

**-Job posting  
-Qualifications**

**FINDINGS AND AWARD  
IN A DISPUTE**

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

(hereinafter called the "Union")

**AND: HER MAJESTY THE QUEEN IN RIGHT OF  
NEWFOUNDLAND AND LABRADOR represented by  
TREASURY BOARD**

(hereinafter called the "Employer")

**GRIEVOR: RAPHAEL KELLY  
FOR THE UNION: ELAINE PRICE  
FOR THE EMPLOYER: DON SATURLEY  
BEFORE: W. JOHN CLARKE, C.Arb. C.Med.**

**PRELIMINARY**

The hearing of this matter took place at Grand Falls-Windsor on November 16 and 17, 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 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. There was one person who had been given notice of the proceedings as a person potentially affected by the outcome. He failed to attend.

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

- C#1 Collective Agreement between the Parties effective May 4, 2004 to March 31, 2008.  
C#2 Grievance form dated January 30, 2008.



- C#3 Grievance form dated February 20, 2008.
- C#4 Job description for “Welder” numbered 8226.
- C#5 Job description for “Welder” numbered 8225.

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

For the Union:

Raphael Kelly, the grievor, who entered the following:

- RK#1 Certificate of Qualification #47-89, Boilermaker -Government of Newfoundland and Labrador;
- RK#2 Certificate of participation in Journeyman Structural Welding– Westviking College, 1994 04 28;
- RK#3 Canadian Welding Bureau Welder Identification card issued to grievor with expiry date 03/29/98;
- RK#4 Grievor’s application / resume for position of welder dated July 23, 1997;
- RK#5 Letter dated December 13, 2007 from Ms. Daphne Bouzane of the employer to the grievor;
- RK#6 Letter dated January 17, 2008 from Ms. Daphne Bouzane of the employer to the grievor;
- RK#7 Grievor’s application for employment as a welder dated July 3, 1997;
- RK#8 Job Posting for “Welder” with closing date of June 27, 1997;
- RK#9 Job Posting for “Welder” with closing date of March 29, 2007;
- RK#10 Grievor’s application for employment as a welder dated March 24, 2007 with attached resume;
- RK#11 Certificate of Qualification #24-07 purportedly from Government of Newfoundland and Labrador certifying the grievor to be qualified as a welder.

For the Employer:

Wayne Ricks who entered the following:

- WR#1 Letter dated June 21, 2007 to the grievor from Wayne Ricks of the employer.

John Hicks

Keith Power

George Barnes

Daphne Bouzane, who entered the following:

- DB#1 Letter to the grievor from Daphne Bouzane.



### THE FACTS

The grievor is 54 years old and was hired in September 1997 into the seasonal position of welder. The position of "Welder" is defined in a job description referred to in the collective agreement. That job description provides a definition of work and illustrative examples of the work. In terms of experience, training and qualifications, it sets forth the following:

**"DESIRABLE EXPERIENCE AND TRAINING:**

Experience as a welder as well as some experience in various other trades associated with repairs of vehicles and equipment; graduation from high school with completion of an approved apprenticeship program for welder and courses in automotive body repairer, automotive mechanics and machinist trades; or any equivalent combination of experience and training.

**NECESSARY SPECIAL QUALIFICATIONS:**

Possession of a journeyman certificate as a welder issued by the Province of Newfoundland and Labrador"

The grievor had worked in the position of welder seasonally for approximately 10 years with this employer when this grievance was filed. He is a member of the union which represents the welders with this employer. The grievor testified to having attended for eight months of a nine-month welding course at the trade school in Stephenville Crossing. He left that institution as he had been offered a job. He felt that the course had basically been completed when he left although he did not receive a certificate to that effect.

