a notice for heavy equipment operator, which stated as follows:

Employment Opportunity  
(Temporary Replacement)

Applications are invited for the position of Heavy Equipment Operator.

The successful applicant must have a minimum of five years work experience and hold all necessary licences.

Applications in writing stating employment history, education and class of driver's license will be received up to November 10, 2006

Town of Harbour Grace  
PO Box 310  
Harbour Grace, NL  
A0A 2M0

The Employer awarded the position to Sean Jordan by letter dated December 8, 2006. The Grievor, Fred Reynolds, also applied for the position and was unsuccessful. At the relevant time, according to the seniority list, Fred Reynolds and Sean Jordan were employed in the classification of maintenance worker and had dates of employment of August 3, 1998 and July 25, 2005 respectively.

There was one employee, Walter Neil, employed in the classification of equipment operator. Vic McCarthy testified that prior to the job competition, when the Town needed a second equipment operator, the maintenance worker next in seniority, with the required qualifications, would fill the position on a temporary basis. The hiring of Sean Jordan to the temporary equipment operator position, and the calling in of Sean Jordan to work shifts as heavy equipment operator, in priority to the Grievor, led to the Union filing a grievance on behalf of Fred Reynolds. The grievance

requested that the Employer be directed to comply with the Collective Agreement and pay compensation for lost wages. The Employer denied the grievance and stated that it had complied with Articles 9 and 24 of the Collective Agreement.

Richard Gill testified that the Town Council wanted to have the ability of bargaining unit members to operate heavy equipment tested by the Operating Engineers College (“OE College”). The Union agreed it would be beneficial to have the testing. Mr. Gill testified that it was his understanding that the report prepared by the OE College stated that all employees were found to have equal ability, that safety practices were not being followed and that further training was recommended. Vic McCarthy testified that he was informed by Dan Power, works supervisor, that the Town was going to have the OE College evaluate the bargaining unit members to test their ability as heavy equipment operators. Mr. McCarthy testified that after the report was received from the OE College, Mr. Power agreed that the employees were the same, that all employees needed theory and safety training and that the Town Council would consider having the employees receive the recommended training.

Dan Power was hired as works supervisor by the Town of Harbour Grace in 2006. He testified that the OE College did not prepare an assessment of employees in the way the Town requested. The emphasis in the report was on the recommendation for training for all employees. Mr. Power agreed that the report suggested that all workers needed upgrading and did not conclude that one worker had greater ability than another.

The report of the OE College, entitled “Report of Assessment for Heavy Equipment Operators Evaluation and Training for the Town of Harbour Grace”, stated, in part, as follows:

#### Introduction

On October 04, 2006, the Operating Engineer’s College (OEC) was contacted by the Town of Harbour Grace to provide a quote for training for the heavy equipment operators at the town municipal depot. In subsequent discussions with Dan Power, Works Supervisor, it was realized that each of the equipment operators would need a

competency evaluation on the equipment before any training could take place, as each was at a different operator skills level. A strategy was planned which could be carried out in a two fold approach:

- (i) Determine the proficiency of each operator on each piece of equipment required
- (ii) Make recommendations to the training needs of each operator

Upon approval of a competency evaluation to be carried out, Mr. Gary Snow and Mr. Terry Sparkes instructors with OEC, met with Dan Power and the equipment operators at the town depot where the operators, as directed by OEC instructors, went through an evaluation on the assigned equipment.

Interviews and operational evaluations were carried out on October 17, 2006.

...

#### Operator Assessment:

An assessment of equipment operators was conducted by OEC, Appendix 02 containing individual rating sheets and suggested orientation/training where applicable.

...

Operators assessed - Fred Reynolds, John Merrigan, Harry Hennessey, Charles Archibald, Sean Jordan

All five operators hold a:

- class 02 drivers license
- air brake indorsement

Three operators hold a valid Power Line Hazards course, two have certificates that have expired. As the theory section of this course has a PLH course and it expires every 3 years, it is suggested that all operators renew the course.

