

Job Posting
Vacancy
Work of the Bargaining Unit

**FINDINGS AND AWARD
IN A DISPUTE**

BETWEEN: **NEWFOUNDLAND AND LABRADOR ASSOCIATION OF
PUBLIC AND PRIVATE EMPLOYEES**

(hereinafter called the "Union")

AND: **THE TOWN OF DEER LAKE**

(hereinafter called the "Employer")

GRIEVOR: **RANDELL WOODFORD**
FOR THE UNION: **FRED OATES**
FOR THE EMPLOYER: **HAROLD SMITH, Q.C.**
BEFORE: **W. JOHN CLARKE, C.Arb. C.Med.**

PRELIMINARY MATTERS

The hearing of this matter took place at Deer Lake on July 3, 2009 at which time the parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to the jurisdiction of the arbitrator to hear the grievance.
3. The grievance procedure had been properly followed or requirements had been waived.
4. The arbitrator would remain seized of the matter for a period of 60 days following publication of the Award in the event the parties could not agree on the interpretation of the award or in the event there is a question of compensation arising from the award.
5. Witnesses were excluded from the hearing until called upon to testify.
6. The time limits for the filing of the award were waived.
7. Colin Pittman was given Notice of the hearing.

The following exhibits were entered by consent and identified as follows:



C#1 Collective Agreement between the parties expiring March 2008.

C#2 Grievance form dated October 2, 2008.

C#3 Job Posting for 2 Full Time Equipment Operators

The following persons testified under oath and entered exhibits identified as follows:

For the Union:

John Fudge

Randell Woodford

For the Employer:

Maxine Hayden

THE FACTS

The grievor, Randell Woodford, is an equipment operator with the employer where he has been employed for in excess of eight years. He has no position with the union. At the time of the subject job posting, two of his fellow workers had left. One of these was an equipment operator and the other was a truck driver. Mr. Woodford had considered applying for the truck driver position if it came open. The employer posted a notice seeking two Equipment Operators. By so doing the grievor was of the opinion that the employer had taken away his opportunity to apply for the truck driver position. He has the necessary endorsement of "air brakes" to occupy the position of equipment operator but wanted the position of truck driver.

John Fudge works with the Public Works Department of the employer as a heavy equipment operator and a lead hand. He has been with the employer for approximately 24 years, is the president of the union and a shop steward. He filed the grievance on behalf of the grievor because he felt there was a discrepancy in the job posting which in his view should have been for a replacement for the truck driver who left rather than an equipment operator. The posting in his view should have requested an equipment operator and a truck driver. He feels the employer is trying to eliminate the truck driver position in the collective agreement. He felt this action on the part of the employer affects the morale of the employees because some equipment operators may want to work in a less demanding and strenuous job and be a truck driver, especially as they get older. Mr. Fudge confirmed that if equipment is dispatched to a job and not needed the

A handwritten signature in black ink, appearing to be 'JF', is written over a diagonal line that extends from the bottom right corner of the page.

equipment operators will do whatever work is available.

There is one new truck which is used for ploughing and salting streets in winter. During the winter months loaders, and sometimes backhoes, are used for snow removal. There are times when both of the employer's trucks are used and there are occasions when both trucks are parked and unused. All equipment operators with the employer can operate the trucks. Mr. Fudge acknowledged that vacations are taken throughout the year and are not limited to summer as they used to be. The trucks are used in pretty well every aspect of the operations of the employer.

Maxine Hayden, the Town Manager of approximately 15 months who had previously been the Town Clerk for 28 years was involved in the decision to post for the position. She said that the employer examined article 35.01 and felt that it was within its rights to look for two equipment operators so that they could get more flexibility in the workforce. There is no person in the workforce who is specifically assigned to operate a truck; it could be any of the equipment operators. Every day the trucks are used and the number of hours they are used varies from day to day. By hiring an equipment operator that person could multi-task on a job site instead of having a dedicated truck driver. The history of this employer is that when equipment operators are at a job site, they do whatever needs to be done if they are not operating equipment.

She explained that a truck driver cannot multitask as an equipment operator can because they do not have the licensing endorsement required to operate the equipment.