The grievor submitted the following documentation in support of his qualifications:

1. "Certificate of Qualification" as a Boilermaker issued by the Director of Institutional and Industrial Education Division of the Government of Newfoundland and Labrador dated October 27, 2008. This certificate was said to replace the original which was issued on 01/07/1981 and it has to be renewed again on December 31, 2012. This certificate allows the grievor to work anywhere in Canada as a boilermaker.
2. A certificate dated 1994/04/27 at Port Aux Basques from the Westviking College of Applied Arts, Technology and Continuing Education acknowledging that the grievor had participated in an 11 week course in Journeymen Structural Welding.
3. A Canadian Welding Bureau "welder identification card" issued to the grievor on 04/10/96 and expiring on 03/29/98 in the category of "Flat/Horiz/Vert/Over" for the electrode filler metal group E 48018 for thicknesses of 1/8 inch and over. The grievor stated that this certificate certifies that he has been tested in flat, horizontal, vertical and overhead welding and that the welding has been x-rayed to prove that there were no defects in his workmanship. The grievor stated that the certificate is not valid now as a test must be performed every two years in order to do vertical and overhead welding. The

grievor was advised by his employer that he did not need it for his then current position so he did not take time off work to be retested.

4. Certificate of qualification *purportedly* certifying that the grievor "has been examined by the Welder Trade Examining Committee and in the opinion of the Committee is qualified to receive this Certificate of Qualification in the Trade of Welder", however, it was admitted by the grievor that in fact, this was not a genuine certificate and was in fact false. The grievor had taken no course nor was he certified as a journeyman welder.

The grievor submitted a resume in support of his application on July 23, 1997 for the position of welder. That resume highlights the grievor's experience from June 1975 to 1996. It shows the grievor's having worked for numerous construction companies including the Imperial Oil bulk plant at Stephenville Crossing, Connolly and Twizell in Labrador City, Marshall Steel in Labrador City, Combustion Engineering in Sarnia, Ontario, Amalgamated Metals Inc. in Sarnia, BW Bartle Ltd. in Grand Falls-Windsor, Exploits Steel Fabricators, Amalgamated Metals in Dartmouth, Nova Scotia, Abitibi Price, M. & M. Engineering Ltd., Foster, Wheeler and Babcock and Wilcox. The grievor indicated that his position with all of these employers was that of welder and he worked on a variety of projects conducted by these companies. A list of references was provided in that resume. The grievor conceded that he had not worked on a lot of heavy equipment prior to working with this employer but he had worked on some wood hauling trailers.

The grievor testified that he had other certificates including one received for a welding test in Sarnia, Ontario which he had satisfactorily completed and one for a high pressure pipe ticket. He had kept these certificates over the years but when he started with government he did not need them anymore and misplaced them.

He graduated from high school but did not do an apprenticeship for welding. He has completed no courses in auto body repair. It was the grievor's contention that he had an equivalent combination of education and experience which would qualify him as a journeyman welder. He contended that there was never anything put on his employment file saying that he did poor quality work. He did concede, however that he had been told once before he was laid off that there was some displeasure with his work. This involved the mechanical head saying that some of his welding was not up to standard and, on another occasion, a supervisor had told him that he

did not like the look of a particular weld he had done.

It was when the grievor applied for a permanent position with this employer in 2007 that the employer found out that he did not have a certificate as a journey person welder. The grievor noted however, that the employer had used him as a welder after it became aware of that fact. Two extensions of his seasonal position of welder were granted, one on December 13, 2007, extending the termination to December 31, 2007 and the second was given on January 17, 2008 extending the seasonal position of welder to terminate on March 31, 2008.

The grievor had applied for two positions with the employer. The first position was a seasonal one with a closing date of June 27, 1997. The qualifications for that position read as follows:

"QUALIFICATIONS: Graduation from high school; completion of an approved apprenticeship program and possession of a journey person certificate as a Welder as issued by the Province of Newfoundland and Labrador."

In his application for that position in response to a question on the form, the grievor stated that he had a journeyman welding ticket which was completed in 1994 and for which he had a diploma. This was not true.

The second was a permanent welder position with a closing date of March 29, 2007. The qualifications listed in that job posting read as follows:

"QUALIFICATIONS: Experience as a welder as well as some experience in various other trades associated with the repair of vehicles and equipment; graduation from high school with completion of an approved apprenticeship program for welders and courses in vehicle body repair; mechanical repairs and machinists trades; experience in mechanical repairs and machinists work would be an asset; possession of a journey person certificate as a welder issued by the Province of Newfoundland and Labrador."

In response to a question on this application form the grievor responded that he possessed a journeyman welder's certificate. This was not true. The employer asked to see the certificate. The grievor requested time off to write the exam and later said that he had passed it. He submitted a certificate to the employer certifying that he was "qualified to receive this Certificate of Qualification in the Trade of Welder." This certificate was false. The grievor later advised the employer of this fact and was disciplined. He continued in his part time position until laid off.