#### Summary

In summary the majority of the town operators have a good knowledge of operating and driving equipment. The main part of training would be for the operators to receive formal instruction in safety and operational procedures. This training would benefit both the operators and the town in having a safer, more knowledgeable and responsible work force with all operators qualified and further on their way to Heavy Equipment Certification.

...

Operator's Name: Fred Reynolds  
 Date of Evaluation: Oct. 20, 2006  
 Examiner: Gary Snow & Terry Sparkes

Equipment operated	Caterpillar 420 Backhoe
Operators evaluated in	
Pre-operational inspections	- Pre-op not carried out, no check list - Walk around not carried out - Windows were steamed up while driving and operating
Mounting & dismounting	- Carried out
Set-up	- All tires were not off ground
Machine control	- Good control manipulation - Too fast not planing each move
Excavating	- Moving material but not orientating the bucket to the excavation for maximum power stroke and control - Bottom of ditch not kept level
Backfilling Clean up	- Backfilling and tamping material, should use more bucket movement less side sweeping - Good cleanup
Loading	- Very good on loading and dumping the loader bucket - Carried the loaded bucket too high while moving to the truck for dumping

Fred Reynolds, showed a good understanding of the equipment operated, he had never used the 420 before, what stood out was the lack of planing the job at hand and all operations were too fast for the operators control level.

- This operator would benefit from a;
  - Backhoe
    - Four day theory course
    - One week practical course

- Driving
  - One day, Professional Drivers Improvement Course (PDIC)
  - One day, Progressive Shifting Course
  
- This time in the seat, working with an instructor, after the theory and safety has been completed would be sufficient to give this operator knowledge of proper safety and operating techniques.

#### Operational Evaluation Report (Equipment)

Operator's Name: Sean Jordan  
 Date of Evaluation: Oct. 20, 2006  
 Examiner: Gary Snow & Terry Sparkes

Equipment operated	Caterpillar 420 Backhoe
Operators evaluated in	
Pre-operational inspections	- Pre-op not carried out, no check list - Walk around not carried out
Mounting & dismounting	- Carried out
Set-up	- All tires were not off ground
Machine control	- Good control manipulation
Excavating	- Good control with backhoe bucket - Too much rush
Backfilling Clean up	- Backfilling and tamping material, should use more bucket movement less side sweeping - fair cleanup
Loading	- Very good on loading and dumping the loader bucket - Carried the loaded bucket too high while moving to the truck for dumping

Sean Jordan, showed a good understanding of the equipment operated, he had never used the 420 before, what stood out was the lack of planing the job at hand and all operations were too fast for the operators control level.

- This operator would benefit from a;
  - Backhoe
    - Four day theory course
    - One week practical course
  - Driving
    - One day, Professional Drivers Improvement Course (PDIC)
    - One day, Progressive Shifting Course
  
- This time in the seat, working with an instructor, after the theory and safety has been completed would be sufficient to give this operator knowledge of proper safety and operating techniques.

Dan Power testified that the Town could have hired a heavy equipment operator from outside the bargaining unit based on the report of the OE College. He proceeded to arrange for another test of the ability to operate a backhoe of the bargaining unit members. The test was observed by Dan Power and two town councillors, Tom Short, the chair of the Public Works Committee, whose employment background was in fish harvesting, and Stephen O'Neill, owner of a garden centre and landscaping business, who had experience operating mini excavators. Dan Power testified that during the test the employees were asked to operate a backhoe to dig a hole 4 feet by 4 feet by 4 feet, load a dump truck, and backfill the hole. Mr. Power testified that the time to complete the test was not recorded. He made notes in his diary about the testing. He did not have any test results or notes available at the arbitration hearing. There were no points awarded for test results. He testified that there was a marked difference between Sean Jordan and Fred Reynolds in their performance of the test. Sean Jordan demonstrated smoother operation of the backhoe bucket and placed the bucket down at the proper angle to obtain maximum torque. Fred Reynolds did not operate the bucket to obtain maximum torque, swung the bucket in an erratic manner and spun one of the tires when loading the dump truck. Mr. Power testified that the two town councillors and he all agreed that Sean Jordan had better ability than the Grievor and that Sean Jordan had the best ability of all five employees who were tested. Mr. Power believed that he was qualified to assess the ability of employees as heavy equipment operators. He is a certified technician of the Association of Engineering Technicians and Technologists of Newfoundland. He has professional experience in consulting and construction, and for about 12 years he owned and operated heavy equipment for

