

IN THE MATTER OF AN ARBITRATION

BETWEEN:

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 115
(the “union”)

AND:

TECK COAL LIMITED (LINE CREEK OPERATIONS)
(the “employer”)

Re: Job Posting (Tireman) Grievance

AWARD

ARBITRATOR:

Nicholas Glass

COUNSEL:

David McDonald
for the Employer

Brandon Quinn
for the Union

DATE AND PLACE OF HEARING:

December 10 & 11, 2014
Ferne, B.C.

DATE OF AWARD:

January 14, 2015

A W A R D

I. Issue

The union alleges two breaches of the collective agreement: Firstly, the employer should have posted for and hired a T1 or “Tireman in Training” but instead hired a T3 or “Qualified Tireman”. Secondly, the employer posted for one vacancy in the Tireman classification, but in fact hired two Tiremen following the posting, without posting the second vacancy.

The union does not seek damages for these breaches or any staff replacements, but seeks a declaration in both cases that the employer was in breach of Article 9 of the collective agreement.

II. Facts and Background

The employer operates a coal mine at Line Creek which involves the use of heavy equipment including haul trucks. Much of this heavy equipment runs on pneumatic tires, some of which are extremely large and involve high air pressures.

The job description in Article 30 of the collective agreement for Tireman is as follows:

Repair and maintain truck and mobile equipment tires as per the Company’s tire program. Operate the mobile tire manipulator, tire breakdown equipment, shop and hand tools. Make and repair tire chains. Be familiar with the handling of liquid ballast. Maintain tire records. Service the tire maintenance machinery except for the tire manipulator.

It is common ground that this is a job description requiring skills. There is no trade or certificate required but the T3 position is treated rather akin to that of the trades employed at the site, such as electricians, carpenters and heavy duty mechanics. There are three levels within the classification of Tireman which are listed at Article 6.01(d) of the collective agreement. There is a T1, or Tireman in Training, and persons applying for this position are required to have no qualifications except physical fitness for the work and seniority. There is

an hourly limit on that position which extends for the first 1,032 hours. There is then an automatic lift to level 2 or T2 which covers the next 1,032 hours taking an employee up to 2,064 hours. The step from T2 to T3 is not automatic and requires that the applicant or candidate take and pass certain training modules and tests. In the evidence there was at least one employee, Mr. Pelletier, who tried something like 87 times to pass the first test and failed to do so. He eventually posted out to a different position.

Thus, it may be seen that although there is no formal apprenticeship program for Tiremen and no trade certificate, this position is treated by the parties, as reflected in the collective agreement, very much like a position which begins with a trade apprenticeship followed by entry to a certified trade position.

Currently there are four Tiremen at the site. Three are qualified Tiremen or T3's and one is a Tireman in Training or T1. This is considered to be a typical or usual complement of Tiremen. They are spread between four shifts, A, B, C, and D and there are always two Tiremen functioning on any one shift. They operate in rotation which does not exactly match the rotation of the shifts but the net result is that there are always two Tiremen on any one of the four shifts.

The relevant provisions in the collective agreement relating to the posting of job vacancies are mostly found at Article 9:

ARTICLE 9 - JOB/TRAINING VACANCIES – AREA / SCHEDULE
CHANGES

9.01 Job Vacancies

- a) A job vacancy arises as a result of an addition or replacement to the work force in any classification.
- b) All job vacancies shall be posted at the entry level or the certified trade level.
- c) For the purpose of this article, the following applies:

1. Entry level has no qualification requirements except for Tireman, Certified Trades and Trades Apprentices.
 2. Certified means any provincial or Inter-provincial ticket.
- d) Entry level and certified trade level are defined as the following:
1. Plant Operations
 - i) Janitor/Helper
 - ii) Plant Entry Level
 - iii) H.E.O. Entry Level
 - iv) Cable Belt Repairman (0 – 12 months)
 2. Mine Operations
Level 1 excluding Rubber Tire Dozer.
 3. Warehouse
 - i) Certified Warehouseman
 - ii) Apprentice (0-6 months)
 4. Maintenance
 - i) Helper
 - ii) Janitor
 - iii) Tradesman
 - iv) Apprentice (0-6 months)
 - v) Serviceman
 - vi) Lubeman (Plant)
 - vii) Tireman (0-12 months)
- e) Job vacancies shall only be applied for by employees not in the classification in which the vacancy exists, except in Mine Operations where the procedure in Article 8.03(a) shall be followed [9.01(h) shall apply].
- f) Notification of a job vacancy shall be displayed on all bulletin boards for seven calendar days, during which time interested employees may make application for the vacancy. Within an additional seven calendar days, the successful applicant shall be selected. A notice of the selection shall be posted on the Company bulletin boards. Within 14 calendar days of the award being made, the successful applicant shall be placed into the new position.
- g) The notice of job vacancy shall set out the job description, trades qualifications and/or prerequisites required. A copy of the notice shall be forwarded to the Union Office.
- h) All employees on layoff shall be deemed to have bid on all job vacancies for which they have the necessary prerequisites and/or qualifications.
- i) Job vacancies shall be filled in the following order
1. Senior applicant (Company seniority) who is physically able and has the necessary trades qualifications and/or prerequisites to perform the work.

