

Ref:

Promotion, Seniority

**FINDINGS AND DECISION
IN A DISPUTE**
between

THE TOWN OF POUCH COVE
(the Employer)
and

**THE NEWFOUNDLAND ASSOCIATION OF PUBLIC AND PRIVATE
EMPLOYEES**
(the Union)

Grievor: Mr. Jason Noseworthy

For the Union:

Presenter: Mr. Leo Puddister,
Advisor: Mr. Gerald Noseworthy, Shop Steward & Town Foreman

Witnesses: Mr. Gerald Noseworthy
Mr. Jason Noseworthy, the Grievor

For the Employer:

Presenter: Mr. John Peddle, Employer Relations
Advisor: Ms. Barbara Tilley, Town Manager

Witness: Ms. Barbara Tilley

The Arbitrator: Dr. John A. Scott

The Hearing was held in St. John's, October 25, 2010.

Statement of Grievance "Violation of NAPE Collective Agreement, Articles 13 & 14 & all other pertinent articles re Heavy Equipment Operator position."

Requested Adjustment "Full redress."

THE PARTIES AGREED THAT:

- the Arbitrator was properly appointed with authority to hear the case;
- the Arbitrator's notes of the evidence and argument as recorded in the final award will prevail in the event of conflict;
- parties likely to be affected by the outcome of the hearing had been notified and informed of their right to appear and/or be represented;
- all matters pertaining to the grievance procedure and all time limits, whether statutory or arising from the collective agreement, were properly observed or are waived;
- there were no preliminary objections to be raised;
- all witnesses were to be excluded until their testimony was heard;
- issues of quantum, if any, would be considered separately, and if the parties do not reach agreement within thirty (30) calendar days after publication of the Awards they will be referred to the Arbitrator, within the same thirty (30) calendar days, for resolution;
- the Arbitrator will remain seised of the matter for thirty (30) calendar days after publication of the awards to deal with any matters of interpretation should they arise.

DOCUMENTS TAKEN INTO EVIDENCE:

- Consent #1 Collective Agreement (May 1, 2007 to April 30, 2010)
- " #2 Statement of Grievance (June 30, 2010)
- " #3 Job Position posting, Telegram (closing date 28 May 2010)
- " #4 Internal posting (closing date May 28, 2010)
- GN #1 Telegram job posting (August 3, 2009)
- " #2 Internal job posting for Equipment Operators (October 25, 2005)
- " #3 Job description Town Foreman, initialled by Union & Employer
- " #4 Job description Assistant Town Clerk, initialled by Union & Employer
- " #5 Job description, EO/Water Treatment initialled by Union & Employer
- " #6 Job description Heavy Equipment Operator initialled by Union & Employer
- " #7 Job description, Labourer
- " #8 February 11, 2010 Letter & attachments: Ms. Tilley to Mr. Puddister
- JN #1 Grievor's record of salary from 01/01/07 to 05/27/10
- " #2 Grievor's resumé
- " #3 September 13, 2009, Confirmation Letter from Mr. Paul Cook

COLLECTIVE AGREEMENT ARTICLES CONSIDERED

ARTICLE 2 MANAGEMENT RIGHTS

2:01 The Union recognizes and agrees that all the rights, powers and authority to operate and manage the municipality of the Town of Pouch Cove and to direct the Town's working forces are unfettered and vested exclusively with the Employer but with the exception that the direction of the working forces may be modified or abridged by the express and specific provisions of this Agreement.

Should a question arise as to the exercise of Management's rights being in conflict with specific provisions of this Agreement, failing agreement by the parties, the matter may be determined through the Grievance and Arbitration Procedures.

ARTICLE 3 DEFINITIONS

3.01 (p) "Promotion" means an action, other than reclassification resulting from a classification error, which causes the movement of an employee from his/her existing classification to a classification having a higher pay range.

ARTICLE 8 GRIEVANCE PROCEDURE

8:01 A grievance shall be defined as a dispute arising out of the interpretation, application or alleged violation of the Collective Agreement.

8:02 Shop Stewards shall suffer no loss of pay for the time spent processing grievances or attending meetings with the Employer's representative or while attending arbitration hearings.

8:03 An earnest effort shall be made to settle grievances fairly and promptly in the following manner:

Step 1 An employee, with or without his/her Shop Steward, shall, within five (5) working days of an incident giving rise to a grievance, discuss his/her grievance with the Town Manager. The Town Manager shall, within five (5) working days of the discussion, provide his/her response, in writing, to the grievor.

Step 2 Should the response at Step 1 not be acceptable to the grievor, he/she may, within five (5) working days of his/her receipt of the reply at Step 1, together with his/her Shop Steward, present his/her grievance, in writing, to the Town Manager. The parties shall meet to discuss the grievance within five (5) working days of the receipt of the grievance at Step 2, and within a further five (5) days, the Town Manager shall render his/her response in writing.

Step 3 Failing settlement being reached at Step 2, either party may refer the dispute to arbitration within fifteen (15) working days of the Town Manager's decision at Step 2.

- 8:04 Notwithstanding any other provisions of this Agreement, time limits fixed by this Article shall be mandatory and shall not be amended or extended except by the mutual consent of the parties given in writing prior to the completion of the time limits. Failure to meet same by the Union shall be fatal to the grievance. If the Employer fails to meet the time limits so fixed by this Article, then the grievance shall be deemed to be upheld and the redress sought implemented.
- 8:05 Where a dispute arising involving a question of general application or interpretation of the Agreement, or in the event of a group grievance, the Union may initiate a grievance at Step 2.
- 8:06 The Union may originate a grievance on behalf of an employee but only in the event that the duly appointed Shop Steward is unavailable and therefore incapable of initiating the grievance on behalf of the employee. Grievances filed for an employee by the Union under any other circumstances shall be considered to be fatally flawed.
- 8:07 Replies to all grievances, stating reasons, shall be in writing at all Steps,
- 8:08 The Employer shall supply necessary facilities for grievance meetings.
- 8:09 Mutually agreed changes to this Collective Agreement made in accordance with Clause 31:04 shall form part of this Collective Agreement and shall be subject to the Grievance and Arbitration Procedures.

8:10 No grievance shall be defeated or denied by a technical objection occasioned by a clerical, typographical or similar technical error or by the unintentional omission of a Step in the Grievance Procedure.

ARTICLE 13 SENIORITY

13:01 Seniority is defined as length of service in a bargaining unit position since the most recent date of hire, calculated in actual hours worked, exclusive of overtime, and shall operate on a bargaining unit wide basis.

13:02 The Employer shall establish a seniority list showing the date of employment and actual seniority of each employee in the bargaining unit. This list shall be updated as of January of each year. One copy of this list shall be posted on the bulletin board and one copy shall be sent to the Union.

- 13:03
- (a) Newly hired employees shall be on probation in accordance with Clause 12:01 (a) and subject to Clauses 12:01 (a) and 13:03 (b), shall be entitled to all benefits and rights of this Agreement.
 - (b) Notwithstanding the provisions of Clause 13:03 (a), probationary employees shall not accrue seniority until they have successfully completed their probationary periods, however, upon successful completion of their probationary periods they shall have their seniority effective from their date of hire.

