



The Arbitration hearing convened at the Two Seasons Hotel, in Labrador City, Newfoundland and Labrador, on January 13, 2003. The hearing concluded on that day. At the commencement of the hearing, the parties agreed as follows:

1. That the sole Arbitrator was acceptable to the parties and had jurisdiction to deal with the dispute.
2. That the Arbitrator would take written notes and in the event of conflict, these notes would prevail.
3. That the grievance procedure had been properly followed and any requirements waived.
4. That there were no preliminary objections to be argued with respect to arbitrability.
5. That the Arbitrator would remain seized of the matter for a period of sixty (60) days following the date of the Award in the event that any interpretation of the Award or its effect was necessary.
6. That witnesses would not be excluded from the hearing.
7. That all parties likely to be affected by the outcome of the arbitration had received adequate notice.\*
8. That Collective Agreement and statutory time limits for making the Award would be waived.

### **THE EXHIBITS**

The following exhibits were entered by consent:

- |    |                                    |
|----|------------------------------------|
| C1 | The Collective Agreement           |
| C2 | Grievance Report – August 18, 2008 |

---

\* The Employee awarded the position observed the hearing as an interested party.

- C3 Job Posting – Driver/Operator – July 30, 2008
- C4 Correspondence – Town Engineer/Danny Smith – August 8, 2008
- C5 Correspondence – Town Engineer/Hughes – August 8, 2008
- C6 Correspondence – Town Engineer/Brown – August 8, 2008
- C7 Correspondence – Smith/Town Clerk – July 31, 2008
- C8 Driver’s License – Danny Smith
- C9 Correspondence - Hunt/Smith – August 6, 2008
- C10 Correspondence – Hughes/Town Clerk – March 7, 2008
- C11 Driver’s License – Tracey Hughes
- C12 Correspondence – Brown/To Whom It May Concern – August 5, 2008
- C13 Correspondence – Brown/Town Clerk – July 31, 2008
- C14 Driver’s License – Tony Brown
- C15 Correspondence – Barnes/To Whom It May Concern – July 31, 2008
- C16A Public Works Department Memo – August 17, 2000
- C16B Draft Job Posting for Driver/Operator
- C16C Job Posting – Labourer Position – September 27, 2000
- C16D Job Posting – Heavy Equipment Operator
- C17 Simple Effective Solution Job Evaluation – May 2, 2003
- C18 Job Posting – November 15, 2005

### **NATURE OF THE GRIEVANCE**

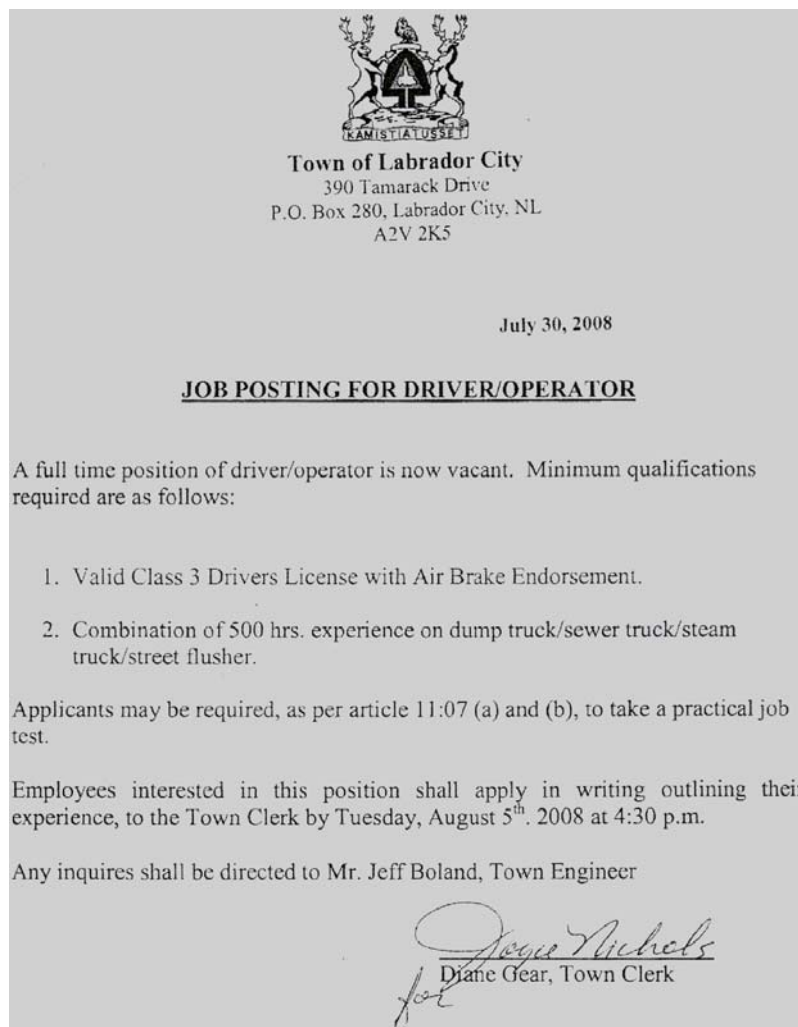
In a grievance dated August 18, 2008, the Union alleges that the Grievor was passed over for the position of truck driver when the job was awarded to a junior employee. The Union seeks full redress - the position for the Grievor and all monies owed. The Union requests that this discriminatory practice cease.