construction companies, including loaders and excavators. He believed that he had more ability as an operator than either Sean Jordan or the Grievor, but did not have ability equivalent to Walter Neil. Mr. Power testified that Sean Jordan had prior experience as a heavy equipment operator with a private contractor in Carbonear before commencing employment with the Town of Harbour Grace. Mr. Power testified that Sean Jordan was not necessarily his first choice for the position before the test was completed. He agreed that both Sean Jordan and the Grievor had equal paper qualifications, having the requisite licenses.

Mr. Power testified that the heavy equipment operator position was posted with the intent the successful applicant would be called in to operate the backhoe, but the successful applicant would not necessarily be the first employee called in to operate the excavator or other equipment. Subsequent to the filling of the position in December, 2006, the Grievor has been called to work to operate snow clearing equipment and to operate the loader in priority to Sean Jordan.

Vic McCarthy testified that he has worked as a maintenance supervisor with both Fred Reynolds and Sean Jordan. He described Fred Reynolds' work as an operator as "pretty good, a bit slow". Fred Reynolds has worked on water and sewer projects as a backhoe operator and dump truck driver. He was not aware of any safety concerns about Fred Reynolds. He described Sean Jordan's work as a heavy equipment operator as "pretty good, a bit too quick". He testified that with Sean Jordan's operation of the backhoe, there is a risk of damaging the water main, which could create unnecessary work and cause disruption of the water supply to an area of the Town.

With respect to the test administered by Dan Power, Vic McCarthy testified that he did not see any test results. He was not present when the testing was conducted. Dan Power told him that Sean Jordan was more careful and was better at following safe work practices than Fred Reynolds.

Fred Reynolds testified that before he was hired by the Town of Harbour Grace, he had eight to nine years experience working with the Provincial Department of Transportation working in various positions, including operator of heavy equipment, such as grader, tandem truck and single axle truck.

When he was hired by the Town of Harbour Grace, he received a letter of appointment stating that his application for part time employment as equipment operator was accepted. However, before he commenced employment, the position of equipment operator was withdrawn and he was hired as a maintenance worker. He has experience as an equipment operator working with the Town of Harbour Grace, including operating equipment for winter snow clearing. When he is called in to work as an equipment operator, he is paid at the higher equipment operator rate of pay. He has operated a backhoe, front end loader and dump truck for the Town of Harbour Grace. Prior to 2006, he was getting called in by the Town to work as an equipment operator. He was usually the first maintenance worker to be called. He was not informed of any problem with his work as an equipment operator. He has a Class 2 driver's license and is licensed for heavy equipment. He testified with respect to the testing performed by Dan Power. When he arrived at work he was told there would be a test. When Tom Short, town councillor arrived at the site, Mr. Short told him that he did not know what he was doing there. It was possible that Mr. Short had just arrived and had not yet received any instructions. The test involved digging a hole 4 feet by 4 feet by 4 feet, loading a truck and filling in the hole. The ground was not marked with paint to identify the location where the hole was to be dug. He did not see any written test results.

