

Cited as:
**Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local
880 v. Van De Hogen Material Handling Inc. (MacInnis
Grievance)**

**IN THE MATTER OF an arbitration
AND IN THE MATTER OF the grievance of Glen MacInnis dated June
26, 2000
Between
Teamsters, Chauffeurs, Warehousemen And Helpers Union Local
No. 880, union, and
Van De Hogen Material Handling Inc., employer**

[2000] O.L.A.A. No. 734

Ontario
Labour Arbitration

M.V. Watters, Arbitrator

Heard: Windsor, Ontario, September 13, 2000
Award: October 4, 2000

(42 paras.)

Appearances:

P. **Shklanka**, counsel, R. Parent, Business Agent and G. MacInnis, Grievor, for the union.
J. Van De Hogen Jr., Vice-President, for the employer.

AWARD

1 This proceeding arises from the grievance of Mr. Glen MacInnis dated June 26, 2000 which reads, in part:

"I the undersigned grieve the company for a junior man working and grieve for all lost wages."

2 The Employer's first step reply of June 27, 2000, written on the face of the grievance form, states:

"As per article 7, subsection 7.2(b)(ii) "In the event of layoff, the Company shall consider (i) Seniority....., (ii) the qualifications of the employee.....".
Current business conditions dictate that management must assign various duties to each employee. Said employee is not qualified for all areas of this operation."

Counsel for the Union, in opening argument, stated that this reply was never given to the Union.

3 Article 7.2(b) referenced in the above reply provides as follows:

7.2(b) In the event of layoff, the Company shall consider:

- (i) the seniority of the employees;
- (ii) the qualifications of the employees, and where the qualifications are relatively equal, the employee's seniority shall be the determining factor.

4 Mention was also made at the hearing of article 21.2 relating to vacancies and new jobs. That provision reads:

21.2 When job opening (sic.) or new jobs are created within the scope of this Agreement, such openings will be posted on the Bulletin Board for three (3) working days (Saturdays, Sundays and General Holidays excluded), and employees shall have the opportunity of bidding on such job openings or new job in order of their seniority.

5 The collective agreement in Schedule "A" provides for only two (2) job classifications, these being Equipment Operator and Labourer. During the course of the hearing, the former was also referred to as Lift Truck Operator. The Equipment Operator classification provides for a higher wage rate than does the Labourer classification.

6 Employees in the bargaining unit are engaged in the loading and unloading of railway cars and trucks and the storing and warehousing of goods on the premises maintained by the Employer. Generally, this work is performed in two (2) distinct areas. Firstly, lumber is loaded and unloaded in the outdoor yard. The lumber is stored there from the time it is received until it is shipped out of the yard to customers. Secondly, a variety of products are loaded, unloaded and stored in two (2) indoor warehouses. The products include drywall, waferboard, paper, zinc and Chrysler engines. I was told that one (1) of the warehouses is used almost exclusively for Chrysler product. Large diesel powered forklift trucks are used to move product within the outdoor yard. Smaller propane powered lift trucks are used in the warehouse areas.

7 The grievor was hired by the Employer on April 13, 1984. He worked as a Labourer until June, 1986. Thereafter, he worked in the Equipment Operator classification until his layoff on June 21,

2000. The grievor has not worked for the Employer since that date. The grievance was filed, in this instance, as more junior employees continued to work for the company following the grievor's layoff. The particulars relating to the junior employees, as excerpted from the seniority list, are as follows:

Name	Date Hired	Position
Ken Smith	June 10, 1986	Lift Truck
Charles Hudson	May 22, 1994	Lift Truck
Kevin Caza	July 4, 1994	Lift Truck
Wayne Upham	January 23, 1999	Labourer

The last three (3) of these employees worked full time hours after the grievor's layoff. For reasons not fully explained, Mr. Smith's subsequent employment was intermittent. I was informed that he, too, has filed a grievance. Such grievance is not before me in this case. I note, at this juncture, that the grievor has approximately ten (10) more years of seniority relative to both Mr. Hudson and Mr. Caza and fifteen (15) more years of seniority relative to Mr. Upham.