- 13:04 An employee shall lose his/her seniority only in the event that:
- (a) he/she is discharged for just cause and is not re-instated by an Arbitrator or under the Grievance Procedure;
 - (b) he/she resigns in writing;
 - (c) he/she is absent from work in excess of three (3) days without the approval of the Employer or without sufficient cause;
 - (d) he/she fails to return to work as required when recalled following a layoff and after having been notified by hand delivered letter or by mail delivery by a means which certifies the deliver (*sic*) except when the failure to return is caused by sickness which is verified by a doctor's certificate provided in a format acceptable to the Employer or for other just cause acceptable to the Employer. It shall be the responsibility of the employee to keep the Employer informed in writing of his/her current address.
 - (e) is laid off for a period in excess of fifteen (15) consecutive months.

13:05 No employee shall be transferred to a position outside the bargaining unit without his/her consent. If an employee is transferred to a position outside the bargaining unit, he/she shall retain his/her seniority accumulated up to the time of leaving the unit but will not accumulate any further seniority while outside the unit.

An employee permanently transferred outside the bargaining unit shall lose all seniority in the bargaining unit after the employee has completed his/her probationary period in the position outside the bargaining unit.

ARTICLE 14 PROMOTION AND STAFF CHANGES

14:01 When the Employer decides to staff a vacancy in an existing or new position, either inside or outside the bargaining unit, the Employer shall post a notice of the position upon the bulletin board for a period of not less than five (5) working days.

14:02 For vacancies or new positions within the bargaining unit, such notices shall contain the following information:

- title of position
- qualifications
- required knowledge and education
- skills
- wage or salary rate
- shift work, if required.

Such qualifications shall not be established in an arbitrary or discriminatory manner. All job postings shall state "This position is open to male and female applicants".

14:03 No position within the bargaining unit shall be filled from outside the bargaining unit until all applications from within the bargaining unit have been considered.

14:04 Both parties recognize:
(a) the principle of promotion within the service of the Employer;
(b) that job security should increase in proportion to length of service.

14:07 An employee who has become incapacitated by injury, illness, compensable disablement, or through advancing years and who is unable to perform his/

her regular duties will be employed in other work which he/she can do provided such a suitable position is available, and the applicable rate for the new position will apply.

ARTICLE 15 LAYOFF AND RECALL

15:01 In the event of layoff, employees shall be laid off in reverse order of their seniority provided that employees who would be retained as a result of that process have the ability to perform the required work. Employees whose employment is affected by the Employer's decision to lay off shall have the right to bump junior employees provided that they have the ability and skill to perform the work of the employees who would be so displaced.

15:02 Employees shall be recalled in order of seniority provided that those employees so recalled are qualified to perform the work required.

15:03 No new employees shall be hired until those on layoff status have been given an opportunity of recall, provided that those on layoff status are qualified to perform the work.

15:04 The Employer shall notify permanent employees who are to be laid off no less than fourteen (14) calendar days prior to the effective date of layoff. Should the Employer not provide this notice, the employee shall be paid at his/her regular rate for the number of days of notice not provided except in such cases where it was not possible for the Employer to have been aware of the need for layoff for a period of time equal to the above notice.

Employees other than permanent or temporary employees who are to be laid off shall be entitled to five (5) days notice or pay in lieu thereof. Temporary employees shall not be entitled to any notice other than that provided in their notice of employment.

ARTICLE 30 JOB CLASSIFICATION

30:02 The Employer agrees to draw up position descriptions for all positions and classifications for which the Union is bargaining agent. These descriptions shall be presented to the Union and shall become the recognized position description.

CLASSIFICATION PLAN

All job descriptions to be re-written and agreed to between the Town Manager and the Shop Steward.

Independent party agreeable to the Town and the Union, to perform a classification/occupational review to make recommendations of change relative to similar jobs, in comparable municipalities.

All recommendations are to be shared between the parties and will be non-binding. Cost of classification to be no more than \$2,800.00 and to be cost shared by the Town and the Union on a 50/50 basis.

OPENING STATEMENTS

FOR THE UNION, Mr. Puddister described the grievance as arising out of the Employer's having denied the Grievor a Heavy Equipment Operator position for which he applied and to which his seniority (Article 13) entitled him. The Union claims that the Employer also violated Article 14.02 in that it acted in an arbitrary and discriminatory manner by inserting an experience qualification that is at variance with the posting requirements under Article 14.02 and under 15.03.

In the Union's view, the Employer has acted in bad faith. The Grievor was not properly considered for the job. Comments were made to the effect that the Grievor would never be awarded the Heavy Equipment Operator position. The Employer also acted unreasonably by not calling him for an interview.

The Union indicated it would call testimony from the Shop Steward, Mr. Gerald Noseworthy, the Town Foreman, who happens to be the Grievor's father.

FOR THE EMPLOYER, Mr. Peddle observed that, in the Employer's view, the Collective Agreement gives the Employer the right to find the best person for any vacancy to be filled. The Collective Agreement does not impose any seniority limitations on the Employer's rights in this regard.

Mr. Peddle also noted that the Employer wants the hearing to remain focussed on the issue as grieved. The required qualifications, as set out in the job postings, were never grieved when it was posted both internally and externally in the *Telegram*. The Grievor did not raise objections over the qualifications required in the posting. The requirements for a "Heavy Equipment Operator" (Consent #4) with this Employer have been fairly consistent over a number of years, and when the qualifications were posted previously they were not grieved. Qualifications, in fact, have not been grieved either by the local Union or by the NAPE main office, now or on previous occasions.

There has also been no discrimination, and no allegation of discrimination, filed with this Board. The Grievor's qualification for the position is the issue.

EVIDENCE

The first Union witness was Mr. Gerald Noseworthy, Shop Steward and also Town Foreman, who has worked with the Town since 1976, starting as a Labourer. He has been Foreman for at least twenty years. He directs the Town's staff, and usually has input into the new employees. He does building inspections and budget preparation, and is also involved in preparing job descriptions. He supervises four staff including two Labourers, the new Equipment Operator, and the Equipment Operator / Water Treatment Plant. Mr. Gerald Noseworthy is, himself, an Equipment Operator and also operates the Water Treatment Plant. He also supervises the Grievor, Mr. Jason Noseworthy, who is also his own son.

Asked whether, as Shop Steward, he had grieved the posting out of which this dispute arises, Mr. Noseworthy identified GN #1 as a copy of notice of position which appeared in the *Telegram* on August 8, 2009 for a Heavy Equipment Operator position, and GN #2, a posting for a job whose closing date was

October 25, 2005. Referring to GN #1, he said:

There was a position posted (GN #1). I talked to the Town Manager. I told her it was not posted internally, but in the *Telegram*. When I became aware of it, I spoke to Barb. She was Town Manager at the time, or maybe Town Clerk. I told her it was not posted internally, so it does not fly... I heard nothing about it until the next notice (Consents 3 & 4) went up. That was posted internally.

Asked whether the Employer had acted on GN #1, Mr. Noseworthy said:

Not to my knowledge... I'd say Consent #4 was probably posted seven days before May 28th.

There is a difference in the wording of GN #1 and GN #2. GN #1 (August 8, 2009) describes the "Essential Qualifications" as being "Four to five years experience as a heavy equipment operator especially in snow clearing operations." But GN #2, the October 25, 2005 posting, described "Essential Qualifications" as "Experience as a heavy equipment operator, especially in snow clearing operations." GN #2 did not specify any particular number of years of "experience".

