5-1966

Re United Cork Linoleum & Plastic Workers, Local 380, and Union Carbide Canada Ltd

Innis Christie

G Brooks

C W. VanWinsen

RE UNITED CORK LINOLEUM & PLASTIC WORKERS, LOCAL 380, AND UNION CARBIDE CANADA LTD.

I. Christie, G. Brooks, C. W. VanWinsen. *May, 1966.*

EMPLOYEE GRIEVANCE claiming improper application of seniority provisions. [Portions of the award have been omitted.]

C. W. Fitzgerald, J. Asselstine, P. O'Meara for the union.
J. R. Scott, W. L. Canniff, W. H. Hanson for the company.

AWARD

The issues in this case are therefore:

Whether the company has the right under the collective agreement to deny promotion to the grievor, who is the senior man, on the ground that he does not satisfy educational qualifications unilaterally prescribed by the company,

If the company is successful in issue, can it be said that the grievor does not in fact have the qualifications prescribed by the company in this case.

With regard to issue: Article 3:01, "management rights provision", provides as follows:

> "The union understands and accepts that the functions of managing and operating the company, including any part of it, shall rest solely with the company. These functions include but are not limited to . . . the determination of the qualifications of any employee to perform work . . . The exercise of these functions of management shall be in accordance with the terms of this agreement."

Also relevant to the question of management rights is the following passage from art. 13 (arbitration provision):

> 13:02 . . . it is the intent of the parties that the following are not matters subject to arbitration:
> (B) Exercise of functions reserved exclusively to management in this agreement and functions customarily performed by management which have not been expressly

> abridged in this agreement, unless it is alleged that the company has violated some specific provision of this agreement in the exercise of these functions in which case the alleged violation is, of course, subject to arbitration.

In determining "the employee's qualifications to perform the work", as a factor upon which promotion is to be based in accordance with art. 11:07, two distinct steps would seem necessarily to be involved: first, it must be decided what qualifications are necessary for the job and, secondly, it must be decided whether a particular employee has those qualifications. In my opinion it is the right of management under art. 3:01 to determine both of these questions. This, I think, is the meaning of the phrase "the determination of the qualifications of any employee to perform work [shall rest solely with the company]"

The following quotation from the award of Reville, C.C.J., in *Re Nat'l Union of Natural Gas Workers, Local 19, and Union Gas Co. of Canada* (1961), 12 L.A.C. 58, is, I think, applicable [p. 61]:

> "Dealing with the first issue, there is a wealth of authority to support the proposition that the company may unilaterally alter, modify and extend job qualifications and job descriptions during the lifetime of the collective agreement in the absence of any clause in the collective agreement forbidding or preventing such company action. Such power is, of course, contained in the usual management rights clause to be found in most if not all collective agreements."

The management rights clause under consideration in that case was much less explicit in bestowing on management the right to determine qualifications than is the management rights clause in the present case. What Reville, C.C.J., had to say about "job descriptions" is, of course, not applicable to the collective agreement under consideration in this case, which contains specific provision against unilateral change of *job descriptions*.

It could be argued that art. 3:01 only gives the company the right to determine whether an employee satisfied pre-established qualifications; and not the right unilaterally to set those qualifications. Even if that were so I would be forced by art. 13:02

(see the passage quoted above) to conclude that prescribing job qualifications is, in the absence of any specific provision of the agreement to the contrary, a matter for management.

I have not overlooked the importance of the concluding clause of art. 3:01, *i.e.*, "the exercise of these functions of management shall be in accordance with the terms of this agreement". Its effect is that management's right to set the qualifications necessary for any job will be subject to any limitations which may be found to arise from the terms of the agreement. There are, I think, two possible limitations.

The first possible limitation is the following: The union has alleged that management's right to unilaterally set qualifications for jobs is limited by the provisions of art. 4:01 and 4:02. Under art. 4:02 the company must notify the union if it creates a new job or changes the content of an existing job to the extent that it should be placed in a different job class. There is no allegation here that when the job of senior hexa operator was created the union was not notified as required.

The complaint is that the union was not notified when the company *effectively* imposed the qualification requirement of grade 12 or equivalent. However, I must hold that job qualifications as established by the company are not the subject-matter of art. 4:01 and 4:02. The references therein are to "classification descriptions", "job class" and "classification title". It was accepted by the union that the documents called "job descriptions" which, in accordance with art. 4:01(C), are made available for union inspection for the purposes of art. 4:02 do not, at the Belleville plant, include the *qualifications* required of the job holder. It was suggested by the union representatives that "job descriptions" of laboratory jobs do include qualifications. This was not established, and, in any case, seems to me to have been explained as a legitimate exception. The references, in descriptions of laboratory jobs, to academic qualifications may very well be included simply to indicate the level of chemical sophistication in the procedures used on the job. I hold, therefore, that art. 4:02, which requires the company to notify the union of changes in job classification, does not require the company to notify the union of changes in qualifications necessary for any job. It is not a limitation on the company's right unilaterally to set qualification requirements.