THE GRIEVANCE

On October 2, 2008, the union filed a grievance against the employer claiming that there had been a “violation of Article 14 – Vacancy” and sought full redress. The employer responded simply “Disagree – Article 35:01”

THE COLLECTIVE AGREEMENT

Article 14 of the collective agreement reads as follows:

A handwritten signature in black ink, appearing to be 'J. Fudge', is located in the bottom right corner of the page.

"ARTICLE 14 VACANCIES AND NEW JOBS

14:01 When a vacancy occurs in any classification, such vacancy shall be posted on bulletin boards of the Council which are accessible to all the employed for a period of not less than five (5) working days so as to give all interested employees an opportunity to make application for the posted vacancy.

14:02 Preference shall be given to applicants based on seniority, providing their qualifications are sufficient to perform the duties of the vacant classification in the following order:

- 1) employees in the Department;
- 2) employees in the Bargaining Unit;
- 3) applicants outside the Bargaining Unit.

As of May 5, 2005, employees from the Recreation Department, who acquire a position with the Public Works Department will be considered to have the least seniority in this Department as of the seniority list on this date.

14:03 When a new classification is created, the Council agrees to negotiate with the Union the rate of pay applicable to that new classification. In the event that the two (2) parties cannot agree on the rate of wages to be paid in the new classification, the matter will be submitted to arbitration and in any event, the new rate will be effective on the day the new classification came into being.

14:04 Both parties agree:

- a) to the principle of promotion within the service of the Council;
- b) that job opportunity should increase in proportion to length of service.

Therefore, in making staff changes, transfers or promotions, appointment shall be made of the applicant with the greatest seniority and who has the required qualifications.

14:05 Employees who are promoted shall be on probation in the new position for forty (40) calendar days. He/she may be returned to their original position and wage rate with no loss of seniority if the employee's work performance in this position is unsatisfactory."

Article 35 of the collective agreement reads as follows:

"ARTICLE 35 JOB SECURITY

35:01 The Council agrees to maintain twelve (12) permanent positions with the Town unless circumstances beyond its control necessitates such lay of: (e.g-equipment



malfunction at the Stadium that prevents use of the facility, loss of Public Works Department and equipment, etc.)

The Council also agrees that two (2) seasonal employees will be recalled as work becomes available. Wherever possible, seasonal employees shall receive a minimum of a twenty- four (24) week work term each year.

THE UNION'S POSITION

The union argues that article 14.01 supports its position. The phrase "when a vacancy occurs in any classification, such vacancy shall be posted..." (Emphasis added). The expression "such vacancy" refers to the vacancy in a classification. In this case that means that when a vacancy occurs in a position of truck driver then such truck driver position shall be posted. Here the employer has a vacancy in the truck driver position but has posted a request for an equipment operator. This is at odds with what the article says it must do in such a circumstance. The employer by its actions has taken away the right of bargaining unit employees who are qualified to apply for the position of truck driver.

Article 19.05 prohibits an arbitrator from altering or amending any of the provisions of the collective agreement or giving any decision inconsistent with the terms and provisions of the collective agreement. This case then simply involves an interpretation of the wording of article 14. 01. If the employer's interpretation is correct that would amount to throwing away the classification scheme envisioned in the collective agreement. This issue goes right to the integrity of the bargaining unit; it takes away the right to go to a lower classification or to be promoted. Because of the demanding physical activity involved in operating some of the heavy equipment, some of the operators may look favourably upon being a truck driver, especially as they get older. This option will be removed if the employer is successful. If the intent of the employer is to have all operators work interchangeably on all equipment, the job of truck driver will disappear.

The intention of the parties in their agreement must be gathered from the written word of the agreement. In article 14:01 the wording is mandatory in that the vacancy "shall" be posted. The vacancy referred to in this case is that in the truck driver classification. It is therefore that vacancy which must be posted. There is no ambiguity in that wording.



There is no management rights clause in this collective agreement so any wording in the collective agreement takes away from management's total right to manage as it sees fit. Here, article 14:01 has fettered management's absolute discretion to manage and dictates that it must post a vacancy when it occurs. It does not provide discretion to post any vacancy. Management's rights cannot be exercised so as to jeopardize the integrity of the bargaining unit. Management, by its actions in this case, is attempting to eliminate the position of truck driver and have the work of that position done by the heavy equipment operator.