2. New hire.

j) Should there be a Tireman in Training (0-2064 hours), the successful applicant for a Tireman vacancy must be qualified.

Gord Chaisson gave evidence for the union. He has now retired from the position of business agent for the union which position was held by him from June 1996 until October 2013. He was originally hired as a heavy duty mechanic in March 1984 and held various positions including assistant chief shop steward and chief shop steward between that time and his appointment as business agent in 1996. His main duties for the company were as a heavy duty mechanic. He was a temporary foreman in the maintenance department in the spring of 1996.

He gave an outline of the Tireman's job description similar to that indicated above. He was not familiar with the current company tire program but referred to an earlier Tireman training manual which is now no longer in effect.

He described the progression from level 1 to level 3 for Tiremen commencing with Tireman trainee and explained that this was a similar model for that used for apprenticeship in the trades. Progression is a combination of hours and fulfilling training requirements. He indicated that there was no trade ticket involved for Tiremen but that the position was "lumped in there" with apprenticeships and training for the ticketed or certified trades.

The only requirement for a Tireman in Training or T1 is, he stated, that they must be physically fit and have grade 12 education as well as requisite seniority. Other than that he was not able to confirm whether Tiremen had to pass any mechanical ability tests as required for other apprenticeship programs.

He explained that there were usually not less than three and up to five or more Tiremen at any one time. The old arrangement that he recalled was that there were four T3s attached to

shift A, B, C and D which were four days on and four days off. There was also a 5/2 Tireman who was the Tireman in Training. There was a program to move up from T1 to T2 and then T3 if capable of being qualified. He had never heard of anyone being held back from progressing from a T1 to a T2, and this progression was simply based on achieving a given number of hours. However, he was aware of cases where an individual would fail to progress to a T3. The example he gave was Roger Pelletier who took the T3 test something like 70 times (other evidence suggested 87 times but the exact number is immaterial) and each time failed to pass the test. He indicated there were safety and performance issues involved in the position of Tireman and referred to one accident involving a John Harter who suffered permanent disability as a result of an accident involving a tire.

Mr. Chaisson's evidence about the mechanics of posting when there is a vacancy in the Tireman classification was a little hard to follow but in the end amounted to this: If a vacancy occurs in the Tireman classification the first and usual posting would be for a qualified Tireman. If there are no internal candidates qualified to fill the posting, then the vacancy would be filled by appointing an internal candidate at the entry level or Tireman in training level. The only variation from this procedure would be if there already was a Tireman in Training or T1 or T2 already in place. If this were so, then Article 9.01(j) would apply. This is the provision that states that if there is a Tireman in Training already in the department, "the successful applicant for a Tireman vacancy must be qualified". This would then mean that the company could hire outside the bargaining unit in order to obtain the required qualified Tireman.

In cross examination Mr. Chaisson stated that if there was a vacancy in the Tireman classification the initial posting would be for a qualified Tireman if there was already a Tireman in training. In this respect he was merely confirming the process set out at Article 9.01(j).

Mr. Chaisson confirmed that there are no qualifications set out in the collective agreement with respect to Tiremen.

The collective agreement, however, clearly distinguishes between a Tireman in Training and a qualified Tireman without spelling out exactly what the qualifications may be.