Asked whether other positions posted by the Employer specified a particular number of years of experience, Mr. Noseworthy referred to GN #1 and said: "This is the only one like it." Asked whether he had grieved GN #1 (the August 8, 2009 job posting), Mr. Noseworthy said:

I went in and spoke to her. I did not write a grievance. We can do that according to our grievance procedure, Article 8, Step 1. Nothing was said, just no action was taken, to my knowledge.

Mr. Noseworthy also confirmed that Consent #3 & 4 were postings. The "Essential Qualifications" section set out in Consent #3 is the same as in Consent #4, and reads, in part: "Five Years Experience as a heavy equipment operator working in various capacities especially in snow clearing operations." Asked whether he had grieved Consent #3, Mr. Noseworthy answered:

No we did not grieve that one, to my knowledge. It was done properly, internally (Consent #4) and externally (Consent #3), and I was made aware of it; so we were all aware of it.

Asked why, therefore, he had grieved a month later, on June 30th, he explained:

I grieved it. I was on vacation... When I came back I was talking with the Town Manager, and she said she had hired an Equipment Operator. I asked who, and I can't remember who she said, but she went on to say: 'He's not going to take it.' It was going to go outside the bargaining unit; and that's when I grieved it... Gary Furlong was hired, and is still there. Gary said he had an interview, and he was kind of waiting for it.

Mr. Noseworthy testified that the Grievor was not interviewed for the job. Asked whether the Grievor had, in fact worked as a Heavy Equipment Operator for the Town, Mr. Noseworthy answered:

Yes. I don't know the duration. He fills in for the Operator at the Water Treatment Plant when that Operator is off. If I was off on vacation, David (the Equipment Operator, who handles the Water Treatment Plant) moves up into my position and (the Grievor) covers for David's position. That did happen.

But it was stopped when Gary was hired. When David took vacation I was going to give (the Grievor) the job, but Ms. Tilley said that it was not to happen... Barb and I have a very good working relationship, but that's not right.

Mr. Noseworthy again confirmed that he supervised the Grievor.

Yes, and so far as I am aware there had never been any complaints. I don't know if others in the Town had any complaints. He was here in May at the Recreation Complex. At the time, David was off on vacation; so they called Jason to come in – he was on layoff – to go to work at the ball field for about two weeks work until David came back.... No one found any fault with his work.

Mr. Noseworthy described a Heavy Equipment Operator's work, which

"... in addition to driving the dump truck, includes snow ploughing and operating a front end loader to grade roads and dig up and repair

water lines and roads... So far as I know, he hasn't sanded, but has driven the truck on numerous occasions..

Mr. Noseworthy testified that the provision recorded on the final page of the Collective Agreement concerning the "classification plan" came about so as to ensure that all job descriptions would be rewritten. The paragraph appeared in the Collective Agreement because, in the Union's view, the existing job positions were not actually being observed. Ms. Wavey Ellsworth, the Town Manager at the time, and Mr, Noseworthy prepared the draft. The rewriting was done. He identified, as GN #3 - GN #7, copies of the agreed revisions, which include – at GN #5 & GN #6, both dated April 9, 2008 – the descriptions for "Equipment Operator / Water Treatment" and for "Equipment Operator"

There is no number of years of experience specified under any of those descriptions. Not to my knowledge... The descriptions were signed after the Collective Agreement was signed. They went back and forth and this was the final result... The first set of initials on each page Wavey Ellsworth's and the second are mine. They were all initialled before the grievance.

Mr. Noseworthy identified GN #8, a February 11, 2010 letter from Ms. Tilley, then Town Manager, to Mr. Puddister with a series of job descriptions attached. Mr. Noseworthy noted that the job description for Equipment Operator / Water Treatment Plant included with GN #8 does specify "a minimum of 5 years experience in snow clearing...".

I got this. This was sent out before the Grievance. I talked to Barb about it. I told her the job descriptions (GN #3 to GN #7) were the ones that were agreed, and that the (GN #8) descriptions were never accepted. They are still an outstanding issue at the bargaining table.

Mr. Puddister asked Mr. Noseworthy whether he is familiar with Mr. Clyde Matthews, a deceased member of the Pouch Cove Town Council, and whether Mr.

Matthews – while a member of the bargaining committee and at the bargaining table – had referred to the Grievor. Mr. Noseworthy said that he had:

... heard Mr. Matthews say that Jason would never get this job... and went on to some mumbo jumbo after that ... but the job issue was raised, and that Jason was not going to get it.

Mr. Noseworthy confirmed he has "operated heavy equipment for close to 35 years", and again reviewed the main duties of a Heavy Equipment Operator with the Town of Pouch Cove, and confirmed that Mr. Jason Noseworthy, the Grievor,

... has graded roads with our loader and our back hoe, and he has completed work on the ball field and driven the dump truck. So he has operated all four types of equipment owned by the Town.

Mr. Noseworthy also said he had heard from the Town Manager that the Deputy Mayor had called to compliment the Grievor on his snow clearing. The Town Manager had informed the Foreman about this, and he had replied:

"He's good. He loves it." I asked her to thank the Deputy Mayor. We like getting all feed back.

Based on the witness' 35 years experience, and his 25 years as a Foreman, Mr. Noseworthy confirmed that it his view that:

Jason is qualified, yes, to do the Town work.

ON CROSS EXAMINATION Mr. Noseworthy confirmed his testimony on direct examination that the posting for the position at the focus of this grievance "was done right", and that the Union "had not grieved the matter." He said:

It (Consent #4) was posted properly, yes; but I did discuss it with Barb. We're both management. The discussion was that I noted it was a Class 5, and the five years, and I asked what she considered a "year"; was it a season? So that was the discussion with Barb.

He also testified that other postings occurred at the same time as GN #1, including

"one for the Town Manager and one for the Town Clerk." Mr. Noseworthy does not know who served on the selection committee for Consent # 4 job competition.

I'd been informed on the previous Thursday that Gary would be coming in... Gary indicated that he had expected to get the job. He told me that some time after he was working there, over a coffee or something.

Mr. Noseworthy confirmed that some of the job descriptions GN #3 to 7, including those for Equipment Operator, were dated April 9, 2008. Asked if they had been used by Council in 2008 or 2009, and if they had been given to the employees in 2008, Mr. Noseworthy said that they had not been given to the employees by the Employer, but added that:

They are in effect up to today... They were in the Agreement as of November 2007. It was in the Collective Agreement that the Town Manager and the Foreman would rewrite them as set out on page 33.

Mr. Noseworthy's attention was directed to Article 30.02. Asked whether GN #3 and GN #6 were, in fact, drawn up by the Employer as required under Article 30.02, he said that

They were rewritten by the Employer...The Town Manager said that they were it. I was dealing with the Town Manager.

Asked whether the job descriptions attached to GN #8 (February 11, 2010) were accepted by the Union, he answered: "They were not, No."

ON REDIRECT EXAMINATION, Mr. Noseworthy confirmed that Article 30:02 had been in the previous Collective Agreement.

That's why we did put the note on page 33. We had it in the previous agreement. But the Town was not reading the job classifications. In my opinion we had nothing concrete so that we could say, "This is it." So page 33 overrides Article 30. They weren't following Article 30, and we wanted it firmed up. All this arose out of training. We were getting certified and not getting anything out of it."