The Union is alleging violations of Article 11, 2, 7, 8, 22, and other applicable articles of the Collective Agreement.

In a reply filed August 25, 2008, the Employer denied the grievance.

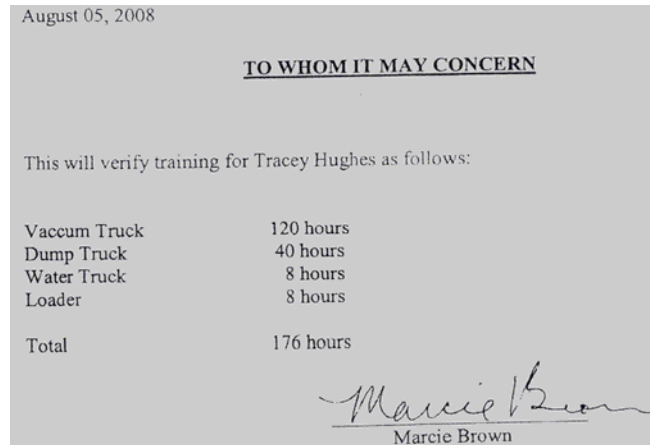
### **THE FACTS**

On July 30, 2008, the Employer posted a vacancy to fill the position of driver/operator as follows:

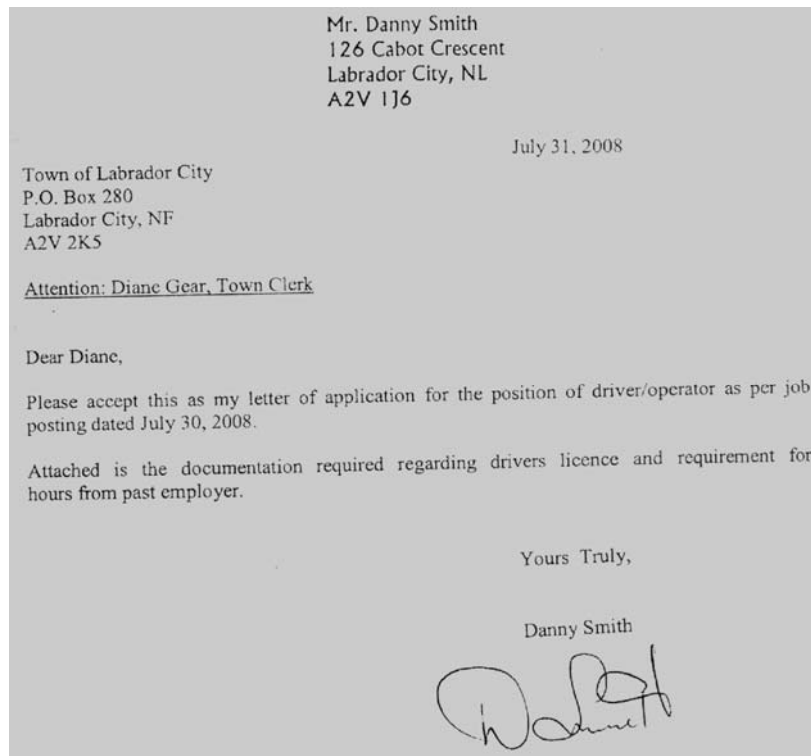


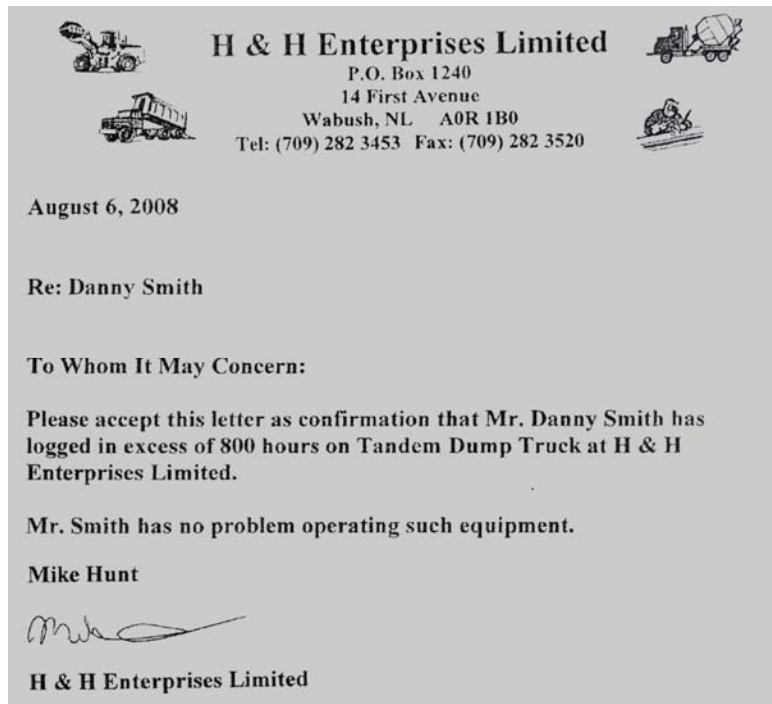
The Grievor applied for the position in a timely fashion and attached to her application her driver's license, as well as records of hours worked on the equipment specified in the posting. With her