Mr. Chaisson was asked in cross examination about the hiring of heavy duty mechanics from Jamaica. He agreed that the number of heavy duty mechanics hired at that time was greater than the numbers indicated in the actual posting documents. He stated that the union and the employer were both well aware of the shortage of trades and the need to hire several heavy duty mechanics. He stated that the union and the employer worked hand in hand to seek out and hire the necessary additional heavy duty mechanics. The union was involved in the process of seeking out and hiring these additional mechanics and it was all according to Mr. Chaisson "transparent and above board". He was also asked about a number of haul truck drivers hired whose numbers did not match the internal posting numbers. Mr. Chaisson referred to a grievance being filed in connection with this by a grievor named Firelli. He also said that there was a provision in Article 22 of the collective agreement for the company to bring in temporary truck drivers without a posting. However, if truck drivers were being hired on a permanent full time basis then these were supposed to be posted on the basis of one posting for one driver.

Angelo Busato also gave evidence for the union. He stated that he was not aware of the employer practice of hiring outside more than the number of vacancies in the posting, when no internal candidates are successful. He then went on to describe his understanding of how the posting and hiring process applied to the classification of Tireman. He gave as an example, that if there were three qualified Tiremen and a fourth was required then the position should be posted at the entry level (T1 or T2). If there already was a Tireman in training (T1 or T2) then only a qualified or certified Tireman could be hired. He further stated that if there was a Tireman in training who chose to leave that position then the posting should be another entry level posting. He stated he was not aware of the employer posting for a qualified Tireman when there was no Tireman in training.

He conceded in cross examination that he had not been involved with hiring of Tiremen or assessing qualifications for a T3 level Tireman.

Rob Foskett also gave evidence. He stated that it had never happened to his knowledge previously, that two or more external candidates were hired following a posting for one vacancy for which there were no successful internal candidates.

Mr. Foskett described the genesis of the current grievance which had some confusing aspects to it, as noted by counsel for the employer. I do not find it helpful to review in detail the course of the grievance and the grievance procedure leading to arbitration. It is apparent that the union's position did change along the way but the employer is not seeking to strike down the grievance as presented at the arbitration hearing on the grounds that it is not precisely the same as the complaint originally filed pursuant to the grievance. As I stated during the hearing, it sometimes takes a while for a position to be crystallized and by the time counsel presented their openings at the hearing the issues were and are well defined.

Jeremy Cartwright gave evidence for the company. He is the maintenance training coordinator at Line Creek and has been for the last three years. Before that he was a heavy equipment operator at Elkview Mine Operations. He is responsible for maintenance personnel training both on site and off site. He confirmed that the training manual produced by Mr. Chaisson which used to apply is no longer made use of. There is a training program for Tiremen at Line Creek. In 2012 the company joined the Tire Industry Association. Prior to that, in order to qualify as a T3, this was based on hours worked and a report from the trainers. However, from the time of joining the Tire Industry Association the employer made use of three courses provided by the Tire Industry Association. These were Automotive tire service, Commercial tire service, and Earth moving tire service. All three had what was described as "Level 200" as a basic component for each. There were ten modules for Automotive, thirteen for Commercial and fifteen for Earth moving. Generally trainees would progress through the three courses and each would have a final exam in which it was necessary to obtain 70% or better.

He made some reference to the events leading up to this grievance which are more fully covered in the evidence of Mr. Dinel outlined below. After one posting for a single T3 vacancy

there were two outside candidates hired, referred to later, one of whom graduated through this course (Shipley) and the second through an equivalent level of course run by Fountain Tire (Cicoine). He stated that the employee Bennett who joined the company in 2013 as a qualified Tireman had also been through an equivalent course.

He confirmed that Pelletier who had all the necessary hours by April 2013, could not pass the first tier exam this was after having tried approximately 87 times.

When Jason Vandebusch came and asked him about what the qualifications were for a T3, Mr. Cartwright told him. Mr. Vandebusch then told him that he had worked for Integra Tire and done some courses there. Mr. Cartwright then said "If you have the certificates bring them in".

This was done and upon reviewing the certificates Mr. Cartwright advised Mr. Vandebusch that this was not acceptable by itself as it did not evidence any experience on mining equipment. He was therefore found not to be qualified to occupy a position as a T3 Tireman.

In cross examination Mr. Cartwright confirmed that in order to be a qualified T3 Tireman it was necessary to have the TIA courses completed or the equivalent, plus the stipulated 2,064 hours. As for T1 he also confirmed that this was seniority driven and whoever applied would be considered acceptable for the position provided they were physically fit and able to carry out the tasks and were the most senior. He was unable to confirm how physical fitness was determined. He also confirmed that there were no courses or exams required for being suitably qualified for a T1 position.

