

IN THE MATTER OF AN ARBITRATION

BETWEEN:

United Steelworkers of America, Local 16506

Union

-and-

Alumabrite Anodizing Limited

Employer

AND IN THE MATTER OF Job Competition Grievances of Minh Nguyen and Bich Nguyen

BEFORE: Shari Novick

APPEARANCES:

For the Union: Brian Bressette, representative

For the Employer: Michael McFadden, counsel

A hearing into this matter was held in Hamilton, Ontario on February 25, 2000

AWARD

Introduction

These two grievances arise out of a job posting for the position of Shipper/Receiver Trainee at the Employer's plant. The parties requested that the grievances be heard together. Notice of the hearing was provided to the incumbent, who attended the hearing and made a brief opening submission but did not otherwise participate in the proceedings.

After receiving several applications for the position posted, the Employer undertook a selection process which included an interview and a written test. Each of the candidates interviewed were then scored according to 11 identified criteria. Both grievors received scores of 8 out of 11. Two other candidates, Ed Agnew and Mike Finn, scored 10 out of 11. Mr. Agnew was awarded the job, as he had more seniority than Mr. Finn. After a few days of working as a Shipper/Receiver Trainee Mr. Agnew advised that he did not wish to remain in the position, and the Employer then awarded it to Mr. Finn. Both grievors have more seniority than Mr. Agnew and Mr. Finn.

The Union argues that the Employer acted improperly and that the position in question should have been awarded to one of the grievors. The parties agree that if both of the grievances are successful, only one of the grievors could be awarded the job.

The collective agreement

The issues raised in this case call for an examination of the language of the seniority provisions in the parties' collective agreement. The articles relating to job postings read as follows:

10.01 The principle of seniority based on length of continuous service with the Employer will be recognized as hereinafter provided:

In cases of lay-offs, recall to work following layoff, **promotions** (excluding promotions to positions excluded in the definition of "employee" in Article 1 hereof), demotions, upgrading or transfers ***where the skill and efficiency of the employees concerned are relatively equal, seniority shall be the governing factor.***

10.02 In the event of openings occurring within the bargaining unit, the Employer will post a notice on the special bulletin board supplied for union purposes which shall remain posted for a period of three (3) working days (a copy will be given to the Union) during which written application for eligible employees may be submitted to the Plant Manager. ***Any candidate for the position will be selected based on their qualifications for the position as well as seniority,*** and will be given a 3 day trial period. If there are no qualified resident applicants, external hiring will be required. Within ten (10) working days the employee may return or be returned to their previous classification. This Section shall apply to occupational groups referred to in Schedule "A" hereto including trainee groups but shall not apply to...

(emphasis mine)

The evidence

The Employer is in the business of anodizing or applying high-lustre finishes to extruded aluminum. I was advised that Alumabrite has experienced a dramatic increase in its business over the past two years, which has led to a tripling of its hourly work force as well as the volume of product it ships out of its plant in Hamilton.

The background facts relevant to the two grievances before me are largely undisputed. The grievors both work as general labourers at the Employer's plant. Minh Nguyen's seniority dates back to March of 1995, and Bich Nguyen began working for the Employer in May of 1997. Both Minh and Bich applied for the Shipper/Receiver Trainee position posted on November 15, 1999. This position is essentially a six-month training position, after which time the employee becomes a Shipper/Receiver which is a higher-paid classification.

The job posting in question set out various qualifications required, among which was that candidates be certified lift truck drivers. This requirement was qualified by the comment that while certified candidates will be preferred, other candidates would be considered. The posting also indicated that “experience learned outside Alumabrite will be considered”.

John Swayze is the general foreman at the Employer’s anodizing plant and the direct supervisor of both Shipper/Receivers and Shipper/Receiver Trainees. Mr. Swayze testified that due to the significant increase in the number of employees at the plant and the corresponding increase in the number of candidates who apply for jobs that are posted, the Employer has recently instituted a more formal selection process than had existed in the past. He explained that he had drafted a list of general interview questions for the candidates, and that the lead hand in the shipping department had created a written test consisting of two questions requiring the candidates to exercise problem solving skills and one to assess their writing skills. The final portion of the written test involved a numerical problem requiring the candidates to calculate the number of boxes and the number of skids comprising a simulated shipment from shipping documents provided.