### **Union Submission**

The Union submitted that Article 9.07 was a relative ability type of seniority article. The Union did not dispute the procedure followed by the Town to have the OE College do an assessment of equipment operator ability. Based on the assessment by the OE College, Fred Reynolds and Sean Jordan were relatively equal. The Town did not act reasonably to reject the OE College report. The test conducted by the Town was flawed and unreliable. The persons conducting the test for the Town included two councillors who were not qualified to do heavy equipment operator testing. One town councillor had a background as a fish harvester and the other town councillor had a background in the landscaping business using mini excavators. There were no test results or notes of the test produced at the hearing. Not having the test results meant it was unknown whether all three persons were doing the same evaluation. There was no substantial and demonstrable difference

between the ability of Fred Reynolds and Sean Jordan. Fred Reynolds was initially hired as an equipment operator by the Town Council. The Employer was not entitled to be the sole judge of ability and qualifications under the Collective Agreement. The Grievor was entitled to the position under Article 9.07.

### **Employer Submission**

The Employer submitted that there was no violation of Article 9.07. Fred Reynolds and Sean Jordan were not equal in ability and qualifications. The OE College assessment did not demonstrate that they were relatively equal. The OE College report could have been interpreted to mean that none of the applicants were qualified for the position and the Town could hire from outside the bargaining unit. The Town completed its own assessment of ability to operate heavy equipment. All three persons conducting the test agreed on the results. The decision was not flawed. The Employer requested that the grievance be denied.

### **Considerations**

The Arbitrator will consider whether the Employer violated Article 9.07 of the Collective Agreement when it did not appoint Fred Reynolds, the Grievor, to the position of heavy equipment operator (temporary).

The Employer awarded the position to Sean Jordan, an employee having less seniority than the Grievor. Both the Grievor and Sean Jordan were employed in the position of maintenance worker by the Town. The Grievor commenced employment on August 3, 1998 and Sean Jordan commenced employment on July 25, 2005.

The job posting for the position of equipment operator (temporary) required a minimum of five years work experience and all necessary licenses. The Grievor had a Class 2 driver's license which met the requirement for necessary licenses. The Grievor had in excess of five years work experience.

He met the minimum qualifications set out in the job posting. The job posting did not refer to any particular piece of heavy equipment. Both the Grievor and Sean Jordan had experience operating heavy equipment prior to their employment with the Town of Harbour Grace.

Article 9.07 states that “in the matter of promotions . . . ability and qualifications shall be the governing factors, however, where these factors are equal, seniority shall govern”. Article 9.07 is the type of article known as a “relative ability” type of seniority article. The approach followed by arbitrators when reviewing an employer’s decision made under a “relative ability” type article, is discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, at paragraph 6:3200:

If the requirement is “relative” ability, the employee must demonstrate that his or her skills more or less match the person who was given the job. Once an employee has made out a *prima facie* case, the onus will shift to the employer to establish the basis for its decision. . . . However, even though the burden of proof may shift to the employer to explain why it passed over a grievor, arbitrators are agreed that the employee ultimately bears the burden of proving that the employer’s decision was flawed, either in the standards that were used or in the way that they were applied.

The Brown & Beatty text also states the following on the topic of “relative ability” at paragraph 6:3220:

6:3220 Senior employee if relatively equal

. . . If the grievor was the senior applicant for the job, arbitrators have said that the grievor must prove not only that he or she has the minimum qualifications and/or basic ability to do the job, but as well that he or she was relatively equal in these respects to the other applicants who were junior to him or her. Even where the employee awarded the job is only temporary or a probationer and has little or no seniority, if the seniority-rated employee is unable to establish that his or her abilities are relatively equal to those possessed by the successful candidate, the grievance will fail. Arbitrators are generally agreed that in order to meet the standard of relative equality, employees need only show that their skills and abilities are approximately, not exactly, the same. When an employee is able to meet the test and/or show that the employer’s assessment of the competing applicants was perfunctory, incomplete, based on irrelevant or improper grounds, or defective in some other way, the onus would then shift to the employer to substantiate that its selection was not arbitrary,

discriminatory or unreasonable.

