C.A. No. 02954

NOVA SCOTIA COURT OF APPEAL

Jones, Matthews and Chipman, JJ.A.

Cite as: Cape Breton Development Corporation v. United Mine Workers of America, District No. 26, 1994 NSCA 73

BETWEEN:	)	
	)	
CAPE BRETON DEVELOPMENT CORPORATION	)	Brian G. Johnston for the Appellant
	)	
Appellant	)	
	)	
- and -	)	
	)	
THE UNITED MINE WORKERS OF AMERICA DISTRICT NO. 26	)	N. Blaise MacDonald for the Respondent
	)	
Respondent	)	
	)	
	)	
	)	
	)	
	)	
	)	Appeal Heard: March 10, 1994
	)	
	)	
	)	Judgment Delivered: March 23, 1994

THE COURT: The appeal is dismissed with costs which are fixed at $1,500 including disbursements as per reasons for judgment of Chipman, J.A.; Matthews, J.A., concurring and Jones, J.A., dissenting by separate reasons.

CHIPMAN, J.A.:

This is another case involving the application of the proper standard of curial review of a tribunal's resolution of a labour dispute.

The appellant Corporation had a collective agreement with the respondent Union which agreement was governed by the provisions of the **Canada Labour Code**, and in particular, s. 57(1) and s. 58:

> "57 (1) Every collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or employees bound by the collective agreement, concerning its interpretation, application, administration or alleged contravention.
>
> . . .
>
> 58 (1) Every order or decision of an arbitrator or arbitration board is final and shall not be questioned or reviewed in any court.
>
> (2) No order shall be made, process entered or proceeding taken in any court, whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise, to question, review, prohibit or restrain an arbitrator or arbitration board in any of his or its proceedings under this Part.
>
> (3) For the purposes of the *Federal Court Act*, an arbitrator appointed pursuant to a collective agreement or an arbitration board is not a federal board, commission or other tribunal within the meaning of that Act."

An arbitrator appointed pursuant to a provision mentioned in s. 57(1) is a statutory tribunal; **Roberval Express Limited v. Transport Drivers, Warehousers and General Wholesaler's Union et al** (1982), 83 L.C.C.L. para 14,023 (S.C.C.). Section 58(1) and (2) clearly constitute what the Supreme Court of Canada referred to in **United Brotherhood of Carpenters and Joiners of America, Local 759 v. Bradco Construction Ltd.** (1993), 93 C.L.L.C. 12,213 as a true privative clause.

Article 10 of the collective agreement provided for a selection of an arbitrator to resolve disputes between the parties.

A dispute arose under the following circumstances. William Broderick was employed by the appellant at a work site known as the Central Shop. His classification there was Tool Room Attendant. As a result of planned downsizing, the appellant declared 13 positions at the Central Shop, including that of Broderick, to be redundant, resulting in his layoff from his classification. The relevant provisions of the collective agreement dealing with seniority are in

Article 25.4:

> "(B) **PERMANENT CLOSURE**: Layoff and Recall
>
> (A) The Corporation will advise the Union representatives in advance of any layoffs and provide details of classifications involved, and it is understood and agreed that employees who exercise their seniority in the bumping process must also have the ability to perform the work as outlined in ability 25.1(B) of this article 25.
>
> (B) **PERMANENT CLOSURE**: In the event of a permanent closure of an operating site or any part thereof, or in the event of a permanent reduction of the workforce at a site other than closure, employees shall be laid off in reverse order of their bargaining unit seniority.
>
> . . .
>
> (1) An employee who is laid off from a classification at his/her site will be the most junior employee from the classification and will have the right to bump the most junior employee in any classification at that site or the most junior employee within his/her classification in the bargaining unit.
>
> (2) An employee bumped from a classification at a particular site will have the right to bump the most junior employee within the bargaining unit.
>
> (3) Employees laid off who are unable to exercise their seniority under 1 and/or 2 shall be placed in available positions at the discretion of management."

It will be observed that subclause (1) of Article 25.4(B)(A)(B) refers to the rights of the laid off employee; subclause (2) refers to the rights of an employee who has been bumped and subclause (3) relates to an employee who was laid off and otherwise unable to exercise seniority rights and who must therefore take placement at the company's discretion.

After some preliminary discussions, Broderick was told by the appellant that if he wished to remain on site, that is at the Central Shop, he would have to bump the most junior employee there. He had wished to bump someone in the Fabrication Shop which was at the site but the most junior employee at the site was in the classification of sweeper. That was the position he was offered in his work site. Instead of accepting this directive of management, Broderick and

the Union made a grievance under the collective agreement which was heard by an arbitrator appointed pursuant to Article 10 of the collective agreement.

