IN THE MATTER OF GRIEVANCE NUMBER 1508 DATED OCTOBER 25, 2006, ON BEHALF OF JAY WIRLL;

AND IN THE MATTER OF AN ARBITRATION OF THE SAID GRIEVANCE;

BETWEEN:

AMALGAMATED TRANSIT UNION, LOCAL 1374,

UNION,

- and -

SASKATCHEWAN TRANSPORTATION COMPANY,

EMPLOYER.

APPEARANCES:

For the Union: **Mr. Len Munter**
For the Employer: **Mr. G. S. (Greg) Trew**

BEFORE: **T. F. (Ted) Koskie, B.Sc., LL.B. (Acting as a Single Arbitrator)**

Case Heard: December 11, 2006, at Regina, SK
Award Dated: December 28, 2006

AWARD

I. BACKGROUND, DISPUTE AND PRELIMINARY ISSUES

[1] This case was heard on December 11, 2006, in a meeting room at the Delta Hotel in Regina, Saskatchewan.

[2] Amalgamated Transit Union, Local 1374, after this called the "Union," and Saskatchewan Transportation Company, after this called the "Employer," agreed the Board was properly constituted and had jurisdiction to hear and decide this matter.

[3] In Grievance Number 1508,[1] after this called the "Grievance," the Union alleges the Employer violated section 14(3) of the Collective Bargaining Agreement,[2] after this called the "CBA," in that:

a) within Bid Number 140-10-06,[3] after this called the "Bid," the Employer advertised for applications for a full-time, permanent position of Clerk within the Finance Unit in Regina, Saskatchewan, after this called the "Position";

b) four individuals applied for the Position;

c) the Employer awarded the Position to Rosy Barnhardt, an individual up to that point employed with the Employer in a part time position and who had not yet completed her probationary period; and

d) another applicant, Jay Wirll, after this called the "Grievor,"–an individual up to that point employed with the Employer in a full-time, permanent position as an Express Services Attendant 1and who had completed his probationary period–was not awarded the Position.

[4] The Grievance asks that I award the Position to the Grievor, together with back pay.

[5] Rosy Barnhardt was not present at the commencement of the hearing. The Union satisfied me it gave her notice of the arbitration hearing and its time and place and her right to attend and seek to participate in same. I invited argument from both the Union and the Employer whether I should proceed with the hearing in her absence. Both took the position I should.

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[1] Exhibit U/E-1, Grievance Number 1508

[2] Exhibit U/E-2, Collective Bargaining Agreement

[3] Exhibit U-5, Bid No. 140-10-06

Although it appears from the Grievance that the outcome of the proceedings could affect Ms. Barnhardt, I am of the view it is not contrary to the principles of natural justice to proceed in her absence. Though the position of the Union may conflict with the interest of Ms. Barnhardt, it is clear the position of the Employer is one of maintaining Ms. Barnhardt in the position it awarded to her. I infer that as the reason she has chosen not to attend this hearing.

[6] The Grievor was not present at the commencement of the hearing. The Union satisfied me it gave him notice of the arbitration hearing and its time and place and his right to attend same. I adjourned the hearing and asked the Union to contact the Grievor to find out if he intended to attend the hearing. The Union satisfied me it reached the Grievor and the Grievor advised he did not intend to attend. I invited argument from both the Union and the Employer whether I should proceed with the hearing in his absence. The Employer took the position the hearing should not proceed in the absence of the Grievor. The Employer went further. It invited me to dismiss the Grievance because of same. The Union took the position I should proceed in the absence of the Grievor. The Union argued its case was one of "policy" issues that did not require the presence of the Grievor. Upon conclusion of arguments, I was satisfied the absence of the Grievor at the hearing would not be an impediment to these proceedings and ruled the hearing should proceed.

[7] Section 7(4) of the CBA provides that "if possible, an agreed statement of facts will be presented to the arbitrator." The Union and Employer advised there was no such statement to be presented.

[8] Section 7(4) of the CBA provides the arbitrator will render a decision within five working days of the hearing. The Union and Employer agreed to waive this requirement.