application, the Grievor submitted a valid, Class 3 Driver's License as required. There was also correspondence from a co-worker, Marcie Brown, stating as follows:

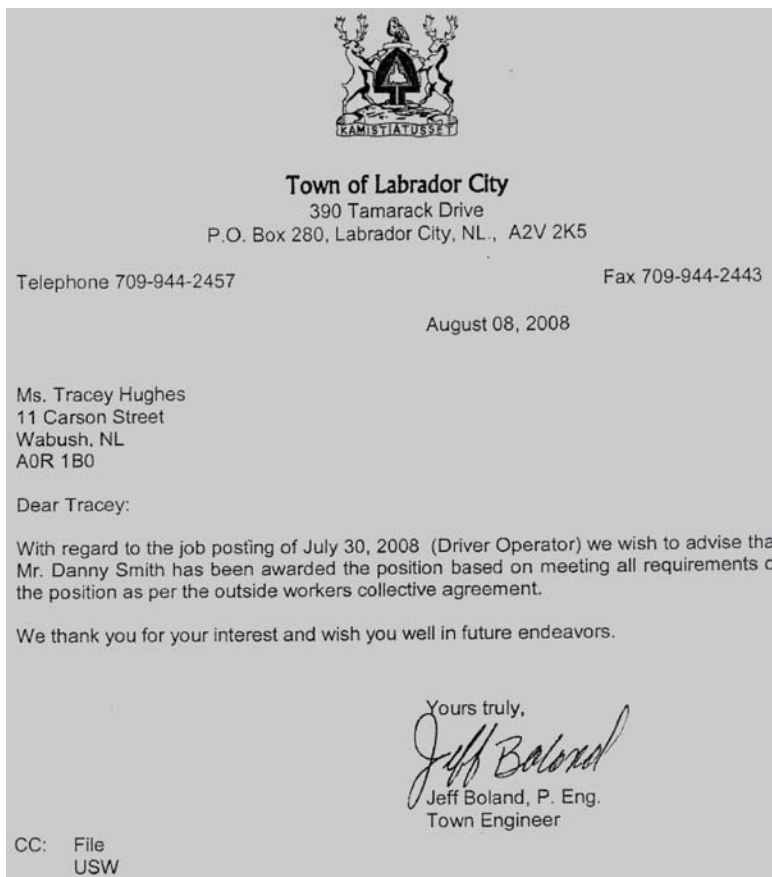


The successful applicant, Danny Smith, applied for the position on July 31, 2008:

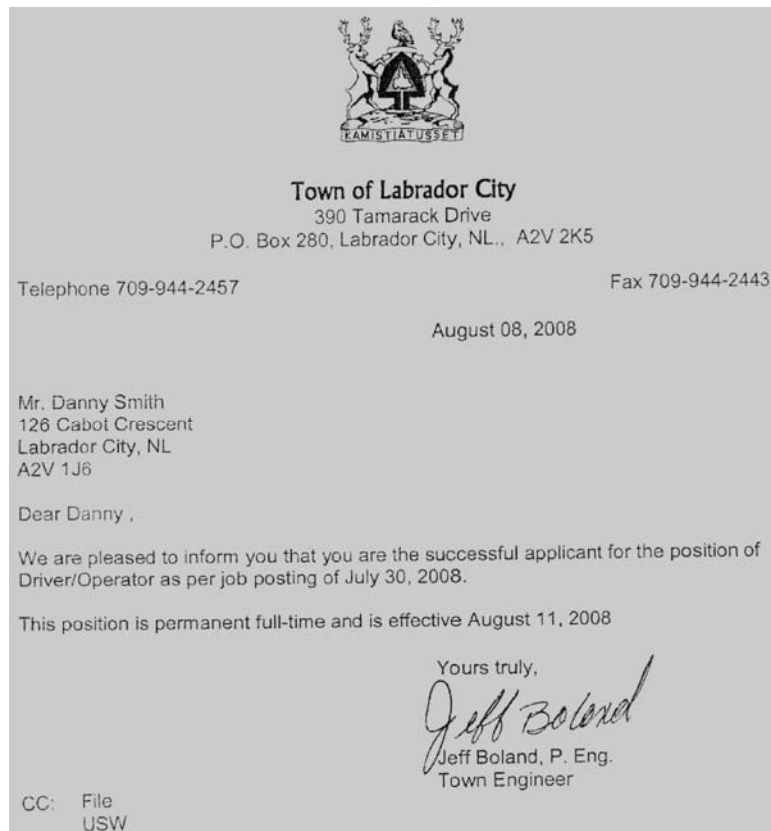




The Employer notified the Grievor that the position had been awarded to a less senior employee in correspondence dated August 8, 2008:



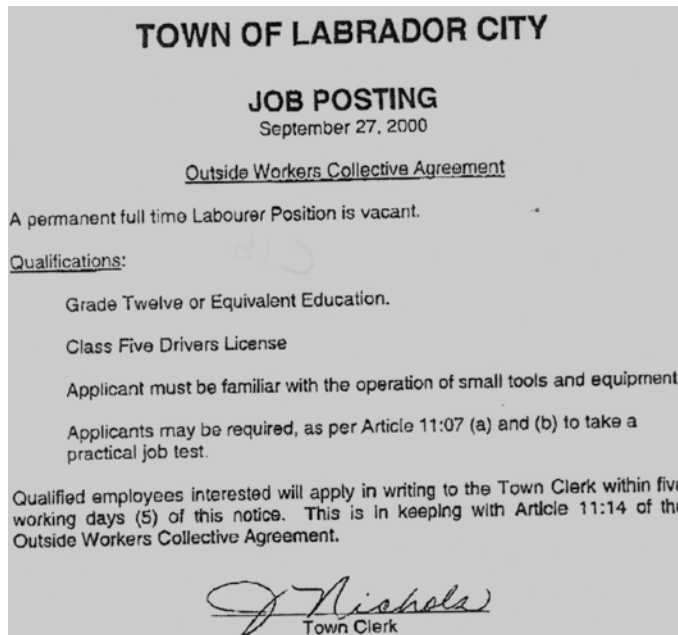
Mr. Danny Smith, who was second in seniority to apply for the position was notified on the same date of his successful application as follows:



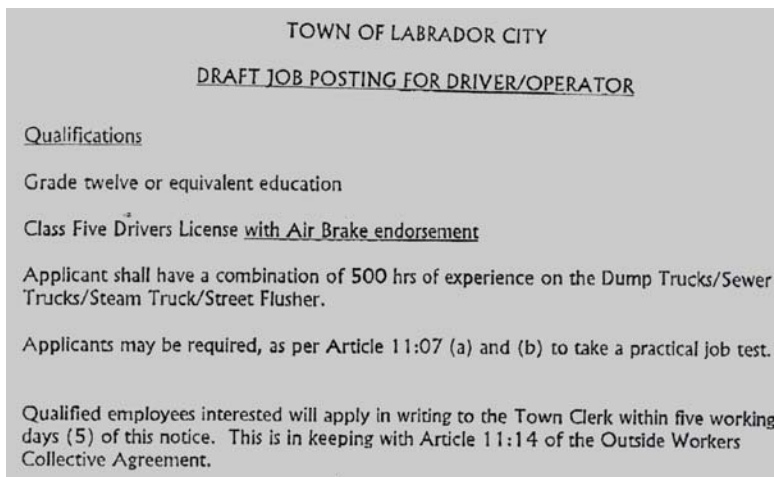
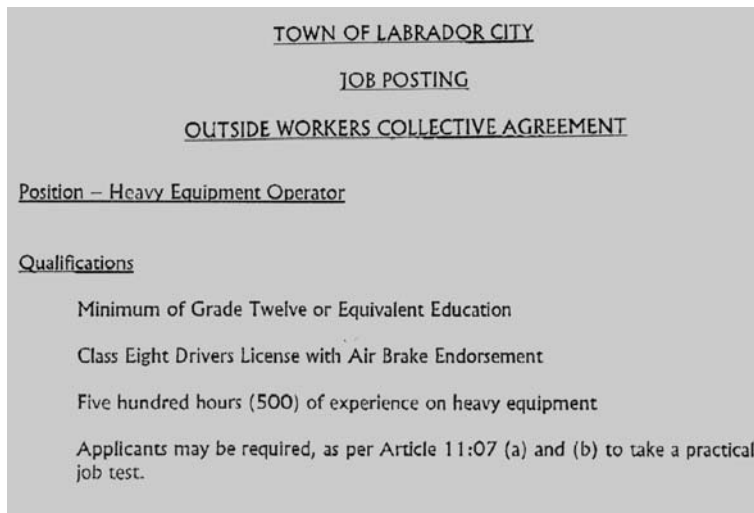
A third applicant was advised that the position had been awarded to Mr. Danny Smith. There were no interviews for the position.