The scope of review by an arbitrator of an employer's decision with respect to qualifications and ability, is discussed in *Re Island Telephone Company Limited and International Brotherhood of Electrical Workers, Local 1090* (1983) 8 L.A.C. (3d) 132 (Christie) at 141 to 143 as follows:

There are few issues more extensively considered in the arbitral jurisprudence than that of review by arbitrators of management determination 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 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):

"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 Arbitrator will review the evidence related to the Grievor's ability. The Grievor has prior experience in the heavy equipment operator position on temporary assignments for the Town. The Grievor's letter of appointment stated that he was hired for the heavy equipment operator position. However, the offer of that position was withdrawn and he was hired in the maintenance worker position.

The Employer relies upon a test that it conducted of the Grievor and Sean Jordan and three other employees. The Employer's test was conducted after the Employer received the results of testing by the OE College. The results of the Employer's test were stated by Dan Power in his testimony at the hearing. Mr. Power and two of the Town's councillors conducted the test. The town councillors did

not have demonstrated qualifications as heavy equipment operators. Mr. Power had prior experience as an operator and owner of heavy equipment in the construction industry. The employees taking the Employer's test were not advised of the test prior to arriving at work and being asked to complete the test. The employees were all asked to complete the same test by using a backhoe to dig a hole 4 feet by 4 feet by 4 feet, load a dump truck, and backfill the hole. Mr. Power testified regarding his observations and the reasons that he believed Sean Jordan was superior to the Grievor in his performance during the test. In particular, Mr. Power testified that Sean Jordan operated the bucket more efficiently and at the proper angle to obtain maximum torque. The Employer did not produce any written test results.

The OE College conducted similar practical testing of the Grievor, Sean Jordan and three other employees in the operation of a backhoe. A competency evaluation was carried out by two heavy equipment instructors with the OE College. The evaluation was conducted at the Town depot, using equipment provided by the Town. The report recommended that all operators would benefit from training and formal instruction in safety and operational procedures. The detailed report of the test result for both the Grievor and Sean Jordan contained the same conclusion, i.e., that both employees showed a good understanding of the equipment operated, but there was lack of planning for the job at hand and operations were too fast for the operator's control level. It was recommended that both employees have a four day theory course and a one week practical course in the operation of the backhoe. The OE College is an independent organization with expertise in heavy equipment operator training. The OE College conducted a test at the request of the Town. The detailed report completed by the OE College noted some differences in the strengths and weaknesses of the Grievor's and Sean Jordan's operation of the backhoe. However, a reading of the OE College report in its entirety leads to the conclusion that there was no demonstrable difference between the ability of the Grievor and Sean Jordan. They were relatively equal or approximately equal in their ability to operate the backhoe.

The Arbitrator places greater weight on the result of the test conducted by the OE College than the result of the test conducted by the Town. The OE College test was conducted by qualified heavy

equipment instructors, it was conducted by a college that was independent of the Employer and the Union, and it set out a detailed written analysis of the strengths and weaknesses for each operator. It was unreasonable for the Employer to reject the test result of the OE College and rely upon its own test result.

Based on the testing by the OE College, the Arbitrator is satisfied that the Grievor's qualifications for the position of heavy equipment operator (temporary) are equal to the ability and qualifications of Sean Jordan, within the meaning of Article 9.07. The Union has proven that the Employer's decision was flawed when it rejected the independent OE College report, and relied on its own subjective test that was not proven to be reliable. The Grievor was therefore entitled to be awarded the position as the senior applicant.

### **Decision**

The grievance is allowed. It is ordered that the Grievor, Fred Reynolds, be placed in the position of heavy equipment operator (temporary) with full compensation for lost wages and benefits, effective December 8, 2006.

**DATED** this 30<sup>th</sup> day of July, 2007.

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James C. Oakley  
Arbitrator