7-19-1968

Re United Food Processors Union, Local 483 and Canada Starch Co (McKay)

Innis Christie
Dalhousie University Schulich School of Law

D L. Guthrie

George Barron

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IN AN ARBITRATION

Between:

United Food Processors Union, Local 483

(The Union)

and

The Canada Starch Company Limited

(The Company)

Grievances: Re E. McKay, filed February 22, 1968
Re E. McLaughlin, filed February 26, 1968
Re E. McLaughlin, filed March 18, 1968

Hearing - June 12, 1968

Before: Innis Christie, Chairman
D. L. Guthrie, Company Nominee
George Barron, Union Nominee

Appearances:

For the Union:

J.H. Caldwell	Vice-President and Grievance Chairman, Local 483
R.J. Patrick	President, Local 483
J. Stitt	Chief Steward
B. McKay	Power House Steward

For the Company:

A. J. Clark	Counsel
K. O. Weldon	Industrial Relations Manager
M. K. Baillargeon	Power House Superintendant
G. Eddy	Process Superintendant

Witnesses:

Called by the Union:

B. McKay
J. A. Sayeau

Called by the Company:

K. O. Weldon

Employee grievances, pursuant to the Collective Agreement between the parties effective May 28, 1967, alleging improper assignment of work to a probationary employee and requesting payment of overtime. It was agreed by the parties that the result in the McKay grievance would be accepted as governing the two McLaughlin grievances.

AWARD

The facts:

On February 1, 1968, one of the regular firemen in the Company's boilerhouse was due to retire. The Company posted his job on December 1st 1967, in accordance with Article 11 (A) (7) of the Collective Agreement, which requires that a vacancy resulting from retirement be posted sixty days in advance of the normal retirement date. The posting, referred to as Bulletin No. 150, remained up for five days required by Article 11 (A) (7). It specified the nature of the job, the rate and the requirement that the applicant "must have a valid third class stationary engineer's certificate."

The rate set out in Bulletin No. 150 was $2.77 per hour, the Class 7 rate, although by the collective agreement the job carries a class 8 rate. The parties agreed, however, that sometime earlier management and the Union had reached an understanding under which any new fireman in the boilerhouse would be paid a class 7 rate.

There were no applicants for the job posted in Bulletin No. 150. The Company then advertised the job in newspapers, specifying that the applicant must hold a third class stationary engineer's certificate. David Hough responded to the ad and was

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hired by the Company, effective February 5, 1968. Effective the same date, he was assigned to the powerhouse as "fireman - boiler - house at a class 7 rate."

Hough started working in the boilerhouse on February 5th, as a trainee on the 7-3 shift with R. Canning. During that week E. McLaughlin and the grievor, B. McKay, worked the other two shifts. The following week Canning was on vacation. Hough worked 11-7 that week, but on Monday, Tuesday, Wednesday and Thursday he was considered still to be in training so McLaughlin and McKay each worked with him for half of the 11-7 shift. On Friday and Saturday of that week, that is February 16 & 17 Hough took the 11-7 shift by himself. At that time, not having worked for 14 weeks or 40 days, he was still "on probation" according to the terms of Article 11 (A) (2). His appointment under these circumstances gave rise to this grievance.

When Bulletin No. 150 was posted, McKay was first spare and first releif operator on the boilerhouse fireman's job. Mr. McKay testified that shortly after the posting Mr. Weldon, the Industrial Relations Manager, inquired why he had not applied for the regular fireman's job. McKay told Weldon that as first spare and first relief operator he was getting class 8 rate whereas, in accordance with the arrangement between the Union and Management, Bulletin No. 150 specified a class 7 rate. Subsequently, McKay did apply for a similar job posted in Bulletin No. 10, dated February 6, 1968, which also bore a Class 7 rate. However, Mr. McKay testified that he did so because there was an understanding that he would get a class 8 rate. When Hough started to train for the fireman's job McKay was the only bulletined relief operator and when Hough first took a shift on his own there were no bulletined relief operators.

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Mr. McKay also testified that although no one applied for the job posted in Bulletin No. 150 he was the only employee approached about the matter. The Company did not approach any of the other four employees at the plant who are holders of third class stationary engineers' certificates. The Union saw some signifigance in this, which was illustrated by the evidence of Mr. Sayeau. Mr. Sayeau testified that in over 5 years employment with the Company he has changed jobs several times. On two occasions he was approached by someone in a supervisory capacity and pursuaded to apply for a posted job for which there had been no applications.

Mr. Weldon, the Industrial Relations Manager, testified that none of the holders of third class stationary engineers' certificates at the plant, other than McKay, had been approached about the job posted in the Bulletin No. 150 because he had been quite certain that none of them wanted the job. Each of them either held a job generally regarded as "desirable" or at some previous time had specificaly requested transfer out of the powerhouse. Mr. Weldon did not feel that the Company was in any way obligated to seek out employees who might be suitable for a posted job. He also denied that it had ever been the Company's practice to seek the Union's agreement before advertising publicly for new employees.