Bob Dinel gave evidence for the employer. He was the maintenance general foreman at Line Creek and had been in this position for 13 years. His trade was that of heavy duty mechanic and he reported to Peter Nebben the general supervisor. He had five supervisors reporting to him: four mechanical and one electrician.

There were approximately 103 bargaining unit members in the maintenance department. The ticketed trades consisted of heavy duty mechanics, millwright, plumbers, welders and electricians, plus apprentices for all these trades. Non-tradesmen consisted of janitor, servicemen/lube man, Tireman, and shop helper. The rough percentages as between trades and non-trades was 60% trades and 40% not. Tiremen worked on a four on four off schedule, straight days. A Tireman is assigned to each crew (A, B, C and D). Two Tireman always worked together at all times. Only one Tireman in training in this group of four is allowed.

Mr. Dinel described the duties much as indicated earlier in the job description quoted. He pointed out that the value of one haul truck tire was \$42,000 and there was a safety element to the job. Tiremen worked with air pressures of between 110 – 130 pounds. He described it as a “dangerous job” in which it was necessary to have good knowledge and be able to concentrate fully on the task at hand. It is necessary to work with big heavy equipment. This included tire inflators and tire manipulators. The full assembly weight of the tires serviced in maintenance varied from a low of 640 pounds to a high of 19,400 pounds. He stated there had been at least one quite serious accident involving physical injury which happened to an employee named Harter. He knew of other bad accidents at different sites. These might involve blow ups or rims being not correctly matched to the tire. He was aware of deaths occurring as well but not at Line Creek.

Mr. Dinel testified that he started at Line Creek in 2001 and at that time the employer employed two Tiremen on four on four off straight days. There was no Tireman in training at that time. This changed in 2005/2006 when the employer added two more Tiremen so there was one for each crew which although he didn't say so I assume was at that time still A, B, C and D crews. He also stated that no Tireman below T3 level could work alone.

Before May of 2013 he supervised three T3s and one T2 (Pelletier). Pelletier should have been a T3 but had failed to pass the first level of exam.

Mr. Dinel pointed out that between May 2013 and May or June 2014 there was a complete turnover of all four Tiremen As of May 2013 there were three T3's: Doucet, Walsh and

Morrisette and one T2, Pelletier. One year later the Tiremen positions were occupied by Bennett, Shipley, Cicoine, (T3's), and Spaurel, (T1).

In the case of Kevin Doucet he advised the employer that he would be retiring as of May 30, 2013 by a memo dated April 3, 2013. Following this there was a posting for the job vacancy of certified Tireman, T3. The posting following the announced retirement of Mr. Doucet was dated April 9, 2013 and it closed on April 16, 2013. The posting did not result in any successful internal applicants. No interviews were given as none of the applicants had the necessary qualifications for a T3. The employer then hired a certified Tireman or T3 from outside the bargaining unit. No grievance was filed with respect to this. The successful external candidate was Ryan Bennett.

Mr. Dinel next received a memo from Terry Walsh to advise that he intended to “tender his retirement” on January 18, 2014. Following the retirement memo from Walsh, a posting was created for the job of Certified Tireman, T3, posting date December 5, 2013 and expiry date December 12, 2013. There were no qualified internal applicants. In spite of this Jason Vandebusch received an interview and had his certificates examined as described earlier but he was not qualified for a T3 position. Roger Pelletier also applied but Mr. Dinel could not understand why he applied. Following this the employer went outside and carried out two interviews of external candidates. Dennis Shipley was one of the external candidates who had applied and he was hired. Robert Cicoine, also an external candidate, applied and he was hired as well. It should be noted that the posting dated December 5, 2013 was for one vacancy for a certified Tireman, not two. This is the source of one of the two parts to the union's grievance.

Then in January 2014 Roger Pelletier, who was at level T2, and who had failed to make the grade to become a T3, posted out to the position of haul truck operator where he was the successful candidate on a posting dated January 8, 2014.

Mr. Dinel testified that in mid-January 2014 the other original Tireman in the first group of four above described, Mr. Morrisette, said that “he was thinking of leaving”. Mr. Dinel stated

that as of December 2013 and January 2014 he was faced with Walsh leaving, Pelletier going to operations and Morrisette saying he was thinking of leaving. The new hire, Ryan Bennett, had only been there for six months. In these circumstances he identified a need for two qualified Tiremen or T3s “right away”. He did not put up a second posting for a T3 because he knew from the response to the Walsh vacancy posting just a few weeks before that there had not been any qualified candidates internally.