The position of driver/operator for outside workers was subject to a job evaluation in 2003 and the result was as follows:





And there were undated draft postings entered by consent:



Paula Bursey-Mayo testified that she has been employed with the Town in excess of ten (10) years and has served in various capacities with the Union, including President and shop steward. She was familiar with the Simple Effective Solution Job Evaluations (hereinafter the “SES program”), cooperative wage subsidy, which was implemented to ensure pay equity within the system. Every classification was examined and the work that applied to each was determined. Both the Employer and the Union agreed to the process and to the outcome.

In this particular case, the Employer added requirements for the position of driver/operator after the parties agreed on what constitutes the job through the SES system. If the Employer places additional job requirements, then the job description should change and so should the rate of pay.

The witness agreed that the Union could have grieved the job posting. However, the practice is to file individual grievances and, in this instance, the grievance filed was as stated. It is the duty of management to ensure that the posting is correct and complies with the SES system. Prior to the SES there were no job descriptions as such.

The Grievor testified that she is a seasonal worker and her employment is as a part time labourer. She testified that she was the most senior employee to apply for the position. At the time she had 200 hours in heavy equipment. She was trained in heavy equipment by a fellow employee while she was working as a labourer. That employee was Marcie Brown, who was not a certified instructor. Nevertheless, the Grievor obtained her Class 3 license, which permitted her to operate heavy equipment. She had 176 hours at the time she made her application for the driver/operator position, whereas the Employer was looking for 500 hours on the job posting.

The Grievor testified that the Employer had four types of heavy equipment, a dump truck/sewer truck, steam truck and street flusher. During the time she was training, she was never in the vehicle alone. Someone was always in the vehicle with her. She agreed that she had no work experience in the position. She had passed her license to obtain her Class 3. She had never operated any of the equipment on her own. She was seasonal and worked usually to the end of November. Currently, she is off work and will be recalled the spring. She has a valid Class 3 license with the air brake endorsement. She does have the required training for driving but will need training in ways to operate

the truck. It was her understanding that such training occurs once the person obtains the job. She has a right to request training.

The successful applicant, Danny Smith, testified that he had been working as a seasonal employee since 2004 as a labourer. Prior to 2004 he had been working for other employers, operating heavy equipment and truck driving. He had the requisite Class 3 driver's license. He had been operating the garbage truck for Wabush from 1978 to 1980 and then commenced private work with various construction companies. He had driven a variety of heavy equipment, including a cement truck. He maintained that he had all of the qualifications as required and as the senior employee with all of the qualifications, he was awarded the position of driver/operator.

Jeff Boland, the Town Engineer, testified that he has worked with this Employer since November 2001. His duties included preparation for the job posting in issue. In preparing that posting, he considered the type of equipment that a successful applicant would be required to operate. He reviewed previous postings related to similar positions in writing the job posting. He believed requiring 500 hours experience was reasonable given the equipment the driver was required to operate. He notified the Union as a courtesy that the job would require 500 hours prior to the posting. The Union filed no policy grievance relating to the posting.

The most senior applicant with the minimum qualifications for the position was Danny Smith. Mr. Smith had in excess of 800 hours experience in operating heavy equipment. Mr. Boland did not believe that the Grievor was qualified as she had 176 hours, all of which she accumulated prior to obtaining her license. She had no experience since obtaining her license. The Grievor did not meet the 500 hours of experience as required. The Grievor therefore did not have the minimum qualifications and she was denied the position.

The SES is a software package used to assign weights and values for various work factors. Specific weights were given aspects of a job in an effort to obtain some wage parity within the system. The objective of the SES program was to determine the values to be placed on a job and to establish what values should be assigned to each position, in an effort to obtain a form of wage parity. The Employer did not view the SES as providing every duty for the position or as a job description as such.

Previous job postings were designed to deal with circumstances at the time. Some were of a temporary nature. The witness did not believe there was any impediment to changing the posting in this instance from other postings, as management has a right to set qualifications. The Employer has a right to change a job description and to set the minimum qualifications. He informed the Union that 500 hours would be required. SES values did not change to correspond with this requirement

In setting the qualifications for the job, he believed that two or three would have applied from within employee ranks. He did not know who would get the job. The Employer has no certified instructor to give training at the worksite.

These are facts relevant to this case.

### **POSITION OF THE PARTIES**

#### **The Union**

The Union's position is that the Grievor had the minimum qualifications for a driver/operator posting. Previously, there was no requirement for a minimum number of hours for this job posting. The Simple Effective Solution Job Evaluations dated May 2, 2003, detailed what was required for the position of driver operator. The SES was agreed between the parties. The Employer made no consultation with the Union in changing the job description. Such a change requires discussion. If more duties are required in a particular position, more money would be owing to that classification.

It is the Union's position that this is an improper job posting and the Collective Agreement is tied to the Simple Effective Solution Evaluation of May 2, 2003. The Employer has unilaterally made the addition of 500 hours experience to the job posting without bargaining or negotiating with the Union.