Mr. Noseworthy confirmed that he, himself, had a copy of the signed job descriptions, including GN #6, and that, while the employees did not get them from the Employer, "they were given the descriptions by me." Mr. Noseworthy also confirmed that he did not know, as a matter of fact, who the members of the selection committee were, but that:

Ms. Tilley said that it was composed of Mr. Matthews, the Mayor, and the Deputy Mayor as an alternate. I may not be right, but that's what I understood. When it went into the paper I was not given a copy of it. GN #1 was an issue because it was not posted internally. GN #3 was posted internally, and properly, so it was right as far as GN #1 was wrong. Consent #4 is the one the Grievor applied for.

Asked whether he had grieved the posting (Consent #4) as part of the instant grievance, Mr. Noseworthy said "Yes."

THE SECOND UNION WITNESS was Mr. Jason Noseworthy, the Grievor, who has worked for the Town of Pouch Cove...

... off and on since 1996: a couple of weeks here and a couple of weeks there whenever a job comes up, and I have to then go elsewhere to get work.

He has done various duties for the Town, "including cutting grass, doing paint and labouring things." He has "operated heavy equipment over the last three or four or two or three years, including road grading, ditching and ploughing snow." He has also "been recalled as an Operator, but has worked for the Town as a Labourer." He has "been recalled as an Operator at least once", but does not know the dates.

The Grievor identified, as JN #1 "a list of my earnings for the last years." He noted that, on page 2, the figure \$481.95 recurs several times. He said:

That's a week that I got paid as an Operator. Other times I was working as a Labourer.

The Grievor confirmed he has "clearly got thirteen weeks as an Operator". He also confirmed he had applied for the position noted in Consent #4 and identified JN #2 as "the resumé I handed in, yes." He confirmed that he held the appropriate Class 5 licence and had informed the Employer of that fact: "It was in my resumé". Asked whether he had called it to the Employer's attention that he was currently in the position of a Heavy Equipment Operator, Mr. Noseworthy answered: "That's what I was doing when I handed the resumé in", but added that he was not certain whether he was, at that moment, on layoff or not.

He also testified he had performed all the duties listed on the resumé, and identified "JT Consulting" as a firm for which he had "worked, off and on" – not full time, but cumulatively – for a year. He also had worked for Blue Line Transport. "I worked there clearing snow with heavy equipment... Mr. Paul Cook was the Manager of Blue Line Transport." The Grievor identified JN #3 as the letter confirming his employment with Blue Line Transport, where he had worked "for four seasons, yes."

The Grievor had not been interviewed for the Heavy Equipment position, but had not been told why not. He had not got any acknowledgement of his application, and had not learned the outcome of the competition from the Town, but from his father.

The Grievor testified he had "zero" accidents while working for the Town, and had performed all the tasks listed on the job description for the position. "I've had compliments for my work. That happened on a couple of occasions, yes." The Grievor confirmed he had done labouring work, had never disciplined that he can recall, and had having worked with the Town since 1996. "I was only fifteen then. In fact, it might have been 1994."

ON CROSS EXAMINATION the Grievor testified there had been no covering letter accompanying the resumé. "No. I asked the Town Clerk, and she said 'hand in your resumé.'" Asked when the resumé was actually submitted, he said:

The actual date, I don't know. It had to be done by May 28th. That's when it went in, or the day before.

He testified that he had held

The Class 5 since 1996, and endorsements 8 & 9 were secured in 2008. Endorsement 8 covers traction engine and endorsement 9 covers air brakes... In fact, I'd been operating heavy equipment as required, for several years. I started with Council at about 15 on an occasional basis with extended periods off.

Asked how many hours of employment with the Council he had accumulated in 2006, the Grievor said:

I have no idea ... In 2007, I was with J & T for fifty or forty hours a week, and that was full time. I did not work for the Council in 2007.

The Grievor confirmed there was no heavy equipment involved in his work with J & T Transport.

Asked whether he feels he has the five years required experience required under the job posting, Consent #4, the Grievor said:

Yes, I'd say a little better than that. It all depends on what your year is, the season, or 365 days... I cleared out Clark's parking lot in Donovans a good many nights when not working at J & T.

Asked whether he had provided a driver abstract, the Grievor said:

There were three or four tickets, two of which were for operating unregistered vehicles and speeding. I don't have a copy of it here. I'd have had a copy if I knew it was needed. The Town has a copy. I gave it to them.

Asked how many hours worked as an Operator he has accumulated, the Grievor said that he had...

897.5 hours up until this year, plus employment this year which adds up to more than 900 hours.

Asked whether the hours he worked as an Operator all involved the use of heavy equipment, the Grievor acknowledged he "was sometimes paid as an Operator", but that it does ...

not mean I was doing an Operator's work all the time... but I have got to be available all that time as an Operator.

Asked if he had ever caused any damage to Town equipment, the Grievor said:

A fender bender with a truck. We fixed it. There was no garage or specialty shop involved.

ON REDIRECT EXAMINATION, the Grievor was confirmed that "the fender bender" was reported to Management. "I assume it was reported to the Town Manager." He also confirmed that Mr. Gary Furlong

... is an Operator and is working the machines, but does not work the machines all the time.

The Grievor again said that he had noted on his resumé the fact that he was currently working as an HEO.

Yes, I was working as an HEO that two week period, but I'm not operating now. I'm black listed. I don't know why.

THE ONLY EMPLOYER WITNESS was Ms. Barbara Tilley, Town Manager since September 2009, who acknowledged that she is familiar with the grievance.

Asked whether the Grievor had attached the driver abstract to the resumé, Ms. Tilley answered "No", and noted that the application was received "on the last day of the competition."

ON CROSS EXAMINATION Ms. Tilley testified that the application had been submitted on time, and that she had not informed the Grievor that he needed to supply an abstract. "No. That was in Consent #4".

Asked who had comprised the selection committee for the Consent #4 posting, Ms. Tilley testified that:

Mr. Clyde Matthews, Ms. Roxanne Furley, and the Deputy Mayor, who served as an alternate, and I served on the committee: a total of three on the committee, with one alternate. The Grievor was the only internal candidate.

Asked why he had been screened out, Ms. Tilly said:

I considered him when we went through all the applications. I considered his first, but he did not meet the qualifications in the ad. We were looking for the experience.

Asked how many applicants did have the experience, Ms. Tilley answered:

Ten or twelve, and perhaps seven, did not have the experience. There were twenty applicants in all.

Ms. Tilley confirmed that she had read all the applications. "I read Jason's first, and then all of them." The Grievor had not been interviewed, "but three or four others were." Asked whether she had considered the Collective Agreement, she said: "Yes, I knew he had applied internally, and I knew what that meant."

Asked whether she had considered Article 2.01 (Management Rights) in particular, Ms. Tilley answered, "We did not talk about that clause with the committee, no." Article 13.01 (Seniority) was not considered in committee. Ms. Tilley confirmed that they had considered Article 14.03, but concluded that the Grievor did not have the qualification. Asked whether she had reviewed these matters with the committee, Ms. Tilley said: "They were all given copies of the Collective Agreement." Asked whether she had actually talked about Article 14.02 with the committee. Ms. Tilley said,

We went over it. We considered the qualifications, but we were looking for the experience qualification.

She confirmed the committee had not specifically considered Article 14.04.

Ms. Tilley was asked whether, under Article 15.01, she would turn down a bump if the bumper did not have the five year experience, and whether she would deny a bump in such circumstances, Ms. Tilley said, "Yes."

Asked who made the decision not to give Mr. Noseworthy Equipment Operator work after Mr. Fowler had been hired, Ms. Tilley answered:

I realise he has helped out by automatically being put into that position. There were times that he did operate the heavy equipment, yes; but he does not have the five years required for the job. He only got his licence in 2008.