Keith Power, who is employed with the province in the area of industrial training, testified that in order to become a journeyman in a trade one must either complete an apprenticeship with a combination of in school training and work in the field or challenge the exam for the trade based upon work experience and successfully pass it. These skills have to be acquired and mastered under an individual who is "red sealed" in the province. In order to challenge the exam one must prove that they have worked 7200 hours under a red sealed welder and then seek permission to challenge the exam.

Mr. Power explained that welding experience gained in the trade of boiler making may well be different than that used in the welding profession as there are many types of welding. He stated that a high-pressure ticket would amount to no credit toward a 7200 hour requirement. There may well be some common courses that both welders and boiler makers do but one would have to evaluate each course.

George Barnes is the superintendent of equipment for the Department of Transportation and Works at the Grand Falls-Windsor depot. He is responsible for overall operations of welding repairs to equipment as well as the purchase of equipment. He is familiar with the grievor. He noted that the grievor was off work for a time prior to his returning to work in September 2007. Upon his return to work, his duties were changed as the employer then knew that the grievor did not have the requisite certificate. Mr. Barnes has met with the grievor and outlined certain things that he would not be permitted to work on. He explained that the department would be in some jeopardy by having an unqualified welder working on vehicles which would be on the highway. It would cause them difficulties with highway inspectors.

Mr. Barnes explained that over the last three years they have upgraded large numbers of their equipment. This has resulted in less welding repairs being required. In February 2008 there was not sufficient work for all of the welders on staff and layoff notices were issued, one of which was issued to the grievor notwithstanding that he was not the most junior person. As he was not qualified with the requisite certificate he was unable to perform certain duties and the duties



which he could perform were limited.

In cross-examination Mr. Barnes acknowledged that prior to 2007 the grievor had never been disciplined for inadequate work performance although his ability, on a number of occasions, was brought to the attention of Mr. Barnes by the grievor's supervisor. Mr. Barnes explained that there are some light welding functions which mechanics can do. Throughout the fall of 2007 there was sufficient of this type of work to keep the grievor employed. Critical work is done by bona fide welders and the grievor did not have those credentials.

Daphne Bouzane, the regional administrator who looked after staffing and training testified that the grievor was not interviewed for the position of full time welder advertised for in 2007 as he did not have the qualifications required. If a person applies for a position and does not have the required certificates they are screened out of the competition. In February 2008 a Welder had to be laid off and, as the grievor did not have the qualifications for the position, he was laid off, even though there were welders junior to him who were not laid off.

### **THE GRIEVANCE**

The Grievor filed two grievances against the employer claiming, in the one dated January 30, 2008:

“Violation of article 28 and all other pertaining articles.”

The relief the Grievor requested was:

“Full Redress.”

In the grievance of February 20, 2008 the grievor alleged:

“Violation of article 28 of the collective agreement and all other pertaining articles.”

The relief the Grievor requested was again:

“Full Redress.”

In both cases the employer responded that there had been no violation of the collective agreement.

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## THE COLLECTIVE AGREEMENT

Article 4.01 of the Collective Agreement-Management Rights reads as follows:

"All functions, rights, powers and authority which are not specifically abridged, delegated, or modified by this Agreement are recognized by the Association as being retained by the Employer."

The relevant portion of Article 28 of the collective agreement reads as follows:

"...

28.04 (a)     Layoff Procedure

Where a Department determines that a layoff is required within a headquarters area (each employee shall be notified of his headquarters area), the employees, in the Department and headquarters area, and classification affected by the layoff, who have the least seniority, shall be the first employees laid off, provided that the employees who would be retained in accordance with this procedure are qualified and able to perform the duties required.

...

(c)           Bumping Procedure

(i)           An employee who is to be laid off in accordance with 28.04 (a) or who is not recalled when a recall occurs within his Region, shall have the option to bump, provided the employee retained or recalled in accordance with this procedure is qualified and able to perform the duties required, ... "

## THE UNION'S POSITION

The union argued that there are two questions to be resolved in this matter; whether the employer violated Article 28.04 (a) when it laid off the grievor while retaining less senior employees, and, whether the employer violated article 28.04(c) (i) when it denied the grievor the opportunity to bump.