II. RELEVANT SECTIONS OF THE CBA

[9] In deciding this matter, I have had regard for the entire CBA. However, in particular, I

considered the following provisions:

SECTION 2 - RECOGNITION

1. The Union is hereby recognized by the Company as the sole collective bargaining agent for all of its employees, and the Company hereby consents and agrees to negotiate with Local 1374's designated bargaining representatives in any and all matters affecting hours of labour, wages and working conditions, or matters involving the interpretation of this Agreement.

2. It is not the intent of this Agreement to include matters of management herein and the Company reserves to itself the management, conduct and control of the operation of the business, including but not limited to, the determination of the type, kind, make and size of equipment used by it, and when, how and where such equipment shall be used, the prescribing of all rules and regulations necessary for the safe, proper and sound conduct of its business, the number of employees employed by it and their qualifications and other pertinent and related matters, provided that such are not in conflict with the terms of this Agreement. It is further agreed that each employee shall faithfully, honestly and willingly serve the Company to the best of their ability and exercise their best effort in the promotion of the Company's interests, and shall not engage in other employment allied or related in any way to their present employment with the Company.

. . .

SECTION 4 - DEFINITIONS

. . .

7. Applicable to all classifications, except Operators (see Section 32).

   a. Permanent Employees - Permanent Positions:

      i. A permanent full-time employee is one who has passed the initial probationary period of 180 calendar days continuous employment in the same position. A permanent part-time employee is one who has passed the initial probationary period of 975 hours continuous employment in the same position.

      ii. A permanent position is a position within any classification wherein the incumbent performs work on an ongoing nature on a full-time or part-time basis for an indefinite period of time.

   b. Temporary Employees - Temporary Positions:

      i. A temporary full-time employee is one who has not passed the initial probationary period of 180 calendar days continuous employment in the same position. A temporary part-time employee is one who has not passed the initial probationary period of 975 hours continuous employment in the same position.

ii. A temporary position is either a vacancy where incumbents in permanent full time positions are away from work on any type of leave for up to 180 days duration, or incumbents in permanent part-time positions are away up to 975 hours duration, or any additional temporary position(s) created by the Company for a period of up to 180 days.

. . .

SECTION 8 - PROBATIONARY PERIOD

1. On Initial Employment

The initial employment of every full-time person shall be on a probationary basis for a period of six (6) months in the same position. For persons working part-time, the initial probationary period will be an accumulation of 975 hours worked. Following successfully completing the initial probation period, employees shall be entitled to all rights and benefits of this Agreement.

2. On Promotion or Transfer

An employee who has been promoted or transferred shall serve a three (3) month probationary period in their new position. An employee who does not qualify or who wishes to return to their former position, in the probationary period shall revert to their former position at their former rate of pay including any increment they would have received had they remained in that position. However, employees will only be able to exercise their reversion option three times over the course of their employment with the Company. Reversion rights do not apply for those employees who entered a position as a result of exercising bumping rights on layoff.

. . .

SECTION 13 - SENIORITY, LAYOFF AND RECALL

1. Article II contains certain provisions applying to seniority for Operators only. With this one exception, all provisions concerning Seniority, Layoff and Recall are contained in this section.

. . .

a. No employee shall acquire seniority until said employee has been in the service of the Company for a period of 180 days continuous employment in the same position, when seniority shall be retroactive to date of hire.

. . .

2. Seniority shall be cumulative, exclusive of overtime, as follows:

Full-time seniority takes precedence over part-time seniority for the purposes of bidding shifts, lay off, bumping and/or recall. . . . .

. . .

SECTION 14 - VACANCIES AND PROMOTIONS

1. Notice of new positions shall be posted for bid and include the effective date of such bid and such notices shall be posted not more than (30) days in advance of the effective date and not less than five (5) days and shall be accessible to all employees so that any employee desiring to do so may bid for the position. For permanent vacancies in existing positions, the Company must follow this provision if the position is to be filled. If the Company will not be filling or will delay filling the position, notice to that effect will be posted for five (5) days.

. . .