Mr. Swayze testified about the various other criteria used to evaluate the candidates. He explained that each candidate interviewed was scored against eleven equal-weighted factors, including their performance during the interview and their success on the written test. He testified that each candidate’s attendance and history of lateness were two of the factors considered, and that any candidate with more than eight casual absences or seven or more incidents of lateness was penalized. The Employer filed a copy of its lateness policy, which indicates that continual lateness will attract disciplinary action. The policy states that seven “lates” attract a verbal warning, and each successive incident of lateness results in a step up the progressive discipline ladder. Mr. Swayze explained that this was an important criteria to consider for this position, as trucks often arrive at the plant to pick up shipments at 7 a.m., the start of the morning shift. He stated that if the shipper responsible for overseeing a load to be shipped has not yet arrived at work, a bottleneck will ensue

and shipments scheduled for later in the day will be affected.

Mr. Swayze also testified that forklift or lift truck experience was another important criteria considered, explaining that a major part of the job involved moving goods by forklift.

The witness explained that after adding up the candidates' scores at the end of the selection process, both grievors received eight out of a possible eleven points, while Mr. Agnew and Mr. Finn each scored ten out of eleven. The Employer filed a spreadsheet setting out the various scores achieved by each candidate interviewed. It indicates that Minh Nguyen lost points for not satisfying the following three requirements: he did not have a forklift licence, did not pass the written test and did not have prior shipping experience. Bich Nguyen lost points for having seven late days on record, for not passing the test administered and for not having prior shipping experience. Mr. Agnew, who was originally awarded the job, also failed the test but had a forklift licence, a clean attendance record and had previously worked as a Shipper/ Receiver at another company. Mr. Finn, who took over the position when Mr. Agnew withdrew, also had previous shipping experience at another company. He was not a certified forklift driver, but had gained experience operating a forklift in a prior job.

Mr. Swayze stated that on the basis of the above scores, he did not consider either of the grievors to be relatively equal to either Mr. Agnew or Mr. Finn, and accordingly did not award the position to either of them.

Brenda Smith, the chairperson of Local 16506 testified on behalf of the Union. She explained that the Employer had first advised the Union in the spring of 1999 that it had decided to institute a selection process for job postings in the plant and make the process more formal than it had been in the past. She advised that not all jobs in the plant are required to be posted, but expressed the view that if a job is required to be posted, the most senior employee should be chosen.

Ms. Smith testified that she felt it was improper for the Employer to require that candidates applying for the Shipper/Receiver Trainee position be certified forklift drivers, as they would presumably be trained to do this on the job. She also objected to the inclusion of a numerical problem in the written test administered, pointing out that article 10.02 of the collective agreement provides for a three-day trial period and a further ten days within which the employee selected could be returned to his or her previous position if they were unable to complete the tasks required.

Analysis and decision

I will turn first to the parties' arguments regarding the type of seniority clause contained in the collective agreement governing job postings, so that the Employer's actions can be viewed in the appropriate context.

The Union noted that article 10.02 specifies that candidates will be selected for positions based on their qualifications and seniority and submitted that this is either a "sufficient ability" or a "hybrid" type of clause, neither of which invite the competition embarked on by the Employer for the posting in question. The Employer disagrees with this analysis. It takes the position that article 10.02 cannot be read in isolation, and that it must be read in the context of article 10.01, which mandates that "where the skill and efficiency of the employees concerned are relatively equal, seniority shall be the governing factor. Employer counsel submits that this language clearly invites a "relative equality" analysis or competitive approach to assessing candidates for job postings.