The union reviewed various aspects of the collective agreement to establish the jurisdiction of the arbitrator and the purpose of the collective agreement. The union noted that the grievor was earning seniority and the person with the least seniority during a time of layoff is the person who

should be laid off. The one caveat is that the person who is retained is qualified and able. Similarly with the bumping article if the laid-off employee has sufficient ability to perform the job into which they wish to bump they are entitled to it. These clauses are not competitive clauses; they are threshold clauses. A person may not be able to get a job in a competition but their position is protected. The union reviewed the grievor's qualification noting that he was hired as a welder in September 1997 and there until February 2007 accumulating approximately 10 years seniority. He completed the majority of a course in welding and was certified by the Canadian welding board. From 1994 to 1998 he had tickets in high-pressure welding and stainless steel. He had approximately 23 years of welding experience when he was initially hired by this employer.

He has performed all duties of a welder with this employer. On a couple of occasions his workmanship was called into question in a one-on-one situation by his supervisor but there was no entry made in his personnel file. He had been suspended for falsification of a certificate but the employer contemplated his return to work after that suspension. He was given two extensions to his temporary position in December 2007 and January 2008.

The union argues that it has met the onus upon it of establishing the grievor's qualifications as a welder. The onus then shifts to the employer to justify its layoff and denial of a bump. The employer's actions were not reasonable.

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



### **THE EMPLOYER'S POSITION**

The employer argued that article 28 states that those employees with the least seniority are to be laid off first with one big proviso: that those left are qualified and able to perform the duties required. The question for resolution is who is a qualified welder? Those qualifications, determined by the employer, are to govern the situation provided that the qualifications have a bona fide purpose, that the requirements are congruent with normal requirements and the right to establish requirements must be within management's rights under the collective agreement.

In this case the parties to the collective agreement have included a schedule which includes the job specifications for a welder. One of these specifications is the possession of a journeyperson's certificate. Both parties to the collective agreement have agreed to this. The grievor does not have the certificate. When the employer became aware that the grievor did not have a valid certificate the duties which he was permitted to perform were restricted to non-structural tasks which were of relative low risk. When the time for layoffs came the grievor was laid off out of seniority because he still did not have the qualifications required to be a welder.

The employer submitted various arbitral awards to support its request that the grievance be denied.

### **FINDINGS AND CONSIDERATIONS**

In Re Mohawk Hospital Services Inc. and CUPE Loc. 1605, 38 L.A.C. (4<sup>th</sup>) 53 (Kilgour) the question of whether the employer could require a millwright certificate as part of a job



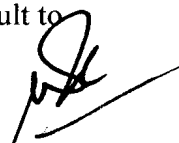
qualification was analyzed by the arbitrator. He concluded (at paragraphs 9 and 22) that in order for an employer to be so empowered, the decision must meet three tests:

1. whether the mandatory requirement was established for a bona fide purpose;
2. whether the particular mandatory certificate requirement was congruent with the normal requirements of the position;
3. whether the right to establish the mandatory certificate requirement is capable of accommodation within the plain meaning of the management rights provisions of the collective agreement.

Taking the last of these issues first, the issue of whether the employer is entitled to set the qualifications required for a particular job is partially contained in Article 4.01. As can be seen from a reading of Article 4.01 all functions, rights, powers and authority which are not specifically abridged, delegated or modified by the agreement are retained by management. There has been no issue raised with respect to these functions having been specifically abrogated in this fashion in the agreement. In fact, quite the opposite is the case. Both management and the union have agreed in the collective agreement that the job description numbered 8225 which was placed in evidence as representing the job description of a welder specifies that "Necessary Special Qualifications" for a welder means "possession of a journey person certificate as a welder issued by the Province of Newfoundland and Labrador".

It would seem as well that the fact that both parties have agreed to this as a necessary requirement in the collective agreement proves that it is congruent with normal requirements for the position as defined by both the union and management. Even if there was not that agreement, it is difficult to argue against an employer, with responsibility for ensuring that its fleet of vehicles is road-worthy, requiring that those employees with the task of maintaining those vehicles in such condition be amply trained to do so. Hence, the second of the three tests is met.