Article 3.01 requires management to conduct itself within the confines of the Collective Agreement. The Employer cannot act unilaterally. Here, the Union has been subjected to an ad hoc training requirement without any consultation.

In short, this Collective Agreement is tied to the SES Program agreed between the parties. The Employer had an opportunity to change the requirements for the position during rounds of negotiations, but chose not to do so.

Finally, there is no issue regarding the timing of the grievance. The Union acted when the Grievor was denied the position. This is not a matter of a policy grievance relating to the job posting.

The Union made reference to cases in support of its position, including Re: Children's Aid Society of Cape Breton and CUPE (1987) 27 L.A.C. (3d) 289 (Outhouse); Re: Hôpital Général Juif Sir Mortimer B. Davis and Syndicat Canadien de la Fonction Publique, Locale 3113 (1990) 16 L.A.C. (4<sup>th</sup>) 277 (Frumkin); and Re: County of Bruce and Service Employees' Union, Loc. 210 (1999) 84 L.A.C. (4<sup>th</sup>) 381 (Rayner).

It is the Union's position that this grievance should be allowed with full redress.

### **The Employer**

The Employer is relying upon management rights as recognized under the Collective Agreement. Management has the right to post the qualifications for a job in the enterprise. The requirements for the job were posted. The posting was a reasonable exercise of these management rights.

Here, the Grievor had some level of training but no actual experience for the position. The Collective Agreement does not require the Employer to provide a training period. Two applicants actually met the requirements for the job as posted, but the Grievor did not. The Employer awarded the position to the senior applicant with the qualifications.

The posting reflected the reasonable duties for the job. The Union made no objection to the posting.

There is no allegation here of discrimination. Seniority was the determining factor. The Union cannot rely upon the Simple Effective Solution Job Evaluation, which was focused on pay equity guidelines. There was no rigid job description for the position. The SES was limited to resolving classifications issues. The SES findings do not bind management.

The job was awarded to the Applicant who held the minimum requirements with the requisite seniority. The Employer acted reasonably in requesting a level of experience. Management stated

what was needed in the job posting. The Grievor did not meet the requirements of the job posting and was not entitled to the job.

The Employer presented a number of cases in support of its position, including: Re: Island Telephone Co. Ltd. and Int'l Brotherhood of Electrical Workers, Local 1030 (1983) L.A.C. (3d) 132 (Christie); Newfoundland and Labrador Health Care Association and NAPE (Re: Deborah Lavers-O'Neill (2000, Unreported) (Browne); and CUPE, Loc. 1252 and Regional Health Authority River Valley Health (Re: Ken Jordon (2004, Unreported) (Bladon).

It is the Employer's position that the grievance is should be denied.

### **CONSIDERATIONS AND REASONS FOR THE DECISION**

Articles relevant to these grievances include:

3.01 The Union recognizes the right of the Employer to operate and manage its business in all respects in accordance with its commitments and responsibilities and, subject to the terms of this Agreement, to direct its employees to discharge, suspend, or discipline employees for just and reasonable cause; to hire, transfer, promote, demote and to assign employees to shifts.

11.07 Applications for promotion will be accepted from permanent full-time employees who meet the minimum requirements for the job. Seniority shall be the determining factor, after employees have successfully demonstrated:

- a) ability to perform the work as appraised by written and/or practical job tests which are fair, equitable, and related to the job;
- b) physical fitness.

Temporary vacancies of more than five (5) working days duration which the Employer decides to fill shall be filled in the following manner:

- 1) the senior bargaining unit employee will be offered the vacancy immediately and may accept or decline;
- 2) if the senior bargaining unit employee declines a vacancy, it will be offered to the next employee in descending order to seniority and so on.

11.08 (a) The Employer specifically recognizes that where minimum qualifications are met, then seniority will be the determining factor in job selection. The Employer also specifically agrees that in a layoff situation it will not attempt to

improve its work force by retaining its most qualified employee, but will retain the most senior person with the basic qualifications to do the job.

- (b) In any dispute concerning qualifications in a layoff situation or in demotion, the most senior person having the minimum qualifications to do the job will be given preference.
- (c) Employees who are promoted from within the bargaining unit to positions outside the unit shall be entitled to return to their former position within twelve (12) months with full seniority rights based on total length of service in the Employer. In the event their former positions have been discontinued, they shall be entitled to a position of like status. During this period, the Employer will continue to deduct Union dues in accordance with Article 2:05 from the employee's pay.

11.14 Every vacancy for a position of more than one (1) month's duration and every newly-created position shall be posted for five (5) working days on the special bulletin board supplied for Union purposes. An employee desiring the position must make application in writing to Management within five (5) days of the posting. Subject to the provisions of Section 11:06 the senior employee shall be given the appointment. Applications to bid for a lower-rated job shall be subject to the approval of management who will take into consideration reasons brought forward by the employee. Such reasons will not be arbitrarily denied. Management will allow employees to submit bids for lower-rated jobs if such employees have been actively in the job they wish to leave for a period of five (5) consecutive years. In such cases a replacement must be available.

