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1968 CanLII 1204 (CA LA)

RE INT'L ASS'N OF MACHINISTS AND GABRIEL OF CANADA LTD.

I. Christie, M. Tate, J.W. Healy, Q.C. *January 24, 1968.*

EMPLOYEE GRIEVANCE alleging improper demotion. Only the portions of the award dealing with a preliminary objection are published.

M. Levinson, J. Sack and others for the union.
R.A. Williamson and others for the company.

AWARD (in part)

Preliminary objection:

On a preliminary objection Mr. Williamson argued that there was no basis under the collective agreement upon which this board of arbitration could interfere with the company's decision to demote the grievor for lack of skill and ability. Article 3, it was argued, puts the matter entirely in the hands of the company. It provides:

> "3.01 The Union recognizes the Company's exclusive right to: (a) Maintain order, discipline and efficiency; (b) Manage the plant, direct the working forces, hire, retire, reprimand,

> transfer, promote, demote, lay off, suspend and discharge employees, and be the judge of their qualifications; provided, however, that the exercise by the Company of any of these rights and powers in conflict with any of the other provisions of this Agreement shall be subject to the provisions of the Grievance Procedure herein set forth."

Article 3.02 provides that no employee shall be discharged without reasonable and just cause, but says nothing about demotion or discipline. Article 10.03, however, provides:

> "In the case of promotions, demotions and transfers within a Division (except temporary transfers and promotions to positions excluded from the bargaining unit), consideration will be given to;
> (a) seniority, and
> (b) skill, ability and qualifications,
> Skill, ability and qualifications being relatively equal seniority within the Division shall govern."

Mr. Williamson argued that art. 10.03 modifies management's right to demote under art. 3.01 only in relation to "competitive demotion", that is demotion which is the converse of promotion, the type of demotion that occurs where for some reason there is a decrease in employment opportunities. In this case, Mr. Williamson argued, the demotion is "disciplinary".

In the event that art. 10.03 was held to apply more widely, Mr. Williamson argued, the board was still precluded from dealing with the matter because under art. 3.01 the company is to be the sole judge of employee's qualifications. Considering this alternative argument first, it is to be noted that under art. 10.03 seniority governs if "skill, ability and qualifications" are relatively equal. If the words "skill" and "ability" are assumed not to be superfluous they must mean something different than "qualifications". Certainly this conclusion may be reached without the slightest strain on the language since the term "qualifications" generally refers to formal training or some substitute for it while skill and ability are more personal to the employee. Under art. 3.01 the company is to be the judge of qualifications but no mention is made of skill and ability. The question whether skill and ability are relatively equal is, therefore, properly the consideration of the arbitration board, where art. 10.03 is relevant. A board of arbitration must, of course, realize that an employee's supervisors are in the best position

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to judge his skill and ability, and should therefore be very hesitant to substitute its own judgment of relative skills and abilities for that of the company.

Even if the company had been expressly given the exclusive right to judge skill and ability under art. 3.01 the board would still, at the very least, have jurisdiction to determine whether the company acted arbitrarily or in a discriminatory fashion in exercising its powers under art. 3.01. It has long been established that the company may not do so. (See *Re United Mine Workers of America, Local 13031, and Canadian Industries Ltd.* (1948), 1 L.A.C. 234, W.D. Roach, J., chairman.)

Returning to the argument that art. 10.03 does not apply to disciplinary demotion, the short answer is that there is no basis in this collective agreement for distinguishing between "disciplinary" and "competitive" demotion. Indeed, it is probably true to say that unless there is some specific provision in the collective agreement demotion is not, in the ordinary sense, a proper form of discipline. It may only be resorted to where the transgression by the employee can be shown to establish in some way his incompetence to perform the job from which he has been demoted. A review of the facts of the reported demotion cases in Ontario reveals that they are, on the whole, consistent with this principle, whatever may be the language in some of the decisions.