8 Mr. Hudson and Mr. Caza attended the hearing and gave evidence on behalf of the Employer. They chose not to participate to any greater extent. Mr. Upham, the sole incumbent in the Labourer classification, did not attend despite being advised of his right to fully participate in the proceeding.

9 The grievor, as indicated above, worked as a Labourer for approximately two (2) years. During this initial period of employment with the company, he stripped and marked rail cars, removed steel bands from bundles of lumber, repiled and banded broken bundles, picked up boards in the yard, and cut crossers with the chain saw. I was left with the distinct impression that most of these tasks were performed outside.

10 At the time of his layoff, the grievor worked as a Lift Truck Operator on the 8:00 a.m. to 4:30 p.m. shift. It was the grievor's evidence that he preferred to work outside in the yard. This preference was generally respected given his greater seniority. The grievor emphasized, however, that he also worked in the warehouse on occasion. He referenced being directed by the foreman, Mr. Ben Becking, to load zinc in the warehouse some three (3) weeks prior to his layoff. The grievor testified that he would seek the foreman's assistance if he experienced any difficulty in locating products within the warehouse. He acknowledged that he probably could not locate everything in the warehouse without such assistance. The grievor asserted that other Lift Truck Operators would require similar assistance from time to time.

11 The grievor stated that he has operated all of the various lift trucks used to perform both yard and warehouse work. He expressed the opinion that the only differences between inside and outside work are the type of lift truck used and the nature of the product moved. It was the thrust of his evidence that he was qualified to perform the work of a Lift Truck Operator both in the yard and in the warehouses. The grievor advised that he never received a performance evaluation. More specifically, the grievor stressed that he was never told he was unqualified to work inside. Indeed, it was suggested that such an assertion would have been inconsistent with the fact he was assigned to work in the warehouse from time to time.

12 The grievor further testified that he was never informed as to the reasons for his layoff on June 21, 2000 or why more junior employees continued at work thereafter. He noted that the Record of Employment subsequently issued by the Employer stated shortage of work as the reason. It was the

grievor's view that he should have been retained at work given both his ability to perform the job of Lift Truck Operator and his greater seniority vis a vis Mr. Caza and Mr. Hudson. The grievor stated that, while he could have worked as a Labourer, he did not approach the Employer concerning such option as there were junior employees doing the same job he previously performed. He questioned why he should "come in as a Labourer" given that fact. It is apparent from the evidence that the Employer did not pursue such possibility with the grievor.

13 As indicated above, Mr. Hudson is a Lift Truck Operator with a seniority date of May 22, 1994. For approximately two (2) years prior to the grievor's layoff, he worked a 9:30 a.m. to 6:00 p.m. shift. It appears from the evidence that Mr. Hudson generally worked outside in the yard until about 4:00 p.m., after which he would switch to the indoor warehouse to assist Mr. Caza with loading and unloading of product. Mr. Hudson testified that he prefers outdoor work but stated he would go inside, if needed. He acknowledged that he might also be compelled to work inside from time to time as a consequence of his lower seniority. When in the outdoor yard, Mr. Hudson operated the same equipment as the grievor.

14 Mr. Hudson stated that he is reasonably comfortable and competent when handling warehouse products. Mr. Hudson conceded that when he first performed warehouse work, he was not "up to speed" as he was unfamiliar with the location of all of the products. He maintained, however, that he "picked it up fast" and experienced few difficulties in performing the work. Mr. Hudson testified that he does not work under supervision when in the warehouse. Mr. Hudson expressed the opinion that, for him, it is harder to work inside than it is outside. He noted, in this regard, that more care has to be taken with the type of product moved and stored inside. He also indicated that the consequences of damage or mistake are much more serious when dealing with the warehouse products. Mr. Hudson acknowledged having made a mistake when working in the warehouse. He, apparently, forgot to either load or unload eleven (11) sheets of drywall. In cross-examination, he agreed to having received three (3) written warnings and one (1) verbal warning for carelessness in the period August 24, 1999 to February 8, 2000. Each of these incidents involved the incorrect loading of a truck. Mr. Hudson was unsure if the warnings resulted from yard or warehouse work.