The issue before the arbitrator was whether the appellant had the right to unilaterally place Mr. Broderick in the vacant sweeper's position or whether it was required to permit him to bump the most junior employee in the Fabricator's classification on the same site - Mr. Broderick's preference. The arbitrator referred to the provisions of the collective agreement set out above and based on his interpretation thereof came to the following conclusion:

> ". . . At this stage, he was, it seems to the Board from the evidence led, such person as is covered by Article 25(4)(B)(1) of the collective agreement. In other words, he had the right to bump the most junior employee at the work site. The most junior employee at the work site would be in the sweeper's position. This post was vacant since no bids had been received either at the site or corporation - wide so he was informed that this position was available to him."

The respondent applied to the Supreme Court for an order in the nature of **certiorari** quashing the arbitrator's decision. The Supreme Court judge in chambers granted the order, holding that the arbitrator's decision was patently unreasonable and that his interpretation of the agreement was one which the language thereof could not reasonably bear. The corporation appeals from that decision to this court.

In **Paccar of Canada Ltd. v. Canadian Association of Industrial Mechanical and Allied Workers Local 14, et al** (1989), 62 D.L.R. (4th) 437 (S.C.C.), McIntyre, J. said:

> "Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has recognized this fact and has created other procedures and other tribunals for the more expeditious and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social, and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards, and labour dispute-resolving tribunals, has gone far in meeting needs not attainable in the court system. "
>
> The test applied by the Supreme Court of Canada to the decisions of such dispute

resolvers, where they are governed by a true privative clause, is that absent error of jurisdiction, such decisions must stand unless they are patently unreasonable. This threshold has been recently reviewed in **Bradco, supra**, where Sopinka, J., speaking for four of five judges of the court said at p. 12,222:

> "Once it has been determined that curial deference to a particular decision of a tribunal is appropriate, the tribunal has the right to be wrong, regardless of how many reviewing judges disagree with its decision. A patently unreasonable error is more easily defined by what it is not than by what it is. This Court has said that a finding or decision of a tribunal is not patently unreasonable if there is any evidence capable of supporting the decision even though the reviewing court may not have reached the same conclusion *(Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644, at pp. 687-88), or in the context of a collective agreement, so long as the words of that agreement have not been given an interpretation which those words cannot reasonably bear (Bradburn, *supra, per*, Laskin C.J., at p. 849). What these statements mean, in my view, is that the court will defer even if the interpretation given by the tribunal to the collective agreement is not the "right" interpretation in the court's view nor even the "best" of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement. Or, as stated by Dickson, J. in CUPE, at p. 237:
>
> > ' . . .was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?'"

The question therefore is whether the chambers judge was right in concluding that the arbitrator had exceeded the threshold by overlooking a material provision which resulted in a restriction of any right of Broderick under the collective agreement to choose his new position.

In **Nova Scotia Liquor Commission v. Nova Scotia Government Employees Union, Local 470** (1990), 97 N.S.R. (2d) 55 at p. 57 this court said:

> "Thus in applying the test it is, in the last analysis, for the court to make a judgment call on the reasonableness of the decision under review. In doing so, it must exercise restraint and the jurisdiction to set aside such a decision will be sparingly used. Where, however, the court's evaluation of the decision leads to the conclusion that rather than having interpreted the agreement, the arbitrator has amended it, added to it or, overlooked material

> provisions in it, the threshold is reached. Conscious of these restraints, it is necessary to review the merits of the arbitrator's award."

In referring to the "patently unreasonable" test, the Supreme Court of Canada has from time to time characterized it as a "very severe test", a "very strict test", "stringent" and a "high standard of review".

On any expression of the test, I am of the view that the arbitrator in the instant case erred because he amended the agreement by leaving out the words "in any classification". He read the bumping provisions set out above as forcing the bumped employee to take the most junior position at his work site. That is simply not what the agreement says. There is no ambiguity - no room for two interpretations. The agreement says he may take the most junior position in any classification at his work site. The appellant did not give him this option mandated by the plain words. In finding that the appellant was entitled to adopt such a course, the arbitrator arrived at an interpretation of the agreement which was patently unreasonable and which its words could not reasonably bear.

I would dismiss the appeal with costs which are fixed at $1,500 including disbursements.

J.A.

Concurred in:

Matthews, J.A.