The second possible limitation is the following: The company's right to establish the qualifications necessary for any

job is limited, as are all the rights of both parties to the collective agreement, by the requirement that in purporting to establish qualifications necessary for a job the company must be *genuinely* doing what they purport to do. They may not, in other words, act arbitrarily, unreasonably, or in bad faith, and use "establishing qualifications" as a guise in defeating employee rights under the agreement. I have held above that under this collective agreement the company need not bargain on the matter of qualifications required for jobs, and it follows that it cannot be for an arbitrator to say what the proper qualifications for a job are. However, if job qualifications were set at a level quite unreasonably high an arbitrator might be justified in concluding that the company was using this as a means to escape the restrictions of, for example, the seniority provisions of the agreement.

At the hearing the company demonstrated that a requirement of grade 12 for senior hexa operators is not unreasonable, and indeed, the union has admitted as much.

I feel constrained to add that bad faith in the setting of qualifications might be indicated not only by the fact that those requirements were in themselves unreasonable; but also by the fact that they were imposed, without consultation with the union, upon a job which had been performed in the past, to the apparent satisfaction of the company, by men lacking those qualifications. In such a case the company could, of course, justify the change in required qualifications by showing that the job had changed or that requirements for the job had only been increased in keeping with a general increase in qualification requirements in the industry.

In the case at hand the company has set a very flexible qualification: "grade 12 or the equivalent in training and experience". If the union could show frequent departures from the grade 12 requirement this might indicate that "grade 12" was not intended to be a genuine consideration; then an arbitrator might be justified in finding that the company had not acted in good faith in setting the academic requirement at that level. But in the present case, once again, the company's good faith is not in question. The only significant departure from the academic requirement was on the initial applications, and there were undoubtedly special circumstances which rendered demonstrated reasoning ability and the other attributes evidenced by a high school certificate of somewhat less importance.

Issue must therefore be decided in favour of the company: Under the provisions of art. 3:01 and in light of the statement of intent contained in art. 13:02(B) it is clear that management has a right to prescribe the qualifications required for the performance of any job, unless there is something in the collective agreement modifying that right. Article 4:02 does not do so; and in exercising their right to prescribe qualifications management had acted reasonably and in good faith.

With regard to issue (b): Can it be said that A. H. Globe, the grievor, did, in fact, have the necessary qualifications for the job posted? The company has not relied on any lack of ability or merit on the part of the grievor as a ground for refusing his application. It is established that he was the most senior of the six applicants, so, if he could be said to have the qualifications he would get the job. Once again, however, art. 3:01 makes it clear that the company has the sole right to determine the qualifications of any employee to perform work.

One would expect that once the company has laid down the qualifications required for a job the question of whether or not any applicant satisfies those qualifications would be an objective one, as is determination of seniority. In this case, however, the company has set such a flexible standard of qualification that the posting of the job still leaves a large area open for the exercise of company judgment on the question of qualifications. This is to be expected where "ability and merit" are in question but seems almost in contradiction to the idea of "qualification". Be that as it may, it is clear that in this case the company may exercise its judgment, subject to the implied limitation that it must not act in an arbitrary or discriminatory fashion.

In its brief to the board the company cited the leading statement by the Honourable Mr. Justice W. D. Roach in *Re United Mine Workers of America, Local 13031, and Canadian Industries Ltd.* (1948), 1 L.A.C. 234 at p. 237, on the point that the company must not act arbitrarily or in a discriminatory fashion in exercising any right that it may have to determine individual fitness for a job. *Re United Steelworkers, Local 1177, and Canadian Furnaces Co. Ltd.* (1958), 9 L.A.C. 231, is an example of a case in which an arbitrator held that such a determination has been arbitrary or discriminatory.

Quite aside, however, from the requirement that the company not act arbitrarily or in a discriminatory fashion, it seems to

me that an arbitrator would be entitled to ask in appropriate cases whether it was *reasonable* of the company to say that the experience and training of a given applicant was, or was not, the equivalent of grade 12. In this case the company's decision was clearly reasonable, and there was no evidence of discrimination.

I must add that it seems to me that if there was a history of waiving a posted educational requirement and accepting in lieu thereof seniority and plant experience, an arbitrator might be entitled to treat a sudden insistence upon the prescribed educational standard as evidence of discrimination against an individual applicant. This, I think, would be something different from bad faith in initially setting an unduly high educational standard which, as I have indicated above, might also be shown by a regular waiving of the educational standard. (This is of course quite unrelated to the concept of "past practice" as an aid in interpreting the meaning of ambiguous words in a collective agreement.) At any rate, no such basis for a finding of discrimination is shown here because, once again, the fact that the educational requirement was waived in the special circumstances of the original posting cannot be said to show that the company is ordinarily prepared to accept people of lesser education than that posted.

On issue (b) as well, therefore, I must find for the company: They have not acted arbitrarily nor in a discriminatory fashion in relation to the grievor. It cannot be said and, indeed, it was hardly argued, that Mr. Globe had qualifications which the company could not, with reason, say were not "grade 12 or the equivalent".

In summary: The company acted within its rights under the collective agreement in unilaterally imposing the job qualification requirement of "grade 12 or the equivalent in training and experience" for senior hexa operators. Article 4:01 and 4:02 do not affect the company's rights in respect of job qualifications, and there is no indication of bad faith in the setting of the qualification. On the narrower issue: it cannot reasonably be said that the grievor satisfied the posted qualification, nor is there any evidence at all of arbitrariness or discrimination in the rejection of his application.

[G. Brooks dissented.]
[Full award 17 pages]