15 Mr. Hudson, in his evidence, described a change he has observed at the workplace. In his view, yardwork involving the movement and storage of lumber has declined. Conversely, he has noticed a marked increase in the activity level of the warehouse. Mr. Hudson suggested that this change was the reason why he was needed in the warehouse areas after 4:00 p.m. Mr. Hudson's evidence on this point differed somewhat from that presented by the grievor. The latter expressed the opinion that there is still "a lot of lumber to be moved around" in the yard. The grievor also stated that he has not seen a shift, or change of emphasis, in the work from the yard to the warehouse.

16 Mr. Caza is likewise classified as a Lift Truck Operator. His seniority date is July 4, 1994. Mr. Caza testified that he has worked outside in the yard as well as inside in the warehouse areas. Like Mr. Hudson, this employee was working the 9:30 a.m. to 6:00 p.m. shift at the time of the grievor's layoff. I was left with the impression that Mr. Caza worked primarily in the warehouses between the hours of 4:30 p.m. and 6:00 p.m. This employee asserted that he is familiar with all of the products located in the warehouse and that he is comfortable working therein without supervision. Mr. Caza did not think there is "a big difference" between inside and outside work. In his mind, the material distinction is that the Lift Truck Operator is required to operate different machines depending on whether he is working indoors or outdoors.

17 Mr. John Wilson, like the other witnesses, is a Lift Truck Operator. His seniority date is September 2, 1980. He has served as the Union Steward for the past six (6) years. Mr. Wilson was called on to present evidence on behalf of the Union.

18 Mr. Wilson generally confirmed the evidence of the grievor, Mr. Hudson and Mr. Caza as to their respective work locations and the pattern of their work. He further advised that he has worked both inside and outside with each of these employees. Mr. Wilson's evidence may be summarized as follows with respect to such work within the warehouse areas:

- (i) he has worked with Mr. Caza in the warehouse areas more than ten (10) times. Mr. Caza has experience in the Chrysler warehouse;
- (ii) he has worked with Mr. Hudson in the warehouse on one (1) or two (2) occasions. He has never seen Mr. Hudson work in the Chrysler warehouse;
- (iii) he last worked with the grievor in the warehouse a matter of weeks before the latter's layoff. The grievor was then working with zinc. He could not recall when he worked indoors with the grievor prior to the most recent occasion. Mr. Wilson believed that the grievor has never worked in the Chrysler warehouse as he "has the seniority to stay outside"; and,
- (iv) warehouse work is generally not supervised.

19 In his examination in-chief, Mr. Wilson was asked to compare the grievor's ability when working inside against other employees who work more regularly in the warehouse. I recorded his answer that there was no real difference other than "finding the stuff". He explained that products are stored at numerous locations in the warehouse and that these locations can change on short notice. Mr. Wilson asserted that he, and other employees working in the warehouse, often have to ask a foreman or a colleague as to the location of a particular product. This Arbitrator asked Mr. Wilson how long it would take an employee assigned from the yard to the warehouse to learn the location of the various products. He responded that it would depend on the individual, and that it took him approximately two (2) weeks to become familiar with where things were stored when he first moved into the warehouse. Mr. Wilson seemed to acknowledge that in such an initial period, an employee might not be as efficient or as quick as they might later be. Notwithstanding this limited reservation, Mr. Wilson stated that he never observed any problems when working with the grievor inside.

20 Mr. Wilson distinguished yard and warehouse work on the basis of the product and the size of the equipment used to load, unload or store same. He added that more care must be taken in moving material, such as drywall, through the warehouse. Mr. Wilson observed that the Lift Truck Operator classification is generic in the sense that specific qualifications are not attached to, or expected from, those operators who work either inside or outside. On this point, he noted that operators called to replace a sick employee are brought in pursuant to seniority and not on the basis of whether they normally work in the yard or in the warehouse. From his perspective, all of the employees within the Lift Truck Operator classification know how to operate the different pieces of equipment used to move product at the company premises. Mr. Wilson was asked whether he observed any significant difference in Mr. Hudson's or Mr. Caza's ability to perform the job in comparison to that of the grievor. He responded to the effect that there was no difference.

21 Mr. Wilson testified that he met with Mr. John Van De Hogen Jr., Vice-President of the Employer, about two (2) weeks prior to the grievor's layoff. He recalled that in their discussion, Mr.