If the language of article 10.02 was the only mention in the parties' agreement of how candidates are to be assessed in the event of a job posting, I would agree with the Union's characterization of the clause as a "hybrid" type. However, article 10.01 cannot be ignored. The first sentence of that article sets out that seniority is to be "recognized as hereinafter provided", and the second sentence goes on to specify that in various cases including job promotions, seniority shall be the governing factor "where the skill and efficiency of the employees concerned are relatively equal". In my view,

the overall structure of article 10 and the order in which the clauses appear within it clearly suggests that clause 10.01 must be read as a condition precedent clause, or one setting out an overriding principle that each successive clause in that article must be interpreted against. I note that article 10.02 then goes on to set out the manner in which job postings are to be dealt with, followed by further clauses addressing the order of layoffs, the instances in which an employee's seniority will cease and other seniority-related issues.

If article 10.01 appears in the agreement, its language must be deemed to have some meaning. I find that the Union's submission that the seniority clause in question is not a competitive clause is untenable, unless article 10.01 is simply ignored. As stated above, the rules of contractual interpretation prevent me from doing so. I also find that articles 10.01 and 10.02 are not inconsistent. The language in 10.02 requiring candidates to be selected based on their qualifications for the position as well as their seniority mandates that both of these factors be taken into account: the manner in which they are to be considered or balanced is then provided for in article 10.01. In my view, the language in 10.01 reflects that of a "relative equality" clause, and permits a competitive process for assessing candidates in a job posting.

The question then becomes whether the grievors were relatively equal to either Mr. Agnew or Mr. Finn, or whether the process engaged in by the Employer was flawed in any way. The Union submitted that the scores achieved by both grievors, the more senior employees, were not low enough to warrant them being bypassed in the competition, and that the qualifications set out in the posting were high for a trainee position.

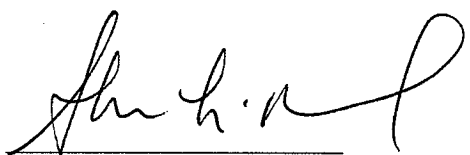
While the listed qualifications may appear somewhat high for a trainee position, I note that the Union's submission on this point focused on the requirement that candidates possess a minimum educational requirement of grade 12 or its equivalent. This factor, however, did not play a role in the selection process as both grievors as well as Mr. Agnew and Mr. Finn satisfied this requirement.

And, while I agree with the Union's statement that seniority is an important factor to consider in this context, I find that the Employer's preference for candidates with forklift experience and prior experience in shipping to be appropriate, given the requirement in article 10.01 that the candidates be assessed on the basis of their skill and efficiency. It was open to the parties to specify that postings for trainee positions are to be excluded from a competition; I note that while article 10.01 excludes certain positions from the relative equality test, trainee positions are not mentioned. On the whole, I find that the criteria used to assess the candidates were reasonable as well as rationally connected to the position in question.

Given the language in the parties' agreement, the grievors face the onus of proving that their qualifications are "relatively equal" to those of Mr. Agnew or Mr. Finn. As stated above, both grievors achieved scores of eight out of eleven when all of the criteria were considered, while Mr. Agnew and Mr. Finn scored ten out of eleven. Translated into percentage terms, the grievors scored 73%, while the other two candidates scored the equivalent of 91%. In my view, these scores cannot be considered "relatively equal". If the difference in scores had been attributable to subjective factors such as an interviewer's impression of their attitude or some other personality trait, my view might be different. Instead, I note that the difference in scores is attributable to objective factors, such as not having prior shipping experience or passing the written test administered (which called for objective assessments), as well as Minh's lack of forklift experience and Bich's record of lateness in contravention of the Employer's late policy.

In the circumstances, I find that the job posting procedure was conducted appropriately in light of the relevant collective agreement provisions, and accordingly, the grievances are dismissed.

DATED AT TORONTO, ONTARIO THIS 20TH DAY OF MARCH, 2000.

A handwritten signature in cursive script, appearing to read "Shari L. Novick", written over a horizontal line.

Shari L. Novick
Sole Arbitrator