Here the Grievor is senior to the junior applicant appointed to the driver/operator position as posted.

At 6:0000, Brown and Beatty make reference to the importance of seniority as follows:

Seniority systems are an integral part of virtually every collective agreement. They define eligibility for a wide variety of monetary and fringe benefits provided for in collective agreements, and they determine an employee's entitlement to particular jobs in the context of promotions, transfers and layoffs. With all of the terms and conditions of employment to which they are linked, seniority provisions are designed to reward employees for longevity of service. The theory underlying such systems is to provide those employees possessing the longest record of service in the context of a layoff with the greatest job security and, in the context of a promotion, with the greatest potential for advancement. The extent to which a particular seniority provision secures such benefits will depend in large measure on the scope or definition of an employee's seniority, the manner in which the agreement provides for its application, and the extent to which it is qualified by such other considerations as skill and ability. Notwithstanding enormous variation in all of these matters in collective agreements, all arbitrators start from the premise that:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations

and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

Brown and Beatty at 6:3000:

Although every collective agreement is distinctive in some respects, typically seniority rights are qualified by requirements of skill and ability in one of two ways:

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 a 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. (Emphasis added)

The parties agree that this Collective Agreement and, in particular, Articles 11.07 and 11.08 contain what is commonly referred to as a sufficient ability clause – the first theme referenced above.

Qualifications are at issue in this case. That is not uncommon. Brown and Beatty write at 6:3000:

As already noted, rarely do collective agreements provide that seniority is the sole criterion to be utilized by an employer in determining entitlement to a particular job. Seniority rights are almost always circumscribed temporally, geographically, occupationally and, as described in the preceding sections, they may only apply in certain defined contexts such as promotions and layoffs. In addition, virtually all seniority clauses contain the proviso that, before an employee can claim a position on the basis of his or her seniority, the employee must first show that he or she has the necessary ability, qualifications, etc., to do the job. If none of the applicants is capable of satisfying the requirements of the job, it is generally accepted that an employer is free to ignore the seniority provisions in an agreement and to appoint whomever it desires, whether from within its workforce or from the labour market, so long as it acts fairly and without discrimination.

The burden of proof rests with the Union. Brown and Beatty in Canadian Labour Arbitration, at 3:2400, state:

The obligation of having the onus or burden of proof means the party bearing it will not succeed when, on the basis of the evidence adduced and argument presented, the result has not been pointed to one way or the other in the mind of the arbitrator. That is, for the party with the onus of proof to succeed, the scales must tip in its favour. However, where there are two

conflicting versions of what occurred, the arbitrator must first resolve which one is correct before applying the foregoing principle. ...

In the allocation of the burden of proof, the general principle is that “the onus of proof in all cases rests primarily on him who asserts a claim to establish and prove it and not on the other side to disprove the claim”. And in grievance arbitrations, it is generally accepted that the Grievor has the ultimate burden to make out a breach of the collective agreement except in cases of discharge where the initial burden to prove a *prima facie* case is met by proving the collective agreement, the fact of employment, and the dismissal.

The scope of an arbitrator’s ability to review a management decision is limited. Brown and Beatty at 6:3100 state:

Notwithstanding the many variations in the type and language of seniority clauses that may be included in collective agreements, there has been relatively little dispute among arbitrators as to the general scope of their review of managerial decisions that are made according to any of the standard promotion and layoff regimes. In the first place, there is a consensus that regardless of the language of the agreement, the standard of arbitral review of managerial decisions that involve an assessment of the abilities of employees is less demanding than that used in discipline cases. As a general rule, arbitrators have been reluctant to interfere with managerial decisions of this kind unless there is evidence of arbitrariness, discrimination, bias and/or bad faith, or an indication that the employer’s judgment was unreasonable in some basic and significant respect. In the usual case, and particularly when the job is a skilled and technical one, the issue is not viewed as whether the grievor in fact possesses the requisite skill and ability but, rather, whether the employer’s decision as to those matters was reasonable in the circumstances. From the earliest awards it has been said that the primary function of an arbitrator’s review is to ensure that:

... the judgment of the company must be honest, and unbiased, and not actuated by any malice or ill will directed at the particular employee, and second, the managerial decision must be reasonable, one which a reasonable employer could have reached in the light of the facts available. The underlying purpose of this interpretation is to prevent the arbitration board taking over the function of management, a position which it is said they are manifestly incapable of filling.

In most cases, arbitrators have not restricted their inquiries to analyses of the *bona fides* of the employer’s motives. In addition, as the extract confirms, arbitrators have always examined the merits of such decisions at the time they were made against a standard of reasonableness. As summarized by one arbitrator, an employer’s decision will be tested for its honesty, its completeness and its correctness under a test of reason. For others, a test of reasonableness centres on an assessment of whether management has deviated from the path of rationality or relevancy. Another formulation asks whether the decision was based on evidence that is so minimal that no employer, acting reasonably, could have arrived at that decision.