Van De Hogen mentioned the possibility of future layoffs and that such layoffs would be made according to who "has been more skilful". Mr. Wilson replied, at the time, that layoffs had previously been effected pursuant to seniority. Mr. Wilson believed that this discussion would be pursued by way of a further meeting between the company and the Union, including its Business Representative, Mr. Frank Biekx. I was told that this follow-up meeting was never held. Mr. Wilson, in his evidence, claimed that he could not recall a situation where an employee had previously been laid off out of seniority. He did recall one (1) case in which a Lift Truck Operator used their seniority to move into a Labourer's job instead of being laid off.

22 At the hearing, evidence was presented with respect to a notice posted on the employee bulletin board on April 19, 2000. The body of the notice reads:

"Effective Monday, April 24, 2000, the hours of operation in the yard will be from 8:00 a.m. to 4:30 p.m.

There will be two positions available from 9:30 a.m. to 6:00 p.m.

Please sign below if interested in the second shift - 9:30 a.m. - 6:00 p.m.

....."

Mr. Hudson and Mr. Caza both signed the posting. As indicated previously, these two (2) employees were already working a shift between 9:30 a.m. and 6:00 p.m. Mr. Hudson testified that the rumour in the yard was to the effect that employees in the two (2) positions referenced in the posting would not be subject to layoff. Mr. Hudson was, therefore, surprised and annoyed when he was laid off on or about April 24, 2000. He was then led to believe that "seniority would overrule whoever signed the posting". Mr. Hudson was subsequently returned to work on June 1, 2000. He testified the foreman then told him that "the people who signed the posting would be working".

23 There is a dispute in the evidence as to how long the above notice was posted. It is unnecessary to resolve such dispute for purposes of this proceeding. It was the grievor's evidence that he never saw the posting prior to his layoff. He asserted that he would have signed it if he had seen it. In the grievor's words, he would have been disinclined to "give up his job to someone with ten (10) years less seniority".

24 Mr. Wilson stated that, on his reading, the notice was a posting for a shift rather than a posting for a new position. Additionally, with the change in the hours of operation of the yard, the two (2) employees on the later shift would only be alone for one and a half (1 1/2) hours at the end of the day instead of three (3) hours, as before. As noted above, both Mr. Hudson and Mr. Caza were already working until 6:00 p.m. Mr. Wilson testified that he saw nothing in the notice to indicate there would be new or special requirements for the two (2) positions extending beyond 4:30 p.m. Put another way, he did not consider the positions to be specialized Lift Truck Operator positions. Rather, the two (2) incumbents would have to cover both inside and outside work after 4:30 p.m. In his judgment, there would likely be more of the former type of work after that hour as by then most of the senior employees who preferred to work inside would have completed their day. Mr. Wilson repeated his assessment that all of the Lift Truck Operators were qualified to work the later shift.

25 Mr. Wilson, like Mr. Hudson, heard rumours that the two (2) positions would not be subject to layoff. He subsequently informed the foreman that, as in the past, any layoffs should be effected on

the basis of seniority. It was Mr. Wilson's evidence that he was told by Mr. Van De Hogen Jr. that the persons who signed the posting would not be laid off.

26 Mr. Wilson advised that no meetings were held between the parties in respect of the instant grievance. It was his evidence that when the Union attempted to discuss the situation with the Employer, it was simply told to "take it to arbitration".

27 Given the nature of the issues raised in this case, the Union proceeded to call its evidence first through the grievor and Mr. Wilson. The Employer then called Mr. Hudson and Mr. Caza as its witnesses. After these latter two (2) employees had completed their evidence, and before the Employer closed its case, this Arbitrator asked Mr. Van De Hogen Jr. if he intended to give evidence or whether he planned to call additional witnesses to support the Employer's position. Mr. Van De Hogen Jr. replied that he did not intend to do so. Counsel for the Union then elected not to call reply evidence. The parties, accordingly, proceeded to present their closing arguments.