Just to complete the personnel narrative, Peter Morrisette, who had indicated he was thinking of retiring, stayed on as a T3 until he successfully posted into a vacancy for a janitor pursuant to a posting dated the 21st of May, 2014. On July 3, 2014 Mr. Dinel posted a vacancy for a Tireman (entry level). Jason Vandebusch applied on this posting but Brent Spaurel also applied and was successful. He was the senior qualified applicant.

Mr. Dinel was asked if he considered that the employer was obliged to post for an entry level Tireman if there is no Tireman in Training. His answer was “No, I believe I can decide when or if I wish to do so. I have never felt I have to put a Tireman in Training in there. I have never been told this by anyone from the union”.

He was also asked about the second union complaint which was where there is a posting for one vacancy, there are no qualified internal candidates, and the employer goes outside to hire, is it acceptable to hire more than one person? His answer was “We have done this”. Mr. Dinel then referred to some examples of postings where a greater number than indicated on the posting were hired. The first example referred to was heavy duty mechanics where they posted for two and hired five. This was in May 2012. In 2013 the employer hired at least four heavy duty mechanics and posted only for three. In 2014 there was a posting for one vacancy and two were hired. These were all heavy duty mechanic positions.

When asked why the hirings did not match the postings he stated that the employer was always looking for tradespeople and if they liked two external applicants in a follow up to a posting, they would hire both. He described it as an open and continuous need. He then stated that the same thing happened in the operations group where the employer needed to

maintain a minimum number of drivers, and if there are no internal successful applicants “We tend to bring on more than the number posted from outside”.

In cross examination Mr. Dinel confirmed that to the best of his knowledge both Kevin Doucet and Peter Morrisette had originally been hired as T1s and they graduated up to T3s. It was put to him that another Tireman, Andrew Story had started as a T1 and then graduated to a T3 but he did not have knowledge of this because it concerned a time from before he arrived in 2001. It was put to him that the hiring of Mr. Bennett as a T3 was the first hiring from outside since 2001 and he agreed with this. I pause here to note that when Bennett was hired there was a Tireman in Training, Pelletier, so a T3 would be the appropriate hiring following Article 9.01 (j). He confirmed that from his point of view he was free to hire a T3 if he wanted to, regardless of the presence or absence of a T1 in the existing complement of Tiremen.

Mr. Dinel confirmed that there were no conversations between the union and the employer about a specific overriding need for qualified Tiremen. He acknowledged that there had been discussions with the union about a specific need for additional heavy duty mechanics. Regarding the matching of postings to hirings outside in terms of numbers, it was put to him that some of the examples of extra drivers arriving at the school would not necessarily be permanent full time drivers but could be temporary or part time drivers. Mr. Dinel stated he did not know the answer to this. He confirmed there had been no grievance filed by the union over the hiring of additional drivers. He also stated that when outside candidates were hired in response to a lack of qualified internal candidates the union is not notified about this specifically.

Mr. Dinel conceded that he did not put up a second posting before hiring the second outside candidate (Cicoine). He repeated that he knew Peter Morrisette was leaving soon and Pelletier was posting into a haul truck job. He confirmed that if he had put up an additional posting to cover the Pelletier vacancy it would have been a T3 posting and not a T1 posting. If no qualified internal candidate applied, he would then have hired a T3 or qualified Tireman from outside. He would not have posted a T1 vacancy even if Pelletier was already absent.

That completed the evidence for the company. There was some union reply evidence by consent in relation to the Firelli grievance which was mentioned earlier. This was about temporary drivers graduating to full time without the full time position being posted. It was by consent of counsel stated that the company had agreed that when this possibility arose, the full time position should be posted.

III Discussion and Conclusion

It is appropriate at this point to recap how this grievance arose and progressed to the positions taken by the parties at the arbitration hearing. It originally arose because the employee Jason Vandebusch felt that he was qualified as a T3 and should have been hired instead of one of the outside successful candidates.