When it was pointed out to Ms. Tilley that the Grievor's resumé claimed "several years", she answered:

I worked out when he had got his licence in 2008, and that was it. I did not consider the resumé (JN #2) as bearing on the matter. I knew his licence was in 2008.

Ms. Tilley also confirmed that Mr. Furlong does do other than operating jobs despite the fact that he is a Heavy Equipment Operator, and that the Grievor has done Equipment Operator / Water Treatment and other duties as well.

ARGUMENT

FOR THE UNION, Mr. Puddister argued that the Union has proven that the Employer has no case. In fact the evidence provided by the single Employer witness is enough, in the Union's submission, to decide the case for the Union. She admitted that the Employer denied the Grievor his appointment because he did not have the experience set out in the job posting.

Mr. Puddister predicted the Employer's argument would likely rely heavily on Article 14:04, which reads:

"Both parties recognize: (a) the principle of promotion within the service of the Employer; (b) that job security should increase in proportion to length of service."

In fact, however, in the Union's view, this clause sustains the Grievor's position. Mr. Puddister argued that Article 2:01 also supports the Union's claim. It provides Management with the rights recognized by the Union, subject to "the express and specific provisions of this Agreement." But there are "express and specific provisions" in the Collective Agreement that limit the way in which Management can exercise those rights; specifically – and most importantly in the instant matter – the rights set out at Article 13:01 governing seniority.

The Employer witness testified that the Grievor was the only one to apply internally. Seniority, therefore, applies. Article 13:01 reads:

Seniority is defined as length of service in a bargaining unit position since the most recent date of hire, calculated in actual hours worked, exclusive of overtime, and shall operate on a bargaining unit wide basis.

As is made clear in *re United Electrical Workers Local 512 and Tunggal of Canada Ltd.*, at p. 162: "This clause applies equally to job applications and to promotions." The Union has shown that the Grievor's rights were truncated in this case, and the position set out (at *Tunggal* p. 162) applies:

"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 such as relief from layoff, right to recall to employment, 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 whenever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement."

The Union also alleges that, in Mr. Jason Noseworthy's case, the Employer was unreasonable and acted in bad faith. The first notice was, in fact, in violation of Article 14:01, since it was posted publically (GN #1), but not internally. That posting was not formally grieved because of the grievance verbally lodged by the Shop Steward. Internal posting is required.

Further, the Employer inserted the requirement for five years of experience into the list of qualifications. In effect, this nullified the seniority provision. It is clear that qualifications must not be arbitrary or discriminatory. But even so, the Grievor was screened out, but not because of his lack of five years of experience. He did have the required experience as demonstrated in the resumé he submitted. It says that he was employed by the Town at the time of the application as a Heavy Equipment Operator, and that for several years – three or four years – he had worked as a Heavy Equipment Operator at J & T Trucking, as he testified. The only blemish was the slight "fender bender". The Grievor's resume shows that he was in a part time job with Blue Lines, and also got experience there. But the Employer made no effort to find out how Mr. Noseworthy had actually secured the five years experience. They did not interview him. They did not ask.

No applicant from outside should have been interviewed until all internal candidates had been considered. It is clear from the jurisprudence that consideration means you have to use the full process involved in the application before you go to outside applicants. Mr. Thistle makes that clear in his 1981 award between *NAPE and the Waterford Hospital, Grievors, Mr. Petten and Mr. Hunt*.

In Mr. Puddister's submission, Article 14:03 requires the Grievor be given the position based entirely on the fact that his seniority increases his job security, as set out in 14:04(b).

He also suggested that the Employer cannot really seriously contend that it has particular interest in qualifications when, as set out in 14:05, the probation period is a mere three weeks.

He invited the Arbitrator to consider GN #2 where, in 2005, no number of years is specified, but then suddenly it changes and, in 2009 (GN #1) "four to five" is added; then suddenly in 2010 (Consent #4) it becomes five. The Union says the Grievor did have the five years experience, and the wording of the posting means the Employer definitely had to consider the Grievor's application. Articles 14:07, 15:01, and 15:02 show how seriously the issue of seniority is taken by the Parties.

The Employer witness also testified that, in her view, the Employer should exclude anyone bumping unless that bumper had five years experience. Article 15.01 clearly does not support that view. Article 14.02 does not specify any standards of length of service or experience. Article 14.02 was agreed by the Parties to be the clause governing vacancies and new positions within the bargaining unit. It makes no reference to duration of experience.

Mr. Puddister introduced arbitral authorities which, in the Union's view, support the grievance, as follows: *Capital District Health Authority and Nova Scotia Government and General Employees Union (Dartmouth City Community Health Team - Grievance of Elizabeth Cleary)* Milton J. Veniot, Q.C. Arbitrator, November 2008; *Capital District Health Authority v. Nova Scotia Government and General Employees Union*, 2009 NSSC 174, The Honourable Justice Gerald R. P. Moir, July 30, 2009; *Re Cape Breton District Health Authority #8 and C.A.W.-Canada, Locs. 4600 & 4603 (MacDonald)* N.S.L.A.A. No. 29, 125 L.A.C. (4th) 331, File No. 2003-068, Nova Scotia, M.J. Veniot, Q.C., December 9, 2003; *Newfoundland Association of Public Employees and Her Majesty the Queen in*

Right of Newfoundland, (Department of Works, Services & Transportation)

Grievor, Harold Bennett, James C. Oakley, Arbitrator; *Newfoundland and Labrador Association of Public and Private Employees and SHALOM INC.*

Grievor: Patti Bryant, James C. Oakley, Arbitrator; *Newfoundland Association of Public Employees and Labrador Health Services Board*, Grievor Olive Blake,

James C. Oakley, Arbitrator; *Newfoundland Association of Public Employees and Dr. Charles A. Janeway Child Health Centre*, Wayne Thistle, Arbitrator;

Newfoundland Association of Public Employees and the Waterford Hospital

Grievors: Mr. A. Petten & Mr. C. Hunt, Mr. W. Thistle, LL.B, Arbitrator.

In the Union's submission, the Union has demonstrated the Grievor's capacity and ability to do the work, and his possession of the credentials to do so. The fact that the licence was conferred in 2008 is not proof that he lacked the experience. It is clear, from his resumé, the Grievor did work prior to possession of the licence in order "to gain experience as an Heavy Equipment Operator".

Article 14.04 has been abridged. The Employer did not consider the Agreement and the rights conferred by it on the Grievor. The evidence is that they "considered" the Grievor; but the evidence is equally clear that they did not consider the Collective Agreement and rights the Grievor holds under the Agreement. Mr. Peddle suggested, in his opening remarks, that Management rights trumps all other rights. That is not the case, as Article 14.04 applies directly to the Grievor. The evidence is that the Grievor was certainly equal to, or better than, the person currently holding the job.

It is clear that, in this matter, the Employer simply wiped out Articles 13 and 14. The Employer cannot do that. The Employer must be reasonable. The evidence is clear that there was a determination on the part of the Employer that

"Jason Noseworthy will never, ever get this job." Attention must also be paid to equivalency in order to justify decisions made by employers. The Arbitrator must bear in mind that the policy of requiring five years experience is new, and is not required for other positions with the Employer. It's not required, for instance, in the hiring of a Town Clerk. Clearly, there is discrimination going on here. The Employer did not consider the possibility of equivalent qualifications, and the grievance must therefore be sustained.