28 Counsel for the Union submitted that the following facts were established in the evidence: (i) a layoff occurred on June 21, 2000; (ii) the grievor was more senior than employees who continued to work after his layoff; (iii) the past practice of the Employer was to layoff according to seniority; (iv) the grievor performed the same job as other Lift Truck Operators within the generic Equipment Operator classification; (v) the grievor had worked as a Lift Truck Operator in the yard and in the warehouse and was qualified to work at either location; (vi) the Employer periodically assigned the grievor to warehouse work; (vii) the grievor, Mr. Hudson and Mr. Caza all had relatively equal ability to perform the job of Lift Truck Operator; (viii) the grievor chose to concentrate primarily on yardwork and was entitled to his preference as a consequence of his greater seniority rights; (ix) the grievor did not lose his qualifications by electing to work more in one (1) area than another and that, at most, a short period of adjustment might be required to permit him to become familiar with the location of all the products in the warehouses; and (x) Mr. Hudson and Mr. Caza did not possess "special qualifications" over and above those held by the grievor. Counsel for the Union submitted that the above evidence disclosed a prima facie breach, on the part of the Employer, of article 7.2(b) of the collective agreement.

29 Counsel for the Union noted that prior to the hearing the Employer never provided any explanation for its decision to layoff the grievor and retain more junior employees. More importantly, he stressed that the Employer led no evidence in this proceeding to show that it considered either the grievor's seniority or his qualifications relative to those of Mr. Hudson or Mr. Caza. Indeed, counsel argued that no evidence was presented with respect to the decision making process used in this instance. In particular, evidence was not advanced as to the criteria used in reaching the decision to layoff the grievor nor was any evidence tendered as to who, in fact, made the decision here in question. Counsel emphasized that neither Mr. Hudson nor Mr. Caza knew anything about how the contested decision was reached. From the perspective of the Union, there was a complete lack of evidence to establish that the layoff was done according to the factors referenced in article 7.2(b). Counsel suggested that given the absence of such evidence, the layoff could have been premised on arbitrary or irrelevant grounds. Ultimately, it was the position of the Union that the Employer failed to satisfy its contractual onus to establish the basis on which it decided to layoff the senior employee. Counsel noted that if such evidence had been presented, then the Union could have called reply evidence in an effort to rebut the reasons relied on. He noted that, in the circumstances of this case, there was no opportunity to call such evidence as the Employer had failed to explain the rationale for its decision.

30 It was the position of the Union that the Employer's failure to lead evidence with respect to the decision making process compelled a decision in favour of this grievor. Indeed, counsel argued that I lacked the jurisdiction to do otherwise. As a consequence, he asked by way of remedy that I make a declaration of contractual violation, reinstate the grievor, and award full retroactive compensation without loss of any service or seniority.

31 I was asked by the Union to find that the evidence surrounding the posting of April 19, 2000 was irrelevant to the resolution of this dispute. Counsel argued that there is nothing on the face of the notice to indicate it was a posting for an opening or a new job for purposes of article 21.2 of the collective agreement. On his reading, the posting simply provided employees with an opportunity to work a specific shift. Counsel speculated that the posting might also have been a bad faith attempt by the Employer to subvert the seniority provisions contained within the collective agreement.

32 In response to a question from this Arbitrator, counsel for the Union submitted, in the alternative, that the Employer had also failed to turn its mind as to whether the grievor was qualified to perform the job of Labourer then filled by Mr. Upham. He noted that the grievor had previously worked in the classification; the job required minimal qualifications; and Lift Truck Operators in the past had bumped into the Labourer position in order to avoid a layoff. Counsel argued that, at the very least, the grievor was relatively equal in qualifications to Mr. Upham and, as a consequence, should have had an opportunity to work in the Labourer classification instead of being laid off.

33 The Union relied on the following awards in support of its position: Re Bridge And Tank Co. Of Canada Ltd. And United Steelworkers, Local 2537 (1975), 9 L.A.C. (2d) 47 (Weatherill); Re Int'l Chemical Workers, Local 721, And Brockville Chemicals Ltd. (1966), 16 L.A.C. 393 (Weatherill).