It is clear on the evidence that there is sufficient work for a full-time truck driver. It is therefore not a case where an employer can argue that there was insufficient work for the position so they need not fill it.

The union filed various textual and arbitral authorities to support its position that the grievance be allowed.

THE EMPLOYER'S POSITION

The employer is required to maintain 12 permanent positions unless certain defined circumstances occur. The listing of positions set forth in schedule "A" gives the pay rate for 17 different positions. There are then, more classifications in the collective agreement than there is a requirement to maintain employees for. There is therefore no guarantee that every classification will be filled.

The evidence of both the union and the employer is identical in that employees are engaged in multi-tasking. Workers will do other duties that they are qualified to do rather than adhering strictly to their job classification. For example, the employer has only two trucks. These trucks are fully engaged in winter but there is only one truck driver. Of necessity then, operators are driving trucks. The employer feels that this is a good idea and there therefore is no need for dedicated drivers for the trucks only. When the trucks are parked a person who is operating it at the time gets out and does other work.

A handwritten signature in black ink, appearing to be 'J. B.', located in the bottom right corner of the page.

The employer is trying to be fair and reasonable in the management of its work force and has agreed to and does pay the higher rate of pay when the employee is doing the higher rated job. Further, operators cannot be paid a lower rate of pay for doing a lower rated job. This is accomplished by a preservation of rate clause.

There is no evidence that an individual gets a classification of payload operator or backhoe operator or grader operator. These classifications are simply rates of pay for various types of work.

The employer questions where the vacancy arises. There is no evidence that suggests that the individual who resigned was associated with any one vehicle. The evidence rather suggests that sometimes there is adequate work for a dedicated truck driver. There is not dedicated work for an equipment operator. This fact separates this case from those put forth by the union in support of its argument. None of the cases put forth by the union shows an obligation by any of the employees to work in another classification. The employer here, on the other hand has the right to say that they want employees to have the qualifications for all jobs so that they can multi-task their operations.

Because the employer is under an obligation to have 12 people employed it must ensure that these people have enough to do. The employer has agreed that if the employee works at a higher paid job they get the higher pay rate. There is no job jurisdiction in this collective agreement; the classifications are only for the purpose of setting a pay rate. Each job stipulates "and other related duties" indicating that employees will be performing jobs above the employees' pay rates. The employer can assign any equipment operator to operate a truck when there is a necessity. Maybe at some time when the town grows there will be a dedicated truck driver. That is not the case now. The employer finds it unusual that they would hire more higher paid individuals and get an objection from the union.

The employer has the right to say that it wants employees who have certain qualifications for all

A handwritten signature in black ink, appearing to be the initials 'JMS' with a long, sweeping underline.

jobs. Because the employer has an obligation to hire 12 individuals, it also has an obligation to ensure that these people have enough to do. If the union's argument is correct, a truck driver would get a lower pay even though he qualifies as an operator.

There is no evidence to demonstrate that the truck driver is a full-time job. Occasionally the trucks are parked and the driver works as a labourer. Sometimes the operator uses the loader to load the trucks. The employer argues that the union has not met the test in the cases which it has put forth.

The employer argues that it retains the right to determine if a vacancy exists. Here it has determined that there is insufficient work for a dedicated truck driver. Because a truck driver resigns does not make it a vacancy. There is a flexible work force at this site to do what is necessary perform the work that is required. The employer has to be flexible as employees take vacations throughout the year rather than in the summer only. Because the employer determines that there is a vacancy in the equipment operator position does not mean that it is destroying the classification system. There are two trucks and one truck operator cannot work both trucks simultaneously.

The employer retains the right of the management of its operation. There is a long-standing practice of equipment operators operating trucks as part of their duties. This is not undermining the bargaining unit.

The employer argues that the union cannot simply grieve under article 14 because it does not like the position that the employer has posted for. It is management's prerogative to post for whatever it perceives as a vacancy.

The employer provided various authorities to support its request that the grievance be dismissed.