With regard to the second outside hiring, the union's objection was that the second hiring was not preceded by a posting, but occurred without any posting at all. That aspect of the grievance did not change and remains the second part of the grievance I am requested to adjudicate. As for the first part, this was a position of the union which evolved following a recognition on the part of the union and presumably Mr. Vandebusch that he did not meet the T3 qualification. The union position was modified to the effect that in the case of the second vacancy created by Mr. Pelletier leaving (he was a Tireman in Training level T2) it should have been posted as a T1, or entry level Tireman position, as there was at that point no T1, and Article 9.01 requires all postings to be at entry level. As Mr. Pelletier's departure was what created an additional vacancy, a second posting for a T1 should have occurred, as the exception in 9.01(j) did not apply. Mr. Van Den Busch felt that if the second vacancy had been posted as a T1, he could have applied and been successful.

The company position was that in December 2013 there were no qualified internal candidates pursuant to the Walsh vacancy posting. The company was thus entitled to hire outside.

When an additional vacancy arose in early 2014, within about two weeks, there was no point in reposting or posting a new T3 which was its requirement at the time because the company knew there were no qualified candidates. It was therefore within its rights to hire an additional T3 from outside without reposting. This was all in accordance with the needs of the company at a time when a Tireman in Training would not satisfy its manpower requirements. There had been a substantial turnover in staff, in a safety sensitive classification, so an additional T3 was hired from outside. It was not obliged at that time to post for a T1.

Thus the issues in this arbitration were crystallized into two separate but related parts which I will now address.

A. (i) Was the employer required to post for the vacancy created by the departure of Mr. Pelletier, at the entry level?

(ii) Could the employer impose different higher qualifications equivalent to T3, in an entry level posting for a Tireman?

B. Could the employer post a single vacancy for a T3 and there being no qualified internal candidates hire two outside candidates as T3's rather than one?

I will first review the applicable sections of Article 9.01. When Roger Pelletier, a Tireman in Training, posted into a haul truck position in January 2014, a job vacancy arose. Article 9.01 Job Vacancies, provides at paragraph (a):

a) A job vacancy arises as a result of an addition or replacement to the work force in any classification.

The previous job vacancies in the Tireman classification occurred when there was a Tireman in Training, Mr. Pelletier, in place and therefore it was appropriate to post for these vacancies for a qualified or certified Tireman or T3. 9.01(j) provides:

j) Should there be a Tireman in training (0-2064 hours), the successful applicant for a Tireman vacancy must be qualified.

In the case of the Pelletier vacancy it was contemplated that there would be no Tireman in Training when it was filled, and so on the face of it Article 9.01(b) will apply. This provides:

- b) All job vacancies shall be posted at the entry level or the certified trade level.

The employer relies on 9.01(c) (i) which provides:

- c) For the purpose of this article, the following applies:
 - 1. Entry level has no qualification requirements *except* for Tireman, Certified Trades and Trades Apprentices.

The argument is that applying this clause, and applying the management rights clauses at 1.02 and 1.03 of the collective agreement the employer is entitled to set qualifications at the entry level for Tiremen and these may be modified according to the actual operational needs of the company when a Tireman vacancy arises. There is no restriction or prohibition against requiring T3 or equivalent qualification requirements at the entry level for Tiremen.

Article 9.01(c) (i) could conceivably be read as opening the door to the employer setting additional qualification requirements for entry level Tiremen. Counsel seemed by this to be conceding that the posting for a vacancy needed to be at the entry level but qualifications for this could be set as T3 or equivalent rather than T1, or in the alternative, (I am not quite sure if it was an alternative but in the end it does not matter) the qualifications for a T1 or T2 could be modified on an ad hoc basis reflecting the needs of the company so as to amount to the equivalent of T3 qualifications.

For the first of these submissions there is a straightforward answer: It is undermined by 9.01(d) 4 (vii):

- (d) Entry level and certified trade level are defined as the following:

...

- 4 vii) Tireman (0-12 months)

While the terminology is slightly different under this provision, the reference to “0 – 12 months” is clearly in the context of the collective agreement as a whole a reference to the T1 and T2 levels in the Tireman position. T1 is 0 – 1,032 hours which is approximately six months, T2 is 1,032 – 2,064 hours which is approximately another six months. Thus, I am quite satisfied that the reference to Tireman (0 – 12 months) is a reference to the T1 and T2 levels in the Tireman classification.

When this is matched with 9.01(b) it is apparent that all vacancies for Tiremen shall be posted at the entry level, which is T1 or T2, subject only to the exception which is found at 9.01 (j).