34 In response, Mr. Van De Hogen Jr. submitted at the outset that the Employer is bound under article 7.2(b) to consider seniority and qualifications in the event of a layoff. He then started to explain why the decision was made to layoff the grievor. At that juncture, counsel for the Union objected as such argument or explanation was premised on facts not adduced in the evidence. A similar objection was advanced when Mr. Van De Hogen Jr. stated that the Lift Truck Operator classification is not generic and that different qualifications may be required for distinct shifts and/or locations. As a consequence of these objections, the Employer representative was advised that closing argument had to be based on the evidence presented in the case. Mr. Van De Hogen Jr. then acknowledged that there was no evidence to substantiate the decision. He, nevertheless, asserted that the Employer had exercised its options under the collective agreement.

35 Article 7.2(b) requires the company, in the event of a layoff, to consider both the seniority and the qualifications of employees. If qualifications are relatively equal as between employees, the senior employee is entitled to remain at work over an equally qualified junior employee. Conversely, if the junior employee has superior qualifications, he/she is entitled to remain at work over a less qualified senior employee. The use of the word "shall" in the first line of article 7.2(b) makes it clear that the Employer must consider the two (2) factors cited and assess the relative qualifications of employees who may be affected by the layoff. I find that there is absolutely no evidence before me as to the process used by the Employer in its decision to layoff the grievor and to retain Mr. Hudson, Mr. Caza and Mr. Upham. More specifically, the Employer did not present any evidence that it considered the seniority or qualifications of these employees. Further, with respect to the latter, there is no evidence before me to indicate that anyone on behalf of the company attempted to

assess relative qualifications so as to determine the effect of seniority on the layoff process. In fact, there is no evidence as to who actually made the decision and on what grounds they relied on in reaching same. In my judgment, this failure is fatal to the Employer's case and entitles the Union to the relief claimed.

36 The circumstances in this case are similar to those found in *Re Bridge And Tank Co. Of Canada Ltd. And United Steelworkers, Local 2537*. The grievor in that award was employed as a pendant crane operator at the time of his layoff. He had worked in a number of other jobs during the course of his twenty (20) years with the company. At the time the grievor was laid off, there were junior employees retained in several jobs, including the job the grievor held at the time of the layoff, which the grievor was capable of doing. The Employer, in that instance, elected not to call evidence and proceeded to argue that the Union had not made out a case which required an answer.

37 The applicable provision of the collective agreement in *Re Bridge And Tank Co. Of Canada Ltd. And United Steelworkers, Local 2537* read:

11.07 In all cases of layoff..... preference shall be given to those employees having the longest service, provided always that the employees in question are, in the opinion of the Company, of relatively equal skill, competence and efficiency. The Company will not exercise its discretion in an arbitrary or unfairly discriminatory manner.

In allowing the grievance, a majority of the Board of Arbitration stated:

"..... Article 11.07 provides generally that "precedence shall be given to those employees having the longest service", and on the facts which have been established, the grievor would be entitled to the benefit of the provision, and to be retained at work and indeed in his classification. That general provision is subject to a proviso, and it is by virtue of that proviso that the company may exercise a discretion in retaining certain employees. This provision reserves to the company a right of selection going beyond that found in many collective agreements, and allows it to ignore the seniority principle where, in its opinion, "the employees in question" are "of relatively equal skill, competence and efficiency". It is not, it should be noted, a case of the senior employees being "qualified" or even "relatively equal", but rather of their being determined to be so "in the opinion of the Company". In our view, once it has been shown (as in the instant case) that an employee is entitled to the benefit of the general dispositive provision of the article, it is then up to the company to bring itself within the proviso, and to show that, in its opinion the employee in question was not "relatively equal" to those retained.

We are of this view not only by reason of our construction of the article but also because we consider it a realistic and proper requirement, in cases of this sort, that the employer, which has taken action with

respect to an employee, which has the benefit of a wide discretion with respect to such action, and which alone has knowledge of the grounds on which its opinion was based, be required the grievor's general entitlement being made out-to come forward and establish the grounds for its opinion."