FINDINGS AND CONSIDERATIONS

The essence of the position taken by the union in this matter is that the action of management in

A handwritten signature in black ink, appearing to be 'JD', is located in the bottom right corner of the page.

posting for two permanent equipment operators is putting the integrity of the bargaining unit in jeopardy. Much has been written about the rights of management to manage. In Canadian Labour Arbitration, Brown and Beatty, loose leaf edition, (Canada Law Book), the learned authors state in section 4:2310 as follows:

"Perhaps the most pervasive and significant example of the importance of a contextual approach has been where the issue pertains to management's traditional right to manage the enterprise, direct the workforce, and establish wage rates. Traditionally, it was said that management is free to do as it sees fit subject to any express terms providing otherwise, or legislative restrictions, and subject to any estoppel which may arise, or any duty to act fairly, and in a manner which does not jeopardize the integrity of the bargaining unit...

On much the same reasoning, arbitrators have held that management may, in the absence of any express terms in the agreement to the contrary... reorganize a department..." impose a freeze on posting vacant permanent positions... establish qualifications for job vacancies... (Citations omitted)"

The collective agreement in this case does not contain an express "Management's Rights" clause, so, in that sense the activities of management are governed by the common law to manage as it sees fit subject to the restrictions of the collective agreement as described in the above quotation. What are the restrictions placed upon management by the subject collective agreement?

The union argues that Article 14.01 confines management to posting specifically for vacancies which occur in particular job classifications such that if a truck driver resigns or otherwise leaves their position, a truck driver should be advertised for. Similarly, supposedly, such would be the case if any other position becomes vacant. Does this argument make sense in the context of this collective agreement and for this employment situation?

The evidence indicates that while individual employees may be called one thing or another, for example a truck driver or a loader operator, this is not entirely descriptive of the function they perform for the organization. The evidence is clear that there is a substantial amount of interchange between the individual employees and the functions they perform. The only apparent benefit of being called one descriptor or another is the pay classification associated with each category. Indeed, the only reference brought to the attention of the undersigned to this schedule in the text of the collective agreement is contained in Article 10 "RATES OF PAY".



The thrust of article 10 is to set forth the rates of pay for employees who have their jobs named as set forth in Schedule "A" and to stipulate that employees who temporarily are required to perform work in a classification paying a higher rate of pay, shall receive that higher rate for all hours worked in that higher paying classification and employees required to temporarily perform work in a classification paying a lower rate of pay shall maintain their regular rate of pay for hours worked in that lower paying classification. There is then no classification system as that term is normally thought of, where employees are classified by particular qualifications and work only with those skills associated with those classifications. Here, employees can seemingly work at any job for which they have the necessary qualifications and are paid in accordance with what they are called. If they work at a higher qualification, they are paid higher. If they work at a lower paid position, they keep their higher pay. This does not seem to be the type of conduct which an employer would embark upon if trying to destroy a classification system.

If one combines this situation with the fact that Article 35:01 requires the employer to maintain only 12 permanent positions when there are 17 described in Schedule "A", it becomes very difficult to agree that there is a classification system in effect at this work site which can be destroyed in the manner suggested by the union. The positions for which the posting was made in this situation require somewhat more qualification than the truck driver position in that the air brake endorsement is required. However, the job pays a higher rate of pay.

The union has argued that the wording of Article 14:01 is such that when a vacancy occurs in any classification, for example a truck driver, that particular vacancy must be posted. This assumes that management (which has the unfettered right to determine if a vacancy exists) has determined that when the resignation of an individual from a position occurs, that is the vacancy. That argument, with respect, cannot prevail. There are 17 classifications specified in Schedule "A" and an undertaking in the agreement by management in Article 35:01 that it will fill a minimum of 12 of those positions. If the union argument were correct, surely management would be caught in an impossible situation of having to fill five positions because there are five vacancies or five



vacant positions. This would make its undertaking of maintaining a minimum of 12 positions meaningless because there would always exist a vacancy when there are less than 17 employees. Management must therefore be the entity which decides if and where there is vacancy in its workforce.