As for the second version of the employer’s position, if the employer were entitled to post a T1 or T2 vacancy and in the job posting require that applicant must have the equivalent of level T3 qualifications, this would undermine the whole sense and purpose of the posting requirement that vacancies are posted at the entry level. This would amount to an unacceptable exercise of management rights for the purpose of avoiding the consequences of 9.01(b).

It is apparent from counsel’s submissions as well as the evidence provided by both sides at the hearing that the only qualifications currently established for the T1 and T2 levels are physical fitness for the job and seniority.

It is possible that the employer could exercising its management rights work towards establishing additional qualifications and requirements for T1 and T2 level Tiremen, but as of the date of the hearing nothing of this kind had been established.

In any event the evidence discloses that what in fact the employer did was decide that its needs as an employer were to hire two T3’s and so it did so. It is unrealistic to claim that the second T3 hiring was really for an entry level T1 position for which additional qualifications were unilaterally imposed to meet the operational needs of the employer. Neither party really acknowledges that the posting was a T1 level with additional ad hoc qualifications attached.

It was a straight forward case of hiring above the entry level when a vacancy arose within the Tireman classification.

There is an additional problem with the employer's first position: 9.01(d) (vii) as I have already quoted, defines "entry level" in the case of Tiremen as "Tireman (0 – 12 months)". This may be usefully compared to Article 9.01(d) (4) (iv). In the Maintenance Department, there are, among other defined entry levels, two entry levels permitted consisting of "certified tradesmen" and "apprentices". It is thus clear that the employer may hire a certified tradesman or an apprentice at the entry level pursuant to Article 9.01(d) (4).

It will be recalled that the employer and the union both agreed the position of certified Tireman was not a formally ticketed or certified trade, but it has many features or aspects which are similar in that there are a series of hours at level T1 and T2 when the person in that position is referred to as a Tireman in Training rather similar to the status of apprentice, and then there is a form of test or exam to achieve the position of "Certified Tireman" or T3.

If the parties intended that "Certified Tiremen" or T3's could be hired at the "entry level" then the list at 9.01(d)4 is where such an intent would in my view be apparent. If this position was intended to be treated as one of two entry level positions along the same lines as Certified Tradesmen at 4 (iii) and Apprentices at 4 (iv) then that is where one would expect such a provision to be found, and it is noticeably absent.

The company cited in support of its position *Re: Corporation of the District of Maple Ridge and Canadian Union of Public Employees Local 622*, 23 L.A.C. 2d 86. At page 94 the Arbitration Board chaired by Professor Hickling stated under the heading "Setting of Standards":

A second point on which there appears to be a consensus of opinion amongst arbitrators is that, subject to the terms of the particular agreement, an employer has the power and the responsibility to fix the qualifications it deemed necessary to perform the requirements of the job. Those qualifications must be reasonable and related to the

functions to be performed. Re: *Inglis Ltd. and USW Local 4487*, 1977 15 L.A.C. 2d 227 (O'Shea) at p. 229.

However I note that the Board then went on immediately to say:

The Employer cannot manipulate the qualifications in order to subvert employee's rights under the Agreement. See *Textile Workers' Union and Lady Galt Towels Ltd.*, (1969) 20 L.A.C. 382; Re: *British Columbia Housing Management Commission and Service Employees International Union Local 224*, 1977 15 L.A.C. 2d 121 at p. 125 – 126.

It is true that the collective agreement does not spell out the qualifications for a T1, T2 or T3. However the collective agreement does set out a scheme or structure with respect to the classification of Tireman, which as earlier indicated provides for a level 1 and level 2 Tireman who are also described in the collective agreement as "Tiremen in Training" who must complete a minimum number of hours at those levels. The collective agreement then also refers to T3 level Tireman who according to the collective agreement "must be qualified".

It would be contrary to the obvious intent of the parties as expressed in the collective agreement, to require that T1 and T2 or entry level Tiremen "must be qualified" to the same extent or equivalent extent to T3's. This process in my view runs squarely up against the principle above cited in Re *Textile Workers' Union and Lady Galt Towels Ltd.*, (supra) and others, to the effect that "the employer cannot manipulate the qualifications in order to subvert the employee's rights under the Agreement". The current employee rights with respect to applications for a vacancy in the Tireman classification include the right to apply subject to 9.01(j), for an entry level position in accordance with the current qualifications which are physical fitness and seniority. As I have indicated the employer may well be free to introduce some level of additional qualification at the entry level for T1 and T2, but if it went so far as to match the T1 and T2 level qualifications to those required for hiring at the T3 level, this would be an unreasonable exercise of management rights because it would have the effect of eliminating two lower levels of Tireman classification, and this cannot be what the parties agreed to.

