

## **Seniority — Nature and scope of discretion for a company in applying a seniority clause — Power of the board to find against the company**

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Résumé de l'article

A Company has no absolute right of discretion when applying a seniority clause containing objective criteria for its application in case of short-term lay-offs, otherwise the seniority rights of the employees could be obliterated by Company action.

The arbitration board must satisfy itself that the company's administrative act was taken with full appreciation of the right for senior employees to be retained on short-term layoffs provided in the Company's reasonable judgment exercised with care and in good faith, it is practical to retain them

Canadian Industries Ltd. and Le Syndicat des Travailleurs de Produits Chimiques de McMasterville; H.D. Woods, Chairman, Me Raymond Caron, Company's nominee, Me Marc Lapointe, Union's nominee.

Therien case that since the trade union has the legal capacity to enter into a collective agreement, it has imposed on it the responsibility that flows from a breach of the agreement. The language of Farwell J. in *Taff Vale Railway v. Amalgamated Society of Railway Servants*, (1901) A.C. 426, applies with greater force to this case in view of the fact that the obligation to enter into the collective agreement was one created by statute:

The proper rule of construction of statutes such as these is that in the absence of express contrary intention the Legislature intends that the creature of the statute shall have the same duties, and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing.

#### BOARD EMPOWERED TO AWARD DAMAGES

Quite apart from any question as to whether an action may be maintained in a court against the Union, I think it quite clear that the Union has the capacity to incur liability for damages and hence the Board of Arbitrators are within their powers in proceeding to assess and award damages.

#### SENIORITY — Nature and scope of discretion for a company in applying a seniority clause — Power of the board to find against the company

A Company has no absolute right of discretion when applying a seniority clause containing objective criteria for its application in case of short-term lay-offs, otherwise the seniority rights of the employees could be obliterated by Company action.

The arbitration board must satisfy itself that the company's administrative act was taken with full appreciation of the right for senior employees to be retained on short-term layoffs provided in the Company's reasonable judgment exercised with care and in good faith, it is practical to retain them <sup>1</sup>

The relevant parts of the agreement are:

#### « Article VII — SENIORITY

(b) Seniority shall govern in the case of employees with equivalent qualifications whenever a lay-off or a transfer or promotion to a classification included in the bargaining unit is necessary.

(c) The provisions of clause (b) need not apply to a lay-off which the Company expects will not exceed three working days in duration, due to lack of material or orders, equipment or transportation failure, strike or slowdown or any reason beyond the control of the Company.

(1) *Canadian Industries Ltd. and Le Syndicat des Travailleurs de Produits Chimiques de McMasterville*; H.D. Woods, Chairman, Me Raymond Caron, Company's nominee, Me Marc Lapointe, Union's nominee.

Notwithstanding the foregoing the Company agrees to implement the provisions of clause (b) in any short term lay-off when the Company considers it practical to do so.

Any allegation of improper selection of an employee or other alleged infringement of this clause (c) may be submitted at the request of the Union to arbitration under the provisions of Article X of this agreement. »

#### THE MEANING OF THE AGREEMENT

...Clause (b) of Article VII clearly establishes absolute rights to jobs to « employees with equivalent qualifications » whenever a lay-off becomes necessary. Once the decision is taken that an employee facing lay-off possesses qualifications equivalent to those of a junior employee, the former has an absolute right to be retained in employment while the latter must face lay-off.

The first paragraph of clause (c) of Article VII modifies clause (b) by establishing certain conditions under which clause (b) need not apply. These conditions relate to the *causes* of the lay-off and the anticipated *duration*. There appears to be no dispute about either, so further mention is unnecessary.

Attention, however, is drawn to the language used as follows: « The provisions of clause (b) need not apply ». The parties to the agreement did not say « do not apply ». Clearly it was intended that under certain circumstances, even though the two conditions regarding the cause of lay-off and anticipation of a short duration were present, clause (b) would apply and seniority would operate as a right. These circumstances are revealed in the second last paragraph of VII (c). According to this paragraph clause (b) does apply « when the Company considers it practical », The problem in administration is to reconcile whatever rights were established for the employees with the discretion assigned to management.