The first of the tests specified by arbitrator Kilgour is as well met in that by its agreement with the definition the union has placed its stamp of bona fides upon the definition. There has been no issue raised as to the bona fides of the employer in making this a requirement. It is not difficult to



draw a connection between this requirement and the legitimate goals of the employer in establishing that standard – to have a highly trained, competent work force.

As a result, there can be no doubt that the employer was justified in using the certificate as a requirement for a person occupying the position of welder. That definition sets the baseline for qualification as a welder.

Article 28.04 then deals with the procedure to be followed by the employer when a layoff is undertaken. That article deals with the issue of seniority by stating that the least senior person shall be the first one laid off. There then follows the proviso that “the employees who would be retained in accordance with this procedure are qualified and able to perform the duties required.” While there has been some disagreement by the employer as to whether or not the grievor was able to perform the duties required, there can be no doubt that the grievor does not have the qualifications as stipulated in the collective agreement in job specification number 8225. The employer is bound to follow the terms of the collective agreement or run the risk of a junior employee, who was laid off, filing a grievance alleging that the employer was in breach of Article 28.04 because Mr. Kelly did not meet the threshold requirement of qualification and was kept on.

A similar argument pertains with respect to clause 28.04(c) in a bumping situation. In such a situation the grievor may bump a junior employee, again, provided that “the employee retained or recalled in accordance with this procedure is qualified and able to perform the duties required”. Again, the grievor does not possess the necessary qualifications for this article to work in his favour in this situation.

The union argued that the case of NAPE & Treasury Board (David Gillingham, Grievor) unreported, 1984 (Rennie, Reid & Easton, chair) is applicable. However, at page 15 of the decision the board points out that "Obviously he has not established that he has the ‘paper qualifications’ even though the Job Description for Cook I does not specifically call for such." In the instant case, the job description specifically calls for a journey person certificate. The grievor's argument in that case was that his performance was satisfactory and the duties of a



cook's helper "are not so demanding as to require a great deal of skill and ability". Such is not true in the instant case.

In C.A. Pippy Park Commission & NAPE (David Downey, Grievor) unreported, 1989 (McDonald, Rowe and Cooper, chair) the issue facing the arbitration board was upon whom did the onus rest to prove the qualifications of the grievor. The board found in that case that the grievor was both qualified and able to perform the duties of Animal Herdsman II into which he wished to bump. There was not there, however, a directive that the employee be in possession of any particular certificate in order to be qualified for the position.

In Newfoundland Treasury Board and NAPE (1992), 27 L.A.C. (4<sup>th</sup>) 137 (Browne), at page 6 of 8, paragraph 24 the arbitrator states: "as to qualifications, neither candidate had any formal skill or training relative to the job." In that case the arbitrator was dealing with a situation where no certificates from a recognized Institute were required as part of the necessary qualifications for the position which was a relatively low skill level position of Maintenance Repairman. Such is not the case in the present grievance.

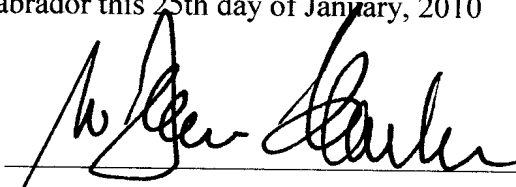
In NAPE & Newfoundland Department of Works, Services and Transportation (Warren, Grievor) unreported 1994, (Cook), the arbitrator was again dealing with a situation where no certificate from an institution was required as a necessary qualification for the position of Storekeeper I.

In NAPE and Newfoundland Treasury Board 49 L.A.C. (4<sup>th</sup>) 257 (Oakley) the arbitrator found, at paragraph 26, "The Employer is entitled to establish minimum qualifications for positions that exceed the qualifications set out in the job specification. The Employer may establish a qualification that a Journeyperson Certificate is the minimum requirement for the Carpenter position. However, the Employer acted arbitrarily in the application of that standard to the Grievor." There is no allegation in the instant case of any arbitrariness or lack of bona fides on the part of the employer in its actions toward the grievor.

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As a result the grievor does not meet the requirement of the position and it follows that both grievances are denied.

**DATED** at St. John's, Newfoundland and Labrador this 25th day of January, 2010



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W. JOHN CLARKE – SOLE ARBITRATOR