The issue:

The issue to whether the grievor, B. McKay, should be awarded overtime pay on the ground that Company acted contrary to the collective agreement in awarding the position of fireman-boilerhouse to D. Hough, a probationary employee who had not applied

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for the job pursuant to a posting. The Union alleged that Had Hough not been given the regular operator's job the grievor and McLaughlin would have worked a 12 hours shift, including 4 hours at the overtime rate, on both February 16 and 17. We must decide whether the grievor is entitled to overtime and whether Hough was properly given the job of fireman-boilerhouse.

Decision:

ARTICLE 3

Reservation to Management

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Subject to the provisions of this Agreement, the Union recognizes the right of the Company (1) to hire, promote and transfer, (2) to discipline any employee for justifiable cause, (3) to allocate work, describe, evaluate and classify jobs, and (4) to determine the number of employees in any classification .

ARTICLE 11

Employee Security

(A) Each of the Parties hereto recognizes that employees are entitled to an equitable measure of security based on seniority, subject to the following provisions: -

(1) It is mutually recognized that seniority, skill, ability to perform the work required, efficiency, responsibility and physical fitness are important considerations in the selection of employees for a job vacancies.

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(2) Seniority status: employees...shall come under the provisions of this Agreement, except that they shall be on probation for the first 14 weeks of unbroken service or 40 days work, whichever is the shorter period of time....

(7) Posting Job Vacancies: All hourly job vacancies within the scope of this agreement (with specified exceptions) will be posted....

When a vacancy becomes evident the job vacancy... will be posted...The successful applicant will be chosen within an additional 14 days. If a vacancy results from retirement,

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> the vacancy will be posted sixty (60) days in advance of normal retirement date.
>
> The selection of applicants for a job vacancy will be in accordance with Article 11 (A) (1). (provision is then made for a reasonable training period etc.)
>
> In event that a selectee proves during his training period to be unsatisfactory or desires to return to his former job then the next selection will be made from those who answered the bulletin. If none of the applicants are qualified the Department or Division head will appoint. an employee who has completed his probationary period.

In our view the curx of the matter is whether this last sentence of Article 11 (A) (7) prevents the Company from appointing a probationary employee in the circumstances of this case. Mr. Clark, however, urged the Board that before we could consider the propriety of Hough's appointment we must satisfy ourselves that the grievor had some right under the collective agreement to claim overtime pay. In his submission, even if Hough was improperly given the fireman's job, McKay was not the proper grievor. The grievance should have been lodged by an employee who could claim that he was improperly denied the fireman job. We do not agree that Mr. Clark's is the best way to approach the matter. A "right to claim overtime" need not be spelled out in the collective agreement. As indicated in an earlier arbitration between these same parties, (unpublished award, dated June 3, 1968, I. Christie, Chairman).

> (There is a) broad question whether "an equitable measure of job security," (under Article 11 (A) (1) gives a bulletined employee the right to demand that the Company call him in on overtime rather than assigning the work to an unqualified employee. It appears to this Board that under the general seniority provision the only limitation on the Company's right to allocate work is that it may not intentionaly undercut rights gained through seniority.

Similarly, if a grievor were the only man in the plant qualified to do certain work and if it could be established that the Company had breached the Collective Agreement in hiring another

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man to do that work, the grievor might be able to establish that as a direct and intentional result of the Company's improper action he lost overtime work. Rights to overtime work can only be determined by examining the provisions of the collective agreement which limit the Company's power to fill jobs as it sees fit. As indicated in the earlier award referred to above under this collective agreement management is clearly intended to be allowed some flexibility in avoiding overtime.

The management rights clause quoted above gives the Company the right, subject to the provisions of the Agreement, to "hire, promote and transfer" employees. What then are the limitations upon this power in the Collective Agreement?

The Union referred us to the definition of "spare and second relief operator" contained in appendix A, which provides that "replacement of regular operators class 4 and higher will be made from spare and second relief operators who have been assigned as a result of a bulletin". This provision is obviously inapplicable because there were no bulletined spare and second relief operators in the plant at the time Hough was given the job. Moreover, the Company did not appoint Hough as a replacement for Canning but as an additional regular operator. The Union would , no doubt, object that the Company did not have the power to appoint a fourth regular operator in the boilerhouse. That matter is, apparently, the subject of another grievance and it is unnecessary to go into it because the provision in question is inapplicable, since there were no spare or second operators bulletined at the time.

Our real concern then is with Article 11 (A) (7). The job

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eventually taken by Hough was posted for 5 days, in accordance with Article 11 (A) (7), but there were no applicants for the job. Article 11 (A) (7) provides that the selection of applicants will be in accordance with Article 11 (A) (1), that is, on the basis of seniority, skill, ability, etc., and provides for a ten day training period. The crucial paragraph then requires that "in the event that a selectee proves during his training period to be unsatisfactory or desires to return to his former job. The next sellection will be made from those who have answered the bulletin." On the other hand, "If none of the applicants are qualified the Department or Division head will appoint an employee who has completed his probationary period.