3. In filling vacancies or making promotions, the vacancy or position will be filled on the basis of ability, experience and fitness. Where ability, experience and fitness are relatively equal, seniority shall be the determining factor. These criteria also apply for selection of employees to act as designated trainers for any in-house skill development programs the Company may elect to implement as necessary. In the application of this section, full-time employees have priority over part-time employees in bidding or bumping new or open permanent full-time positions in all classifications regardless of the experience of the part-time employee. The successful applicant will be notified as to the effective date of their appointment. If in the judgment of the Company none of the employees bidding are qualified for the vacancy or position, it may be filled from other sources and the posting of the name of the successful applicant may be delayed.

4. Employees wishing to make application for positions in classifications other than the one in which they are employed may do so and the Company will give such employees prior consideration before filling the vacancy with other than Company employees.

III. EVIDENCE AND POSITION OF THE PARTIES

A. The Union

[10] The first witness called by the Union was Laurie Fuhr. The Employer currently employs her as a Tariff & Scheduling Assistant. She was the previous incumbent of the Position.

[11] Ms. Fuhr testified that, from her experience with the Position, the summary of duties set forth within the Bid was "fairly accurate." She further testified that when in the Position, she did not:

a) operate a microfiche reader;

b) retrieve proof of deliveries and/or sales;

c) prepare word processing documents; and

d) create simple spreadsheets.

[12] Ms. Fuhr testified that when working in the Position, she occupied approximately two-thirds of her day with receiving and recording results of driver report envelopes for data input files.

[13] Finally, Ms. Fuhr testified that, upon taking over the Position, Ms. Barnhardt needed training. Ms. Fuhr testified she spent approximately thirty-two hours training Ms. Barnhardt. She said that training focused on "drivers hours" and "adding accounts."

[14] Under cross-examination, Ms. Fuhr admitted there have been changes in the Position since she had commenced employment therein.

[15] The Union's second and final witness was Mr. Leo Weaver. He is the current Saskatchewan Executive Board Member for the Union. Mr. Weaver testified he had been involved with negotiation of the current CBA and it predecessors back to 1989.

[16] Mr. Weaver testified that, in the ordinary course of his employment with the Union, he was aware:

a) of the Bid;

b) the Position was awarded to Ms. Barnhardt; and

c) at the time the Employer awarded the position to Mr. Barnhardt, she was a part time employee that had not passed probation.

[17] Mr. Weaver testified that:

a) he has "never known of a test to be administered by the Employer" in connection with filling a vacancy; and

b) there is no reference to testing in the Bid; and

c) there is no reference to testing in the CBA.

[18] In cross-examination, Mr. Weaver admitted:

a) there is nothing in the CBA that says the Employer cannot use a test; and

b) the Union is aware the Employer has tested new employees, but is not aware of testing existing employees; and

c) that the Union and Employer never discussed testing.

[19] Mr. Weaver testified that, from the Union's perspective:

a) Ms. Barnhardt fell within section 4(7)(b)(i) of the CBA;

b) by virtue of section 13(1)(a) of the CBA, Ms. Barnhardt had no seniority rights until she passed probation;

c) section 8(1) of the CBA means Ms. Barnhardt has no rights under the CBA until she

passes probation;

d) the three month probationary period referenced in section 8(2) of the CBA is, in essence, a period for training of a transferred employee;

e) section 8(2) of the CBA applied to the Grievor; and

f) since the Grievor was bidding from what the Union considered a higher position, the Employer should assume he qualifies for what the Union considers the lower, entry level Position.

[20] In cross-examination, Mr. Weaver admitted:

a) section 8(1) of the CBA did not say Ms. Barnhardt had no rights under the CBA, but maintained she had "extremely limited rights"; and

b) the Grievor's existing position was a "different job" from that of the Position.

[21] In looking at section 14(3) of the CBA, Mr. Weaver testified that the Union's position with respect to:

a) "ability," is that it means "capability," which "changes from one time to next";

b) "experience," is that:

i) if an applicant has "no experience on the job," it references experience with the Employer; and

ii) the Employer cannot look at the experience of a part time employee, but can look

at the experience of a full time employee; and

c) "fitness," is that it means physically capable and suitable.

[22] Mr. Weaver testified is was the Union's position that if all of the people bidding for a position are not qualified, the Employer could then only look outside the applicants for an individual to hire.