There is no basis upon which this board can do other than apply the clear words of art. 10.03, under which an employee may *not* be demoted if in the result someone with less seniority, whose skill, ability, and qualifications are relatively equal, holds a better job in the division. Of course, if the company establishes that the employee is incompetent to perform the job from which he is demoted then art. 10.03 is no obstacle because the requirement of relatively equal skill and ability is not met. But there is no basis for saying that there are some types of demotion to which the seniority protections in art. 10.03 are not applicable. This conclusion, which is inescapable in light of the clear words of the collective agreement before us, is in keeping with the accepted doctrine in the United States. In *Allied Tube and Conduit Corporation and U.S.W., Local 6939* (1967), 48 L.A. 454 (P. Kelliher, arbitrator), the arbitrator states, at p. 456:

> "This Arbitrator in several published cases has had before him the matter of the propriety of a demotion as a form of

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discipline. In a matter of *Boeing Airplane Company* (23 L.A. 252) this Arbitrator stated;

> Use of Demotion as a Form of Discipline – the issue in this case is whether the demotion was justified in accordance with the terms of Agreement. Under Article III, Section A 'the direction of the working force is vested exclusively in the Company subject to the terms of this Agreement'. In Article V, Section A Parties provide that 'length of service should receive recognition in the case of . . . demotion . . . and, therefore, agree the principle of seniority, where ability, production, and dependability are relatively equal, shall be the determining factor . . . .
>
> It is not only the general holding of arbitration cases but the clear wording of this Contract which provides that Management has the right to demote an employee where he is not capable of performing the work on a job.
>
> It is on the other hand, according to accepted arbitration authority held that Management must not use demotion as a form of discipline for negligence unless the Agreement specifically so provides because to do so would be to abridge the seniority rights of the employee granted by the Contract."

It must of course be borne in mind that many of the transgressions of employees are in some way relevant to their competence to perform a job. The point is that "disciplinary" demotion can only occur within the limitations imposed by the collective agreement upon the company's right to demote an employee.

DISSENT (Healy)

The majority award clearly sets forth the facts of the case and the submissions of counsel. I regret that I cannot entirely agree with the reasons of the award and the conclusion reached.

Article 10, headed "Seniority" is a typical collective agreement provision designed to afford an employee, based on his length of service, a measure of preference in the ebb and flow of employment opportunities as they became available or are eliminated. The usual consequences are promotions, demotions, transfers, lay-offs and recalls from lay-off.

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The grievor, Mr. Campbell, was not demoted as a result of a lack of work in the mechanical maintenance man classification. He was demoted because in the company's judgment he was not performing the work of that classification satisfactorily. I do not agree with company counsel's submission that the demotion was disciplinary in nature, since there was no element of an offence and no question of deterrent value involved. In my opinion the demotion was simply an exercise of management's right to remove an employee from work he cannot perform to work he can perform. It did not involve any consideration of the relative seniority of employees. Article 10, and particularly art. 10.03, had no application.

Further, even considering art. 10.03, I must differ with my colleagues on the distinction made between skill, ability and qualifications. The word "qualified" in the context of seniority provisions, has been held almost uniformly in arbitration awards in Ontario to mean the ability of an employee to perform the work in question satisfactorily without a period of training. It seems to me that skill and ability are included in the broader term "qualifications". In any event, if it is correct to hold that by virute of art. 3.01 the company is the sole judge of qualifications, it should follow that the union's case must fail under art. 10.03 because *all three* elements – skill, ability and qualifications – must be relatively equal before seniority may govern. If any one of them is not relatively equal as between two or more employees, *e.g.*, qualifications, there can be no application of seniority.

If the issue should properly be decided under art. 10.03 I agree with my colleagues that the *prima facie* case put forward through union evidence, slim as it is, has not been met by the company. In my opinion however, the board has jurisdiction only to determine whether the company acted arbitrarily or in a discriminatory fashion in exercising its powers under art. 3.01. The evidence adduced by the union falls far short of making a *prima facie* case on that ground. Accordingly I would dismiss the grievance.

[Full award 14 pages]

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