The Grievor was not fully considered. The consideration was not as fully processed as was required. The *Petten & Hunt* award makes that clear.

FOR THE EMPLOYER, Mr. Peddle argued that the authorities used by the Grievor and the Union rely on collective agreements with very different wording. The instant Collective Agreement specifically says "considered" and it is clear on the unchallenged evidence that the Grievor was "considered". The conclusion was that the Grievor did not possess the required qualification.

The evidence on GN #1 shows the Union approached Ms. Tilley in 2009, and Ms. Tilley said that the next time "we'll post it internally". Nothing turns on this. Yes, the Agreement does allow verbal grievance, and a formal grievance can be lodged if the verbal grievance does not deal with the matter. The Shop Steward assumed correctly that the matter was settled. But he did not grieve the fact that the Employer was looking for "four to five" years experience in GN #1 posting. Nor did the Union grieve the "Five Years Experience" specified in Consent #4. The fact that the four or five years requirement was not grieved means the Union is arguably estopped from raising the matter. The Shop Steward's expression of concern to Ms. Tilley had nothing to do with the Employer requiring four or five years experience.

In any case, GN #1 has nothing to do with the present grievance. The present grievance is governed by Consent #4, the internal posting. The Shop Steward himself said that Employer had done that posting correctly. Article 14:01 requires that "the Employer shall post a notice of the position upon the bulletin board for a period of not less than five (5) working days". It is worth noting that the Grievor applied on the last day, perhaps the second last day. If he really wanted the position he wasn't obviously very much on the ball. It is also worth noting that the Town Manager testified that there were no abstracts submitted, a fact not disputed by the Grievor.

The experience requirement set out in Consent #4 was not grieved. That posting conforms to the requirements set out in Article 14.02. If there had been some objection to the qualifications specified, the Union should have raised the matter a day or so after it was posted. The Union accepted it. Consent #s 3 & 4 make clear what the position is and what is required for success.

The Town had no evidence of the years of experience as a heavy equipment operator claimed by the Grievor. There was no detail in the resumé. No dates were given to enable the Employer to establish his claim. We do not know if the work was seasonal or what substance there might have been to his claim to have the required experience. The onus is clearly on the applicant to give the Employer the information it needs in order to evaluate the qualifications claimed. There are disconnects throughout this whole situation: information missing, about which the Employer could have no basis to make a judgement.

It should also be noted that there is no reference to seniority in Article 14:02, so there is nothing in that article to fetter the rights of the Employer under Article 2:01. No grievance was filled in 2009 or 2010 about the qualifications

required. The Employer has also observed the requirements of 14.03. The Grievor's resumé was considered prior to all other applications. While the Union made a number of assertions citing Article 14:04, the fact remains that the issue of qualifications is key in this particular instance. The Union's suggestion that Article 14.05 reflects some lack of importance attached to qualifications is simply meaningless. Article 14.05 applies when qualifications are already dealt with.

Mr. Peddle also addressed issues raised by *Browne & Beatty* at para. 6:3000, 6:3100 and 6:3200. In the Employer's view, Article 2.01 is key to the disposition of this matter in all respects. The Grievor did do work as an Operator; but that does not mean that he was doing Operator's work. He was just paid for filling in for a vacant job on various occasions. The snow clearing experience he claims appears to have been in a parking lot, not around the cliffs of Pouch Cove.

The Union had an opportunity to grieve the inclusion of these qualifications. It chose not to do so. Therefore, the Employer can only assume that the Union accepted the Employer's position. The time limits are set out in 8.04. Clearly, the Union is now well past the time limit for raising of an objection in the way that it has suggested here. The Union's comments about the job description are irrelevant. These are matters for negotiation. The reality is that the posted qualifications were accepted by the Union.

The Arbitrator should also look at Article 30.02 in light of the letter on page 33. The letter, in the Employer's submission, makes Article 30.02 more, rather than less, significant. Article 30.02 stands. It is also important to note that Articles 13 & 14 are the only two articles complained of. Article 15 is not even referenced in the grievance procedure.

It is clear that the Employer has a responsibility to attend to public safety.

The Grievor did not meet the qualifications required. Certainly, his claim to do so was not set out clearly in his resumé. He is employed by the Town as a Labourer. He is not operating heavy equipment. The Town now has a permanent Operator.

IN REBUTTAL ARGUMENT, Mr. Puddister pointed out that the grievance also references "all other pertinent articles". Article 15 is certainly available to be used by the Union, as Arbitral jurisprudence makes clear.

It is also misleading for the Town to suggest that the Grievor has not plowed the streets of Pouch Cove. He and the Shop Steward both testified that he had used all the equipment in Pouch Cove, and was commended for his snow clearing by the Deputy Mayor.

The evidence is clear, also, that Article 30.02 was not being observed and the letter was inserted in the last round of bargaining as a way to ensure that the Employer did abide by it. The Union never accepted the Employer's job description, but the Employer did sign off on the agreed job descriptions drawn up under that letter.

The Employer also suggested the Union did not grieve the job posting. The evidence is clear that the Union did grieve the job posting. The fact is that the 2010 postings were actually done correctly, but once the Grievor did not get the position the instant grievance was filed, grieving the fact and all issues relating to that fact at the same time. Thus the issue of the qualifications are central in this hearing. The Union was not required to put in a separate formal grievance on the qualifications. The Employer has never complained about a matter being raised outside time limits.

The only difference in the testimony before this Board is that the Grievor testified he had supplied the abstract while the Town Manager says that he did not.

The fact remains, however, that he was not screened out on issue of an abstract, but because of alleged lack of five years experience. The Employer is right to say that the Union agreed to the inclusion of Article 14.04; but it is important to consider the Collective Agreement in determining the Employer's right to include a five year requirement. The Union agrees that Article 2.01 is strongly worded; but so too are Articles 13, 14 & 15, and they do abridge the strength of Article 2.01.

The Grievor's testimony on his own experience is clear. He did operate the heavy equipment just as much as the other two equipment operators operate heavy equipment. The Employer's argument on this is bogus.

The Employer has said that it did consider the Grievor under Article 14.03. The fact remains the Town Manager said the Grievor was screened out for his lack of five years. He was not "considered", therefore, in terms of the job resumé that he submitted. The Town did not consider the facts of his resumé.

The Grievor was clear, candid and honest in his summary of what is on his abstract. He has a couple of tickets, and one is for speeding. He did meet the qualifications as an Operator for the Town. Therefore, the Town cannot consider a minimum standard under 14.04. The Arbitrator should look carefully at Article 14.04 (a) & (b), and award the position to the Grievor, Mr. Jason Noseworthy.

CONSIDERATIONS

AT ISSUE BETWEEN THE PARTIES is the Union's claim that the Employer violated "Articles 13 & 14 and all other pertinent Articles" in failing to award the Grievor a Heavy Equipment Operator (HEO) position, to which, in the Union's view, he was entitled by virtue of his seniority.

THE ONUS lies with the Party bringing the grievance. In this case, therefore, it is for the Union to establish its position on the balance of probabilities.

THE UNDISPUTED FACTS are that the Employer posted a Heavy Equipment Operator position, both externally (Consent #3) and internally (Consent #4), meeting the requirements of Article 14:01:

"When the Employer decides to staff a vacancy in an existing or new position, either inside or outside the bargaining unit, the Employer shall post a notice of the position upon the bulletin board for a period of not less than five (5) working days."