[23] In cross-examination, Mr. Weaver admitted the Employer "can make the decision" if an applicant is qualified and is the entity that has done so in the past.

[24] Again in Cross -Examination, Mr. Weaver admitted:

a) the reference to "experience" in the Bid does not say "in the Company";

b) there is no reference in section 14(3) of the CBA to "experience in the Company"; and

c) there is nothing in section 2 of the CBA that obligates the Employer to ask the Union what qualifications are required.

Mr. Weaver testified the Employer "doesn't know what 'experience' means as it uses a different interpretation in different circumstances."

[25] Mr. Weaver testified the Union did not want to see its existing unionized employees "dead ended." He said the Union was concerned any other interpretation of the meaning of the words "ability, experience and fitness" in section 14(3) of the CBA might give an advantage to individuals with more education and/or outside experience who are either not employed by the Employer or newcomers to employment with the Employer.

B. The Employer

[26] The Employer called one witness, Patti Fry. She is the Employer's Manager of Financial Services. Ms. Fry is responsible for supervising the staff of the Financial Unit, which consists of a Senior Accounting Clerk, two Accounting Clerks and five Clerks.

[27] Ms. Fry testified that, in 1998, her staff had been decreased for efficiency and financial reasons.

[28] Ms. Fry testified that, in the fall of 2006, a Clerk vacancy occurred. She said that was unusual. It was the first vacancy since 1998.

[29] Ms. Fry testified the Employer received four applications in response to the Bid. She said none of the applicants were from employees in the Financial Unit. She had never supervised any of the applicants and had no prior experience with them. Consequently, she decided to interview all of the applicants.

[30] Ms. Fry testified that she interviewed all four applicants. The interview consisted of a series of questions, followed by a test exercise.[4] Ms. Fry designed the test. She consulted with the Employer's Human Resources personnel to ensure the test reflected the Position duties and would be reasonable and fair. None of the applicants were told in advance there would be a test. They were told at the beginning of the interview. The Employer wanted to see how they "think on their feet."

[31] Ms. Fry testified the oral part of the interview was designed to last ten to fifteen minutes. All applicants were asked the same questions. They addressed oral and communication skills and a "bit of knowledge." Ms. Fry's conclusion was that one applicant–not the Grievor–did not

[4] Exhibit E-2, Test Instructions

have the knowledge the Employer needed.

[32] Ms. Fry testified the applicants were given thirty minutes to do the test portion of the interview. Two applicants did not finish the test. One of them was the Grievor. The test was graded on each element. The applicants got a mark for each correct answer. The Grievor failed the test–46.4%. Ms. Barnhardt received the highest mark–82.4%.[5]

[33] Ms. Fry testified the "result was clear." The most suitable applicant was Ms. Barnhardt. That is the individual the Employer chose to fill the Position.

[34] On cross-examination, Ms. Fry testified the Employer wanted to ensure the person filling the Position could do all the duties set out in the Bid. She said other Clerks could. When pressed whether the person filling the position could be trained for the duties within three months, Ms. Fry testified the Employer needed the person to do the job when he or she came in. Ms. Fry distinguished between a need for orientation from a need for training. She said the former was to be expected.

IV. POSITION OF THE PARTIES

A. The Union

[35] The Union maintains the Employer has violated section 14(3) of the CBA.

[36] The Union initially focused on the word "experience" within section 14(3) of the CBA. It said that while the Employer is entitled to consider the Grievor's experience (since he is a full time employee and completed his probationary period), it is not entitled to consider Ms. Barnhardt's experience (since she is a part time employee who had not yet successfully passed

[5] Exhibit E-3, Test Results

her initial probationary period). In support thereof, the Union referred me to section 8(1) and the fourth sentence of section 14(3) of the CBA. The Union went further and argued that the only experience that could be considered was experience with the Employer.

[37] The Union next focused on the words "ability" and "fitness" within section 14(3) of the CBA. It argued the Grievor was bidding from a position both similar and senior to that of the Position. While acknowledging there may be differences from the former to the new Position, the Union argues the reference in section 8(2) of the CBA to a three month probationary period in essence is tantamount to the provision of a training period. Consequently, the Union argued the Grievor was in a superior position to that of Ms. Barnhardt as far as the terms "ability" and "fitness" was concerned.