In quoting a decision from the Ontario Divisional Court, the authors state at 6:3100:

The 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 issue 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.

Finally, Brown and Beatty state at 6:3100:

Although reasonableness and correctness are the standards against which an employer’s evaluation of an employee’s ability and qualifications are usually tested, in some cases it is claimed that a decision was arbitrary, discriminatory, biased and/or made in bad faith. Employees have prevailed when they were able to show that the employer did not apply its standards consistently, displayed favouritism or failed to even consider them for the job. Decisions that are not in conformity with human rights legislation will be found to be discriminatory as well.

The driver/operator job posting which is the subject of this grievance makes reference to minimum qualifications. One requirement is 500 hours experience on dump truck/sewer truck/steam truck/street flusher.

At the time of her application, the Grievor had 176 hours on the combination of vacuum truck, dump truck, water truck, and loader. These hours were accrued during training and none were accrued after the Grievor had her license. The Union maintained that the qualifications in the job posting for driver/operator should have been limited to those found in the Simple Effective Solution job evaluation for the position of driver/operator.

The Simple Effective Solution Job Evaluation program was undertaken by the parties for the purpose of establishing some form of parity within job classifications. Job evaluation is linked to job classification, as opposed to a job description. Sack and Poskanzer in Labour Law Terms: A Dictionary of Canadian Labour Law<sup>†</sup> makes the distinction between a job evaluation and a job description:

---

<sup>†</sup> Sack and Poskanzer Labour Law Terms (Lancaster House, 1984)

**job classification** category of jobs or occupations grouped together for pay purposes; also used to refer to the assignment of a job to a category of jobs in accordance with a job evaluation plan; see **job evaluation**

**job evaluation** systematic method of determining the value of each job in relation to other jobs for the purposes of wage determination; various methods of job evaluation exist, the most popular of which involves the assignment of points based on factors such as skill, effort and responsibility, etc.

**job description** written outline specifying the main features of a job or job classification, usually including duties and responsibilities and sometimes qualifications; ordinarily job descriptions are designed for the purpose of determining wages and do not prevent an employer from assigning an employee other functions not included in the job description unless the contract so provides

Based on this jurisprudence and the evidence of Paula Bursey-Mayo and Jeff Boland, I am satisfied that the Simple Effective Solution Job Evaluation for the position of driver/operator was not a job description, but rather a job evaluation. The Union's submission that the Simple Effective Solution for the position of driver/operator was a job description that effectively froze the requirements for that position is unsustainable.

However, the Union also disputes the Employer's decision to place the requirement for a "combination of 500 hrs experience on dump trucks/sewer truck/steam trucks/street flusher" as a minimum qualification for the driver/operator job posting. In taking this position, the Union points to other job postings.

Some previous job postings were entered into evidence as Consent 16, but these lack consistency. A memorandum from the Superintendent of Works to the Town Clerk on October 17, 2000, indicated that the Superintendent wished to continue with the draft copy for the position of driver/operator for future postings. The draft job posting for driver/operator included 500 hours of experience. Other job postings for other positions also had an experience factor. The November 15, 2005, job posting for a driver/operator was for a temporary position and did require a 500 hour experience factor. However, Jeff Boland testified as to the unique circumstances surrounding that posting and the fact that it was temporary.

In short, there is no consistency pertaining to the number of hours of experience required for the position of driver/operator found in previous postings.

Furthermore, there are no job descriptions incorporated into the Collective Agreement. Article 3.01 recognizes the right of the Employer to operate and manage its business. Nothing in the Collective Agreement curtails the Employer from inserting reasonable criteria into job postings such as the one in issue here. Here, the Collective Agreement does not preclude the Employer from requiring applicants for the driver/operator job posting to have a combination of 500 hours experience on the various vehicles.

There was no evidence of any discrimination or arbitrariness or bias on the part of the Employer in drafting the job posting or in choosing the successful applicant. There is no evidence that the Employer acted in bad faith in manipulating the job posting for a particular result. There was nothing in the evidence to suggest that the Employer has failed to abide by a particular provision of the Collective Agreement.

In the result, I am satisfied that the Employer acted reasonably and was compliant with the Collective Agreement in respect to these circumstances.

It follows that having carefully considered the relevant articles of the Collective Agreement, all of the evidence and the arbitral jurisprudence as it relates to this matter, I find that the Union has not proven a breach of Article 11 or any other article of the Collective Agreement as alleged in the grievance. It follows that this grievance is denied.

### **DECISION**

In conclusion, having carefully considered the relevant Articles of the Collective Agreement, all of the evidence and arbitral jurisprudence as it relates to this matter, I find that the grievance is denied.

**DATED** at St. John's, in the Province of Newfoundland and Labrador, this 2<sup>nd</sup> day of February, 2009.

---

Dennis M. Browne, Q.C. – Arbitrator/Mediator