In our view these parts of Article 11 (A) (7), given their ordinary and most obvious meaning, apply only in a situation where there has been at least one applicant for the job vacancy posted. If no employee applies then neither the provisions relating to training opportunities etc., nor the provisions relating to the situation where none of the applicants is suitable, applies. In other words, where there is no applicant for a posted job the company has satisfied the only limitation on its right to "hire, Promote and transfer" by posting the job. Thus, as in the case before us, the company is free to hire a man qualified for the job and place him directly in it, although he will, of necessity, be a probationary employee.

Much ofthe Union's evidence and an considerable part of its argument was directed to persuading the Board that the Company has an obligation , where there was no applicant for a posted job, to approach any employee who might conceivable be qualified or interested in doing the job. The Company did make such an approach to McKay with regard to the job set out in Bulletin No. 10 and it is

clear from Mr. Sayeau's evidence that this kind of approach has been used to get jobs filled on various occasions in the past. But we do not agree that the fact that personal approaches have been used in the past to get jobs filled creates any obligation on the Company's part. The collective agreement provides for posting as a means of bringing job vacancies to the attention of the employees who might be eligible and interested. The Union has not satisfied us that what the parties really intended in setting out the job posting provisions was that if no applications are made the Company is required to take the initiative in approaching employees.

We have held that since there were no applicants for the job posted in Bulletin No. 150 the prohibition in Article 11 (A) (7) against the appointment of a probationary employee did not apply. If follows that, in the exercise of its rights under Article 3, the Company was quite free to advertise for a third class stationary engineer, to hire him as a probationary employee and appoint him to the job. In reaching this conclusion we have given the final sentence in the second last paragraph of Article 11 (A) (7) its literal meaning. The direction that the Department or Division hear "appoint an employee <u>who has completed his probationary period</u>" literally only applies "if none of the applicants are qualified. "That is, it applies only if there have been applicants. We are satisfied that this is not only the literal meaning of the provision, but alos a reasonable one which takes account of the interests of the parties. It is probably what the parties intended by the words they used.

Mr. Caldwell, for the Union, was of the opinion that the

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requirement that the Company appoint only "an employee who has completed his probationary period" would not apply where a probationary employee actually applied for a posted job. The Company could award him the job if, on a fair application of Article 11 (A) (1), he was most deserving of it by virtue of his skill, ability, etc. This, Mr. Caldwell, admitted, would mean that the Company could have hired Hough into the labour pool, reposted the Fireman - Boilerhouse job and then given it to Hough as only applicant. To insist on this procedure would not only cause delay, it might prevent the Company from advertising publicly for a qualified third class stationary engineer. In doing so the Company would be running the risk that some employee who had not applied for the fireman's job when it was first posted might have changed his mind. This would be most unfair to one in Hough's position.

There is also the consideration that if there were a job to be filled immediately and none of the Company's employees possessed the certificate required by statute, according to the Union's interpretation of the crucial passage in Article 11 (A) (7) the Company could be prevented from filling the job at all until a second posting procedure had been gone through.

These practical considerations lead us to conclude that the literal meaning of the collective agreement as it applies here is also the most reasonable.

The effect of the stipulation that only an employee who has completed his probationary period may be appointed <u>where none of the applicants are qualified</u> is that where a regular employee does apply for a posted job the Company must attempt to train him rather

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hiring a new employee. This is a considerable protection for people presently employee by the Company, which may inconvenience the Company on some occasion where the only applicants for posted jobs appear quite unsuitable. It is not the intent of the agreement, however, that the Company be required to leave a job unfilled or be required to force transfer upon an unwilling employee where there have been no applicants for a posted job.

Summary:

Under Article 3 management has the right "to hire, promote and transfer" employees, subject to the provisions of the collective agreement. In our opinion the only limitation on the Company's right which is relevant to the circumstances before us is to be found in Article 11 (A) (7). That section requires that job vacancies be posted, that selection be in accordance with seniority, skill and ability etc. and provides "if none of the applicants are qualified then the Department or Division head will appoint an employee who has completed his probationary period". In our view the requirement that the employee appointed be one who has completed his probationary period only applies where there have been applicants for the posted job. In this case there were no applicants for the job posted in Bulletin No. 150. It follows that the Company's right to hire, promote and transfer was unlimted by the requirement that they appoint an employee who had completed the probationary period. This is the literal meaning of Article 11 (A) (7), and a consideration of the interests affected leads us to conclude that it is also a reasonable interpretation of the Article. Where a job is posted and there are no applicants for it, either because no employee wants the job or because no employee satisfies the statutory licencing requirements, the Company

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is free to advertise the job and to hire directly for the specific job.

The industrial relations staff or other supervisory personnel may informally urge employees to apply for posted jobs but there is no requirement that they must seek out every employee who might be interested.

No provision of the Collective Agreement other than Article 11 (A) (7) is directly relevant and it follows, from the way that we have interpreted Article 11 (A) (7), that this grievance must be dismissed.

July 19, 1968

Innis Christie, Chairman

D. L. Guthrie

I dissent Geo. Barron