..... (page 49)

and

"In the instant case, however, the grievor has shown that he was entitled to be considered with respect to a number of positions (some of them apparently calling for rather elementary skills). In our view this evidence, and the particular language of the material provision of the collective agreement before us, placed an onus on the company to bring itself within the proviso in art. 11.07 by coming forward with evidence as to its exercise of the discretion there given: to show that it did in fact properly formulate an opinion with respect to the factors set out in the article. This it chose not to do, and we accordingly conclude that the grievor ought to have been retained at work, given his qualifications and his lengthy seniority. In the circumstances, the case may be considered to have been made out with respect to the very job classification the grievor held at the time of his lay-off, and in which junior employees were retained."

(page 50)

38 While the wording of article 7.2(b) differs somewhat from the layoff provision in the above award, I am satisfied that the approach reflected in the excerpts from that decision is equally applicable here. I accept, on the evidence, that the Union established a prima facie case of relative quality. More specifically, the Union established that the grievor, the more senior employee, had worked as a Lift Truck Operator for a lengthy period of time and that he had performed the duties of the classification in the yard and the warehouse. In so doing, he operated all of the various pieces of equipment necessary to load, unload and store product in both locations. No evidence was led to demonstrate that special qualifications were required in order to perform the jobs occupied by Mr. Hudson and Mr. Caza following the layoff. In this factual context, I find that it was incumbent on the Employer to lead evidence to explain the basis for its decision. Put another way, in view of the evidence established by the Union through its witnesses and through cross-examination of the Employer's witnesses, the Employer had an onus to show how and why it reached the conclusion that the grievor was not relatively equal to the more junior employees who remained at work following the layoff. Without doubt, the Employer failed to satisfy this onus here. On this ground alone, the grievance must succeed.

39 In any event, on the evidence before me I have been persuaded that the grievor, at a minimum, had qualifications relatively equal to those of Mr. Hudson and Mr. Caza. As mentioned, he had previously worked in the yard and in the warehouse area as a Lift Truck Operator. He was familiar with, and capable of operating, all of the applicable equipment. While the evidence establishes that the grievor spent more time working in the yard, there is nothing before me to indicate he was not qualified to load and unload in the warehouse. No problems were brought to my attention in respect of the grievor's performance of the latter work. At most, like other employees moving between the

yard and the warehouses, or vice versa, he would require a relatively short period of time to familiarize himself with the location of product. While that might serve to reduce his efficiency in the short term, I am unable to conclude it rendered him unqualified to perform the job of Lift Truck Operator inside the warehouse. It should be recalled that even after the layoff, Mr. Hudson, and possibly Mr. Caza, spent a significant portion of their day working outside in the yard. In the final analysis, under the terms of article 7.2(b), the grievor, as the senior employee, should have been retained at work as he was at least relatively equal in qualifications vis a vis Mr. Hudson and Mr. Caza.

40 In view of the above reasoning, it is unnecessary to address the issue of whether the grievor was relatively equal to Mr. Upham in terms of his qualifications for the Labourer position. Not having heard from Mr. Upham, it would be improper to make a binding assessment on the point. I am inclined to think, however, that the grievor was likely at least relatively equal to Mr. Upham. I note the following in this regard: (i) the grievor worked as a Labourer during his first two (2) years with the company; (ii) the grievor's lengthy period of employment thereafter as a Lift Truck Operator; and (iii) Mr. Upham's relatively short period of employment with this Employer.

41 Finally, I think that little turns on the posting of April 19, 2000. In my judgment, the posting was simply for a specific shift. It did not have the effect of creating a more qualified Lift Truck Operator position. Clearly, the posting did not eliminate the need for the Employer to apply article 7.2(b) in the event of a layoff. In other words, the posting could not serve to isolate Mr. Hudson or Mr. Caza from the effects of a required layoff. I further note that both employees worked the 9:30 a.m. to 6:00 p.m. shift before and after the posting of the notice. In effect, there was little change to the pattern of their workday.

42 For all of the above reasons, I find that the Employer breached article 7.2(b) when it laid the grievor off from his position of Lift Truck Operator on June 21, 2000. I order that he be reinstated to his former position without any loss of seniority and service and that he be compensated for all lost wages and benefits flowing from the improper layoff. I remain seized in the event there are any difficulties experienced in implementing this award.

qp/s/qlmss

---- End of Request ----

Print Request: Current Document: 30

Time Of Request: Friday, October 02, 2009 00:20:56