The Company has in exhibit C-1 set out clearly and succinctly what appears to be a reasonable purpose of Clause VII (c):

« The intend and purpose of Article VII (c) is to limit the expenses and personnel disruptions involved in the application of seniority-qualification considerations when short-term layoffs are necessitated due to reasons listed in the first paragraph of Article VII (c). »

There is in this statement the recognition of an obligation. Expenses and disruptions are to be *limited*. There is the recognition of a responsibility to apply « seniority-qualification considerations ». This view the company appears to accept. Indeed the basic case made by the company is to the effect it did not consider it practical to implement the provisions of Article VII (b) because, in its opinion, the conditions mentioned in Paragraph one of VII (c) were present In the company's view this released them from applying VII (b).

The Company further contends that the words « ...when the Company considers it practical to do so » means unless the judgment of the Company was rendered arbitrarily or in bad faith the Board cannot find against the Company. It seems that the parties anticipated the difficulties that might emerge in applying Clause

VII (b) as modified by VII (c) and that the question of the authority of the board required more precise definition. The final paragraph quoted above was inserted. From this it follows that questions of « improper selection » or « alleged infringement » are within the jurisdiction of the board. While the Board must respect the primary role of the Company in judging the practicality of applying VII (b) it must also recognize its own responsibility derived from the final paragraph of VII (c) to protect the limited rights of senior employees. The Board therefore assumes the responsibility of applying principles of reasonableness to the Company's decision not to apply VII (b) in the instant case.

The Board reject the idea that the Company has an absolute right of discretion, otherwise the seniority rights of the employees in short term lay-offs could be obliterated by company action. Surely the meaning of clause VII (c) paragraph 4 is that the senior employee has a right to be retained on short term lay-offs provided, in the Company's reasonable judgment exercised with care and in good faith, it is practical to retain him. The union has a right to call for respect for the observation of this principle. The arbitration board must satisfy itself that the Company's administrative act was taken with full appreciation of this obligation. We must assume that the Company should have taken reasonable steps to see that the senior men should be retained over those junior employees with whom they were at least equally qualified.

#### THE BASIC FACTS

According to the Company (C-1).

« Orders for high explosives for shipment during the week of August 29th were slow in materializing during the week of August 22nd. As the week progressed, it became apparent to supervision that with the orders on hand and with knowledge of water shipment movements, a stock surplus might result if H.E. production were maintained at current levels. Thus it became apparent that the only situation which would require the maintaining of 9 crews on the full Monday through Friday schedule. (i.e., August 22nd through 26th) would be the receipt of additional orders.

« By Wednesday, 24th, August, it became apparent that it would be necessary to cancel all H.E. production on 26th August (except for the production required from one standard size gelatin machine, which production was required to meet shipments on 29th August). However, no lay-off notifications were submitted pending possible receipt of orders. On Wednesday afternoon an additional order was received which required the loading of an addition to a shipment being made on 26th August. As the shipment loading was scheduled to start at 6.00 a.m. on 26th August the operation of one machine was required on the 12-8 shift 26 August and it was decided to retain both 12-8 crews to work that shift. »

« The decision as to whether or not to employ the 8-4 and 4-12 shift crews on 26th August was deferred to Thursday pending the possible receipt of orders.

« On Thursday, 25th August no further orders were received and the 8-4 and 4-12 shifts in the H.E. Department operations scheduled for 26th August were cancelled. »

## INTERPRETATION

Three major questions need to be raised and answered.

The first question is that knowing on Wednesday that unless additional orders were received the 8-4 and 4-12 shifts would be cancelled for Friday, should the Company have given notice of lay-off to the men involved and allowed the exercise of bumping rights? We can answer this question independently first and then relate it to the other issues involved.