[38] Under the circumstances of this case, the Union takes the position seniority should decide this matter. The Union argues the only reason the Grievor did not get the Position was because of the test administered by the Employer. Its challenge in this regard falls under two categories.

[39] The first is the contention that the Employer is not entitled to conduct a test. The Union argues that it is not aware of the Employer ever conducting a test, other than a driver's test, and should not be allowed to do so without first negotiating same. The Union argues that section 2 of the CBA does not authorize testing. To the contrary, the Union suggests subsection two of that section says the Employer's management of employee "qualifications and other pertinent and related matters" may not conflict with the terms of the CBA. The Union suggested there was not provision that allowed for a test and the conduct of same would render meaningless provisions such as those contained in sections 4(7)(a)(i), 4(7)(b)(i), 8(1), 8(2), 13(1)(a), 13(2) and 14(3).

[40] The second category of this contention is that the test did not address a significant part of the job duties of the Position and hence was flawed and unreasonable.

[41] The Union urged me to rule that, under the circumstances, the Employer was not entitled to administer a test.

B. The Employer

[42] The Employer takes the position that, without clear contrary language, section 2 of the CBA provides for the retention of its right to make numerous and unfettered management decisions, provided it exercises this "discretion" reasonably and in good faith. It maintains that includes deciding the qualifications of employees.

[43] The Employer submits that, in contesting a decision made by it pursuant to section 14(3) of the CBA, the Union must prove that the Grievor's ability is relatively equal to that of Ms. Barnhardt or the Grievance must fail. The Employer concedes that, if the Union is successful in doing so, the onus will then shift to it to establish the basis for its decision. The Employer argues, however, that even at this juncture, the Union must prove that the decision was flawed in respect of the standards used or the manner in which they were applied.

[44] The Employer argues that, in section 14(3) of the CBA, the words "ability," "experience" and "fitness" ought to be read in order and to carry their plain meaning by virtue of their use in the CBA. It suggested "ability" means the power or capacity to do something or a skill or talent, "experience" means practical contact with and observation of facts and events or knowledge or skill gained over time and "fitness" means a suitable quality or type to meet the required purpose or to be able to occupy a particular position.

[45] The Employer maintains it had no "experience" to rate on behalf of any applicant–full or part time–to the Bid, as none of them had worked in Financial Services. The Employer argues it follows it is entitled to read section 14(3) of the CBA disjunctively and determine "ability" and "fitness" in a reasonable manner of its choosing. The Employer argues there is ample authority for the proposition that it is entitled to determine requisite ability and qualification of job

applicants by means of examinations and tests that will demonstrate suitability and skills and decided to do so through same, coupled with an interview.

[46] To establish such a decision was flawed, the Employer says the Union must show the interview and test were not contemplated by or were inconsistent with the job posting, the collective agreement or some statute; did not bear any reasonable relationship to the work to be done; lacked clarity or were subjective; were arbitrary, discriminatory or in violation of human rights legislation; were not established in good faith; or were imposed retroactively and/or were not fairly or uniformly applied. It argues none of these are present.

[47] In considering these matters, the Employer argued I should be mindful the question of the Employer's reasonableness and bona fides is constrained by the clear language of the CBA. The Employer referred me to section 2(2) of the CBA that says:

> . . . the Company reserves to itself the management, conduct and control of the operation of the business, including but not limited to, . . . the number of employees employed by it and their qualifications and other pertinent and related matters . . . .

and argued there should be a strong presumption of arbitral deference to the employer's judgment.

[48] In summary, the Employer contends the Union failed to meet its onus to prove either that the Grievor's ability and fitness were relatively equal to that of Ms. Barnhardt or that the Employer's determination of relative inequity was flawed such that it should be invalidated.

V. ANALYSIS

[49] The onus rests with the Union to satisfy the Board, on a balance of probabilities, that the Employer's decision to award the Position to Ms. Barnhardt and not the Grievor violated the CBA.

[50] I first look at the wording of section 14(3) of the CBA. Same calls for an assessment and determination of the ability, experience and fitness of the applicants for the position. In his testimony, Mr. Weaver admitted the Employer alone makes such an assessment and determination and I so find.