The situation is somewhat different in CUPE, Local 805 v. Provincial Health Services Authority, 140 L.A.C. (4th) 359 where, at paragraph 33, the arbitrator pointed out "the parties now agree that there was a vacancy that the Employer was required to post." Again, at paragraph 47 is stated: "Counsel for the Employer has admitted that there was a vacancy here, and that it should have been posted. The real issue is whether it should be treated as having been a temporary vacancy for purposes of our order to comply with the Collective Agreement." In the present case there is no agreement on which position is vacant; at best there is agreement that there has been a resignation from the workforce.

In Re General Chemicals Ltd. and C.A.W., Loc. 89, 38 L.A.C.(4th)24(Brandt) the learned arbitrator concluded, at paragraph 14: "The evidence establishes without doubt that there was a 'substantial change' to an existing job". Having found that this was prohibited by article 21.01 (a) of the collective agreement, he allowed the grievance. The evidence in the subject case does not show a substantial change to any existing job. In fact, as noted above, the job classifications in this collective agreement have very loose parameters and employees of one classification regularly perform duties of another especially as it involves equipment operation and truck operation.

In Re Maple Manor and London & District Service Workers Union, Loc. 220, 9 L.A.C. (4th) 115 (Hunter) a full-time housekeeper resigned. The work formerly done by her was given to three other full-time housekeepers, some existing part time housekeepers and partly to newly hired part-time housekeepers. The collective agreement required that when any jobs became vacant on a permanent basis the employer was to post a notice of the vacancy. The employer conceded that there was sufficient work identical in quantity and kind to warrant filling the position. The learned arbitrator found that there was a "job of work for a full-time housekeeper". Such is not



the situation in this case. The evidence reveals that the equipment operators and the truck drivers performed interchangeable duties. This is accounted for in the collective agreement by adjusting the rates of pay when individuals do higher rated work and allow them to keep their existing pay rate when they do lower rated work.

In Re Caressant Care Nursing Home, Listowel & UFCW., Loc.75 3 L.A.C.(4th) 236 (Jolliffe) the learned arbitrator found that upon the resignation of one of the housekeepers, her duties were then performed by two part-time positions. There was found to be no issue of availability of work. The agreement required that the employer post a notice of such vacancy on the bulletin board. That collective agreement contains a definition of "vacancy" which meant "a position of employment within the bargaining unit which is not filled..." There was nothing in that collective agreement which allowed the employer to assign higher rated employees to lower rated positions or to assign lower rated employees to higher rated positions.

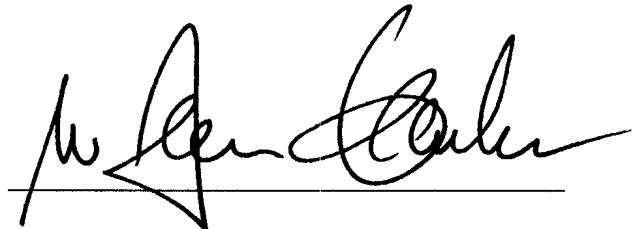
If, in the subject collective agreement, employees were assigned particular tasks, and those tasks only, such that that bundle of tasks, i.e. a job, was to be performed only by the individuals to whom the job was assigned, then the union's case would be strong. In this case however, the evidence indicates that there is frequent interchanging of duties between truck drivers and equipment operators with the only real distinction being their rate of pay and the fact that a truck driver who does not hold the air brake endorsement on their drivers' licence cannot drive equipment for which such an endorsement is required.

In Re Caressant Care Nursing Home of Canada Ltd. & Service Employees Union, Loc.183 44 L.A.C.(4th) 24(Simmons) the learned arbitrator found that the intent of the employer there was (paragraph 17) "to eliminate the full-time bargaining unit as and when opportunities arise." Such an intention has not been made out in the subject case. It was also noted in that case (paragraph 12) that many of the cases in this area occur in situations where there are two different bargaining units affected by management's decision not to post a vacancy such that work which is normally performed by an employee in one bargaining unit is assigned to employees who are in another bargaining unit. Again, this situation does not arise here.

A handwritten signature in black ink, consisting of stylized initials and a long horizontal stroke extending to the right.

As a result of the foregoing the grievance is denied.

DATED at St. John's, Newfoundland and Labrador this 8th day of October, 2009

A handwritten signature in black ink, appearing to read "W. John Clarke", written over a horizontal line.

W. JOHN CLARKE – SOLE ARBITRATOR