JONES, J.A.: Dissenting

The facts in this case are set out in the decision of Mr. Justice Chipman. The appeal turns on the interpretation of the following provisions in s. 25.4 of the collective agreement:

"(B) **PERMANENT CLOSURE**: In the event of a

> permanent closure of an operating site or any part thereof, or in the event of a permanent reduction of the workforce at a site other than closure, employees shall be laid off in reverse order of their bargaining unit seniority.
>
> (1) An employee who is laid off from a classification at his/her site will be the most junior employee from the classification and will have the right to bump the most junior employee in any classification at that site or the most junior employee within his/her classification in the bargaining unit.
>
> (2) An employee bumped from a classification at a particular site will have the right to bump the most junior employee within the bargaining unit."

The issues were clearly defined in the evidence and submissions placed before the arbitrator. The following submissions were made:

> "Chairman: Go ahead then Mr. Cote.
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> Ron Cote: Mr. Chairman, Mr. Bill Broderick, the Grievor in this case, worked as a Tool Room Attendant in the Fitting Department at the Central Shops in Glace Bay.
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> The Collective Agreement, in this case, is quite clear, Mr. Broderick can bump any man on the site whose work he can perform. The language used in this Agreement was agreed to in a vote of the Union membership held on June 8, 1990. The Union contends that the Agreement is legally binding and we want it applied in this case. We have two cases which we would like to submit, Mr. Chairman:
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> Western Grocers case, 1989
> Moloney Electric case
>
> Article 12 of the Collective Agreement grants Management rights. We contend that Management, in this instance, is not being fair to Mr. Broderick. Mr. Crane, in his evidence, has already stated that the tradesman has more job security under this agreement.
>
> We also submit, Mr. Chairman, two cases decided by the Adjustment Board which I am sure will be familiar to you, on the fairness and reasonableness of the employer. They are:

Re: Duncan Dandy Case No. 967L
Re: George Ferguson Case No. 929L

> We feel that the Collective Agreement provisions are clear and we ask that they be properly applied in this case.
>
> Thank you, Mr. Chairman.
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> Chairman: Thank you, Mr. Cote, Mr. MacDonald?
>
> Donald MacDonald: Mr. Chairman, the Corporation has presented documentary and oral evidence to show the new Seniority Agreement was properly applied in this case.
>
> May we cite Palmer, (Collective Agreement Arbitration) Third Edition at page 119.
>
> Article 4(b) of the Collective Agreement reflects the intention of the parties it provides for one Bump at the site and one Corporation-wide. Mr. Burchell, of the Union in speaking to this was given the Union consent to say so. The, 'Most Junior Employee' can be in any classification.
>
> We cite also, Mr. Chairman Brown and Beatty at Page 4-2310 regarding Management Rights. Mr. Chairman, to accept the Union argument in this case would work a hardship on senior employees of the Corporation. The Corporation has shown here that Mr. MacQueen, in the Shops, was a junior employee.
>
> At Section 66-220 of the text Brown and Beatty, Labour Arbitration, there is mention of layoffs. Mr. Broderick was a Tool Room Keeper at the time of the layoff but he was also on light duty. He wanted to stay on the site but he was the most junior Tool Room Keeper. The most junior employee he could bump would be the Sweeper. The Corporation in order to be fair and reasonable, bumped Mr. Broderick into the vacant Sweeper position."

I agree that the arbitrator was a statutory tribunal by virtue of the **Canada Labour Code**. Accordingly the test is whether his interpretation of the Collective Agreement was patently unreasonable. After carefully reviewing the record I am satisfied that the decision was not unreasonable and therefore not subject to review on **certiorari**.

The employee had "the right to bump the most junior employee in any classification at the site". The reference to a junior employee in one classification may not be the most junior employee in any classification at the site if there is another employee in another classification who has less seniority. In that sense the clause means it is the most junior employee in "all" classifications at the site. That allows one bump at the site and one in the bargaining unit. That is the interpretation placed on the clause by the arbitrator. In my view the clause is ambiguous and open to that interpretation.

In Webster's ninth New Collegiate Dictionary "any" when used as an adjective can have the following meanings: one or some indiscriminately of whatever kind; one, some, or all indiscriminately of whatever quantity; all-used to indicate a maximum or whole. The arbitrator did not add words to the agreement but simply interpreted the words used which he was required to do on the arbitration.

I would allow the appeal with costs to the appellant, set aside the judgment and order in the Supreme Court and restore the decision of the arbitrator.

J. A.