[51] The Employer designed and used an interview process that involved both questions and a test. The Union did not challenge the question portion of the interview. However, it took the position the Employer was not entitled to administer the test.

[52] Part of the evidence I have before me is that the Union was not aware if the Employer tested new employees. There is no evidence before me that proves, on a balance of probabilities, that the Employer did not in fact test existing employees or new employees for that matter. Furthermore, part of the evidence before me is that the Union and Employer never discussed the issue of testing. The Union presented no evidence to suggest or give rise to a circumstance where I could find the Employer should be estopped from administering a test. Indeed, the Union never argued estoppel.

[53] The Union argued the CBA does not specifically reference or authorize testing. I find nothing in the CBA and Bid prohibits the Employer from administering a test. I find nothing ambiguous in the CBA concerning the issue. Indeed, quite to the contrary, I find same is authorized by section 2(2) of the CBA.

[54] In administering a test, I find the Employer must act reasonably and in good faith. The Union led evidence from a former employee that occupied the Position. She testified as to the duties she performed when in the Position. She did not perform some duties in the Bid. She spent a considerable amount of time on some duties, for example, drivers' reports. The evidence of the Employer established there had been staff decreases and it was important for the new incumbent to perform all duties set forth within the Bid. The test was designed to reflect same. There is no evidence before me that proves, on a balance of probabilities, that the tests were

unreasonable. In argument, the Union said that the Employer "could make a test that anyone could fail." There is no evidence before me to suggest that is what the Employer did. The Employer's evidence is that the same questions and test were administered to all applicants and no one was given any advance notice of same or its content.

[55] Based on the interviews–questions and tests–the Employer concluded there was no "relative equality" between the applicants. The Employer tendered evidence that Ms. Barnhardt was qualified, the Grievor was not.

[56] The Union argued the Grievor occupied a more senior position at the time of applying for the Position. It says his job duties were similar to that of the Position and any variation therefrom can be dealt with and overcome through training during the three-month period referenced in section 8(2) of the CBA. If that were not so, the Union says it would be tantamount to now saying the Grievor was not qualified to do his own existing job, which the Union says the Employer cannot do. The Union says the Grievor therefore trumps Ms. Barnhardt as far as "ability" and "fitness" are concerned. The Union argues that leaves "seniority," which again places the Grievor in the superior position.

[57] In approaching the interpretation of the CBA and, in particular, sections 2, 4, 8, 13 and 14, my fundamental object must be to discover the intention of the parties. The starting point must be a presumption that the parties intended what they have said. That language should be viewed in its normal or ordinary sense, unless that leads to some absurdity or inconsistency with the rest of the CBA or unless the context reveals the words were used in some other sense. Where there is no ambiguity or lack or clarity in meaning, effect must be given to the words. The context in which words are located is critical to their meaning.[6]

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[6] Brown & Beatty, *Canadian Labour Arbitration*, (3d) (Aurora, Ont.: Canada Law Book), para. 4:2100, 4:2110 & 4:2150

[58] Based on the above and a reading of the specific sections, and the entire CBA, I have decided that the Union's argument would render the first two sentences of section 14(3) to have no effect. I find that the words are not ambiguous. I accept the Employer's argument that it had no "experience" to rate for any applicant. None of them had worked in the Financial Unit. I find the Employer was therefore entitled to look at the ability and fitness of the applicants. As I have already found, the Employer was entitled to use a test as part of that process.

[59] I accept the Employer's evidence that there was no "relative equality" between the Grievor and Ms. Barnhardt. I find the Employer acted reasonably in determining the Grievor was an unsuitable applicant and that Ms. Barnhardt was suitable.

[60] In conclusion, then, I rule the Union has failed to meet the onus that is on it to satisfy me, on a balance of probabilities, that the Employer's decision not to appoint the Grievor violated the CBA.

VI. AWARD

[61] Accordingly, it is the Award of this Board that Grievance Number 1508 dated October 25, 2006, on behalf of Jay Wirll, be and the same is hereby dismissed.

Dated on December 28, 2006.

T. F. (Ted) Koskie, B.Sc., LL.B.,
Acting as a Single Arbitrator