The Company claimed that lay-off notice was delayed until Thursday in the hope that additional orders would have justified retaining continued operation of the two shifts that were cancelled. Presumably this was done in the interest of the employees concerned. Yet it cannot be overlooked that in so doing the Company was carrying the time of decision beyond the point in time prior to which, other things being equal, the more senior men would have had bumping rights. When the agreement was signed, certain rights were established. It is not for the Company to decide when these rights are to be set aside. If there was a justification for denying bumping rights it must be found elsewhere than in the management's decision to gamble with the employee's right.

The second question is whether or not the rescheduling would have deflected the intent of Article VII (c) to limit expense and personal disruptions. It would be reasonable to expect that any reassignment would, because of the mixing of crews, lead to some minor diseconomies. But such expenses are surely contemplated in the obligation undertaken, otherwise the clause would be meaningless. If any substantial extra cost or serious administrative difficulty were to be encountered the transfer would be impractical.

The Company claimed that overtime would have been required because the senior men could not have been notified of the change at least 16 hours in advance. This may very well be true for some of the men, and for these no right to work on the Friday in dispute would exist. But that does not relieve the Company from respecting the rights of those who could reasonably have been notified. The Union's testimony that since the decision to retain the 12-8 shift on the 26th of August was taken earlier in the week the Company was in a position to notify the grievors when they passed through their departmental office to commence their 8-4 shift on the 25th is rather convincing especially since it was a practice to do so.

The Company has suggested that it would have had to select from the very large number of men who were laid off on August 26, not just those who could have been notified as they passed through on their way to work on the morning of August 25th before 8.00 a.m. But the agreement gives them the latitude to select. It appears to the Board that for some men it would have been quite practical to give notice of change of shift for August 26th and for others it would not. The Company's position would be more in keeping with the spirit of the clause in dispute if the decision had been based on selection of individual men rather than on a shift basis. Clause VII (b) could have been set aside for any employees where it would have involved the Company in unreasonable administrative actions and still be applicable to others. This kind of discretion does not appear

to have been exercised.

The final question concerns the issue of whether or not the grievors had equal qualifications with those whom they claim they should have replaced. The only testimony we have on this is from union witnesses. References by the Company to this issue, and the general nature of the Company's ease indicates that the management never actually considered the matter at all. Their decision was based on the assumption that they were within their rights in setting aside VII (b). Therefore seniority and the question of equal ability were, in their view, not operative.

The agreement clearly gives the right to judge ability to the management certainly in the first instance and the Board has therefore no jurisdiction to assume any right to evaluate where the Company has not done so.

#### AWARD

The Company's action was a denial of the full rights of the employees under VII (c) (para. 4). The grievors on the reduced list (Union's brief of Feb. 22, 1961, p. 6 and 7) should have been considered as replacements of those junior employees who were retained on Friday 26 August.

The Company should consider each of these remaining grievors and assess their qualifications relative to those of the junior employees retained. To those considered to possess at least equal qualifications the Company shall pay one day's pay at a rate he would have received had he worked on Friday 26 August, 1960.

#### **Congédiement pour activité syndicale — Réintégration ordonnée par la Commission des Relations Ouvrières — Juridiction de la Commission pour agir en de tels cas en vertu des articles 21a et 21b, de la Loi des Relations Ouvrières<sup>1</sup>**

*Puisque l'article 21b impose au salarié l'obligation de soumettre sa plainte à la Commission, l'on doit nécessairement reconnaître à cette dernière la faculté de s'en saisir. Et puisque l'article 21a, accorde à la Commission la faculté d'ordonner la réintégration, il faut nécessairement lui reconnaître le droit de disposer du cas soumis.*

#### DÉCISION

Le requérant se plaint de l'illégalité de son congédiement survenu le 17 octobre 1960 et sollicite la réintégration dans son emploi chez l'intimée.

Avant d'apprécier le mérite de cette matière, il convient de disposer d'une objection formulée par l'intimée.

(1) *Raymond l'Archevêque — vs — The Nalpac Company, Montréal*; Décision (D-52) rendue le 16 mars 1961 ordonnant à la Compagnie de réintégrer le plaignant dans son emploi avec tous ses droits et privilèges, et de lui payer à titre d'indemnité l'équivalent du salaire qu'il a ainsi perdu.