The posting (Consent #4) reads, in part:

... Essential qualifications: Five years Experience as a heavy equipment operator working in various capacities especially in snow clearing operations.

Valid Class 5 driver's license with eight (8) and nine (9) endorsement. A driver's abstract will be required...

The Grievor testified he had held the Class 5 "since 1996", and that he secured endorsements 8 & 9 "in 2008".

Just prior to the "May 28th, 2010" closing date for the competition, the Grievor submitted his resumé (JN #2), which makes two explicit references to his experience as a "Heavy Equipment Operator" or "snow clearing". The description of his "Work Experience" opens with the observation that he is ...

"Currently working in the position of HEAVY EQUIPMENT OPERATOR for the Town. I have been doing this as required for several years. Duties snow clearing,, (*sic*) general maintenance of equipment. Worked On the Shoe Cove Recreation Complex as a Heavy Equipment Operator with a finished Product that was exceptional."

The resumé then records, a little later, the following:

"Blue Line Transport This was a part-time position from 2004 to 2007 To Gain experience as a Heavy Equipment Operator."

A selection committee was formed comprising: Mr. Clyde Matthews, Ms. Roxanne Furley, and Ms. Tilley, the Town Manager. The Deputy Mayor, served

as an alternate.

The Grievor was the only internal candidate. He has been a Labourer employed by the Town of Pouch Cove for a number of years, and at the particular time of the posting was either on layoff or actually "working in the position of Heavy Equipment Operator" (JN #2), as he had done on a number of previous occasions (JN #1). The Collective Agreement provides, at Article 14:04, that:

Both parties recognize: (a) the principle of promotion within the service of the Employer; (b) that job security should increase in proportion to length of service.

At Article 14:03 the Collective Agreement provides that:

No position within the bargaining unit shall be filled from outside the bargaining unit until all applications from within the bargaining unit have been considered.

The Grievor's application was screened out of the competition because, on to Ms. Tilley's evidence, it was determined that his resumé did not show he had the "essential qualification" of "Five years Experience as a Heavy Equipment Operator" (Consent #4), since he had only secured endorsements required in 2008.

POSITIONS OF THE PARTIES

The Union argues that the Employer was mistaken in judging the Grievor lacked the essential qualification of "Five Years Experience as a heavy equipment operator". In the Union's view, the Grievor did have that qualification, despite the fact that he only secured the required endorsements 8 & 9 (Consent #4) in 2008, two years before the 2010 competition. The Union pointed to evidence that the Grievor had gained the requisite experience prior to and after securing the formal endorsements (in 2008) over several seasons of working both with the Town of Pouch Cove and with other employers as recorded in his resumé.

The Union also argued that the Employer had failed in its obligation under

Article 14:03 to "consider" the internal candidate before reviewing external candidates by not fully processing his application since it did not interview the Grievor and did not put to him questions it might have about his application.

The Union also argued that the instant case must take account of the principle of equivalency as exemplified in a line of Arbitral Jurisprudence dating back to Arbitrator (as he then was) Bora Laskin, and in recent awards and Court rulings in Nova Scotia and in Newfoundland and Labrador.

The Union also strenuously objected to the Employer's having specified the minimum duration in Consent #4 as "Five Years Experience as a heavy equipment operator". The Union led testimony tracing changes in the Employer's requirements for the position over the last five years. In 2005 (GN #2) it was "Experience as a Heavy Equipment Operator". It changed in 2009 (GN #1) to "Four to five years experience as a heavy equipment operator especially in snow clearing operations". Then, in 2010 (Consent #4), it became "Five Years Experience...". The Union insisted that the Employer can find no support for its action in the September 2010 wording in the corresponding section of GN #8 ("minimum of 5 years experience in snow clearing ..."). GN #8 has not been accepted by the Union.

The Union led evidence to support its claim that the Employer was obliged by Article 30:02, and more particularly by the "CLASSIFICATION PLAN" (at page 33), to abide by the HEO position description (GN #6) drafted jointly and initialled as of "April 9, 2008" by the then Town Manager, Ms. Wavey Ellsworth, and Mr. Gerald Noseworthy for NAPE.

The Employer argued that there was no violation. The Union did not grieve the wording of the "essential qualifications" portion of the 2010 Consent #4 posting or either of the other postings (GN #1 & GN #2) in evidence. It can not now expand

the instant grievance, dated June 30, 2010 (Consent #2), by claiming it grieves the "essential qualifications" which it had known about at least since mid- to late May.

The requirements of Article 30:02 were observed. The provision at page 33 confirms it, and puts a procedure in place to do what Article 30:02 says. There is no conflict between the provision on page 33 and Article 32:02.

The Employer also pointed to Article 2:01 as giving it the right to set qualifications, which is a standard management right not fettered elsewhere in the Collective Agreement and, in fact, supported by Article 14:02. There was nothing "arbitrary or discriminatory" in the posting as the Shop Steward acknowledged in his testimony and the Union confirmed in choosing not to grieve the postings.

The Employer also rejected the Union's claim that the Grievor actually possessed the required qualifications. It can not be claimed that "Five Years Experience" could be secured over the two years between 2008 and 2010.

MY FINDINGS:

By way of preliminary comment, I fully agree with the Union's observation that seniority is key to the rights of all bargaining unit members. Thus, I endorse the position set out in *Tungsal* that:

"An employee's seniority under the terms of a Collective Agreement gives rise to such important rights such as relief from layoff, right to recall to employment, 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 whenever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement."

As *Tungsal* makes clear, the variations between Collective Agreements is critical.

On the issue of the "CLASSIFICATION PLAN" (p. 33 of the Collective Agreement) I would point out that the provision explicitly describes itself as contingent on "review" by an "Independent party...", and also states that "all recommendations ... will be non-binding." Thus, I attach no weight to it as determinative of any particular relating to the instant matter.

Proceeding to the substance of the issue, I note that the (Consent #4) posting says that one "essential qualification" is a certain number of years "experience as a heavy equipment operator". The wording is clear and unambiguous. It does not speak of experience *with* heavy equipment, or experience *operating* heavy equipment, or "in the position of HEAVY EQUIPMENT OPERATOR" (Jn #2 p.1) or "*To gain experience as a Heavy Equipment Operator*" (JN #2, p. 2), but speaks of "experience as a heavy equipment operator" (emphasis added). For Ms. Tilley, the endorsements that the Grievor secured in 2008 determined the Grievor's status "as a heavy equipment operator".

I note that the Union did not challenge her reasoning on the particular issue of what the endorsements signified as to the Grievor's Heavy Equipment Operator status. Rather, the Union argued that fairness and the Grievor's rights under the seniority and promotion provisions mean it was unreasonable and discriminatory for the Employer not to grant the Grievor the position, or at least a chance to make his case in an interview. That way he could show why he met the (Consent #4) posting's five year experience requirement through experience he had accumulated working with heavy equipment prior to the endorsements and his employment in the Heavy Equipment Operator position after he got the endorsements.

But I note that the Union also objected to the Employer's having framed the Consent #4 posting as it did, specifically in terms of the "five years" minimum.

The Shop Steward gave evidence that the Union had discussed with the Town Manager the fact that the posting that appeared in the *Telegram* in 2009 (GN #1) not been internally posted. Since the matter had dropped, and the subsequent 2010 posting had been posted internally (Consent #4), no formal grievance had been lodged about the Consent #4 posting itself.

But Mr. Puddister argued that the instant grievance before me (Consent #2) claims a violation, not just of the Grievor's seniority rights arising in the Employer's failure to award him the position, but also violation arising out of the content of the posting because as the "five year" requirement is unfair and discriminatory since it effectively eliminated members of the bargaining unit.

I am persuaded, however, by the Collective Agreement language that the Employer's Management right to set the qualifications is relevantly fettered by Article 14:02 only to the extent therein set out, viz.: "Such qualifications shall not be established in an arbitrary or discriminatory manner." I note evidence that the Employer had increased the experience requirement over the period from 2005 onward. There is no persuasive evidence that the Union raised any objection, prior to the instant hearing, to the duration feature of the 2009 posting (GN #1) or to the same aspect of the 2010 posting (Consent #4). Aside from questions of timeliness, the unchallenged fact that the duration aspect of the required experience was not challenged by the Union on previous postings seriously weakens the Union's credibility in raising an objection to it at this late date in the instant circumstances. I conclude that the five year requirement stands as a reasonable one, and unchallenged by the Union as such.

I note, however, that the Union argued vigorously that Jurisprudence in awards such as those of Arbitrator Milton J. Veniot and others, including Arbitra-

tor Oakley and Arbitrator Thistle, shows that Arbitrators do not allow Employers to hide behind inappropriately fine definitions, and do tend to require Employer's to recognise equivalency in such matters.

I note, in this context, first, that the Grievor himself testified he had "operated heavy equipment over the last three or four or two or three years, including road grading, ditching and ploughing snow." Second, the Grievor's resumé does not claim to have "five" or even four such years experience, but just that "I have been doing this" ("working in the position of HEAVY EQUIPMENT OPERATOR") for several years." Thus, the Grievor did not himself claim he actually had "Five Years Experience" either operating heavy equipment, or "as a heavy equipment operator".

I note however, that the Union did not argue that the Grievor's experience was exactly the same as that of someone with the "Five Years Experience as a heavy equipment operator " the posting requires, but argued that it should be treated as equivalent to such experience. I note particularly Arbitrator Veniot's position (as summarised in Lancaster's Health Care Employment Law E-Bulletin Feb 23, 2010 Issue #31)

Considering that nursing was a "publicly regulated profession" subject to legal requirements such as licensing, and that assessing job applicants was a "judgement call," Arbitrator Milton Veniot arrived at the following definition: "the word 'qualified,' in the context of such a possible appointment, really means 'is legally entitled to, and should be able to, perform the normal duties of the position in a satisfactory manner.' The course of action the Employer followed .. Has the effect of having the word 'qualified' ... mean 'meets the literal qualifications of the Employer.'.. That is not a construction which recommends itself to me...."

Nor does such an approach "recommend itself to me". What is at issue in the case before me is not "the literal qualifications of the Employer", but the reasonable, "essential qualifications", unchallenged by the Union, of an Employer responsible for the public safety of the citizens of the Town of Pouch Cove.

Thus, the Grievor's periods of pre-endorsement experience operating heavy equipment can not, without much more persuasive evidence on the point, be regarded as equivalent to "Five Years Experience as a heavy equipment operator." No persuasive evidence was presented to show that the Grievor's pre-2008 experience was equivalent to experience that someone working "as a heavy equipment operator" would likely acquire over a "five year" period. No persuasive evidence was presented to show that the Employer had been overly technical or precise or demanding in defining the minimal essential qualification it specified in Consent # 4. The Shop Steward's testimony that "Jason is qualified, yes, to do the Town work" does not establish the relative equivalence of Grievor's experience to that set out as required in the posting (Consent #4). In summary, therefore, I find no violation of the Collective Agreement arising out of the five year requirement as it appears in the posting (Consent #4).

On the issues of discrimination and unfairness, however, I note testimony provided by the Shop Steward that he had heard Mr. Clyde Matthews, a deceased member of the Pouch Cove Town Council, "say that Jason would never get this job... and went on to some mumbo jumbo after that ... but the job issue was raised, and that Jason was not going to get it." I can attach very little if any weight to this obviously hearsay evidence (even though it was not refuted) given the impossibility of testing it through direct and cross examination of Mr. Matthews himself.

I note also that Mr. Puddister alleged discrimination arising in the fact that the Employer insists on the five year minimum experience in the HEO competition but not in other competitions. I find, with respect, that neither Mr. Matthew's comment nor the Employer's decision on the five year minimum for the Heavy Equipment Operator position alone, were persuasively shown to be grounds to sustain the charge of discrimination or unfairness against the Employer. The jobs are very different, and there is no obvious ground for requiring the same kind or duration experience or qualifications for all.

I note that the Union also complained that, in failing to invite the Grievor to an interview, the Employer failed to complete its obligation to consider the Grievor as the only inside candidate. Article 14:03 reads:

No position within the bargaining unit shall be filled from outside the bargaining unit until all applications from within the bargaining unit have been considered.

The Article requires the Employer to consider "all applications from within the bargaining unit..." (I note that this language differs significantly from the "fully processed" language of the Collective Agreements before Arbitrators Oakley in *Patti Bryant* and Thistle in *Olive Blake* and in *Petten & Hunt*). The Article does not require that all, or any, applicants be interviewed, but rather that "all applications from within the bargaining unit" be "considered" before filling from outside. Ms. Tilley testified that she did consider the Grievor's application for the position. She also testified that, based on her knowledge that the Grievor had secured the required endorsements in 2008, she concluded it was impossible for him to have acquired "Five Years Experience as a heavy equipment operator".

However, the Union also challenged the mathematical logic of Ms. Tilley's judgement, pointing out that the Grievor had operated heavy equipment before securing the endorsements in 2008, and further that the term "years" in the posting is ambiguous in that it might easily mean "seasons". I do not find the term "years" ambiguous. In any case, the Shop Steward testified he sought clarification on the issue from the Town Manager, and did not testify that he failed to obtain it.

I note, finally, Brown and Beatty, *Canadian Labour Arbitration* 4th Edition at paragraph 6:3300, an earlier version of which is cited with approval by Arbitrator Oakley in his 2005 Award in *Newfoundland & Labrador Association of Public and Private Employees & SHALOM INC.* Grievor: Patti Bryant (p. 23-4).

In reviewing an employer's determination as to whether a particular employee has the requisite ability to perform the job for which he or she applied, arbitrators are often called on to assess the propriety and reasonableness of the standards the employer used to make its choice. With respect to this aspect of the employer's decision, most arbitrators start from the premise that, in the absence of some specific clause in the collective agreement to the contrary, management has the prerogative to determine initially what skills and qualifications are required in any job. To impugn the employer's standards, an employee must prove that they were flawed in some way. Employees have succeeded in having an employer's decision reversed where it was established that the criteria that were used: were not contemplated by and/or were inconsistent with the job posting, the collective agreement or some statute; did not bear any reasonable relationship to the work to be done; lacked clarity or were too subjective; were arbitrary, discriminatory and /or in violation of human rights legislation; were not established in good faith; were imposed retroactively; and/or were not fairly or uniformly applied...

In summary, I find none of these grounds for impugning the Employer's action were shown to have been present in the instant matter.

DECISION

In light of the foregoing considerations, therefore, I find that

THE GRIEVANCE IS DENIED.

Respectfully submitted as the decision of the arbitrator.

John A. Scott, Ph.D.
Arbitrator

November 30, 2010