For the foregoing reasons I find that the employer was in breach of the collective agreement when it failed to post the Pelletier vacancy as a T1 or T2 vacancy, (entry level).

With regard to the second aspect of the grievance, which was failure to post the second vacancy, counsel for the employer concedes that there was a vacancy created by the departure of Pelletier, but he makes two points: Firstly, there had been a posting on December 12, 2013 for a T3 and this had produced no successful internal applicants. There was no reason to suppose that two weeks later there could have been successful applicants internally. Secondly, the employer says that the only potential internal candidate was Jason Vandebusch for the Pelletier vacancy, and he in any event received an interview on January 16, but was found not qualified for a T3 position. Thus, in the circumstances says the employer, there was no need for a posting given the earlier results and secondly, the only interested employee candidate was in fact interviewed although informally. There was thus no prejudice to the employees or to any potential internal applicants.

The first and main answer to this submission is that the posting, because of my findings with respect to the first branch of the grievance, should have been a posting for an entry level position of Tireman or T1 or T2. This would have enabled not only Mr. Vandebusch but other internal potential candidates to apply for a position which did not require T3 certification or qualifications but the much less rigorous requirements for a T1 or T2. The second answer is that even if the new vacancy was legitimately a T3, it should have been reposted because that is the requirement in the collective agreement which provides under 9.01(b) that “all jobs vacancies shall be posted ...” In such a case, certainly, an informal discussion with the union might well have avoided the duplication of paperwork and administration given the circumstances from the previous round of posting and one would hope that this is the kind of interchange that would take place in those circumstances. However, this does not obviate the main problem which is that the Pelletier posting should have been for a T1 which introduces much broader possible consequences in terms of response to the posting internally.

Insofar as there was some evidence of hirings exceeding the number of vacancies posted, with respect to some heavy duty mechanics and some haul truck drivers, this was insufficient to establish a permissible and enforceable past practice, and this point was not pressed by employer counsel in argument.

I accordingly find that a failure to post for the Pelletier vacancy was a breach of the collective agreement. The employer is not permitted under the collective agreement to hire additional external candidates to fill a vacancy without first posting the vacancy which it is seeking to fill.

There is one point made by the union in reply which I wish to record. The union does not claim that there has to be a T1 or a T2 employed at all times. It is only if a vacancy arises and there is no T1 or T2 in place, when the obligation under 9.01(b) to post at the entry level arises in the Tireman classification. I agree with this point.

Employer counsel had two other points which I wish to comment on: he referred to Mr. Gordon Chaisson's statement about the appropriate method of dealing with a T3 posting where there are no qualified internal candidates. He said that if there were no internal qualified candidates the employer should next post for a T1 vacancy and see if there are any successful internal candidates for that. Only if that failed to attract qualified candidates could the employer go outside and hire a qualified Tireman or T3.

I agree with the employer that this is not the correct process in accordance with the collective agreement. Provided that the T3 posting is not in breach of the entry level requirement the next step if there are no qualified internal candidates, is to hire outside. It is not appropriate to post for a T1 position before doing this.

Counsel for the employer also made reference to Mr. Chaisson's evidence given in chief that the correct procedure for posting a Tireman vacancy is to "post what you need". In other words if a T3 is needed then you post for a T3. I agree this was stated by Mr. Chaisson in chief and it was not accompanied at that point by any qualification such as this could only

be permitted when there was already a Tireman in Training. In cross examination he did say that a T3 should of course be posted if there is a Tireman in training. However, he did not recant the evidence he gave in chief that the employer should post what it needed. This would mean that if the employer needed a T3 then whether or not there was a T1 in place, it was appropriate to post for a T3.

Given the overall position of the union given through counsel and other witnesses this was certainly something of an anomaly. However Mr. Chaisson did go on to say “You do not go to hire outside if there is no one in training”. And then he stated “If there is no trainee, it always generated a Tireman in Training position”. These two sets of statements are contradictory to the earlier one quoted and there is no easy way to reconcile them. However the second statements are consistent with the union’s overall position and I will not refuse to assess it on the merits because of this partial contradiction.

The grievance succeeds on both issues and a declaration is provided accordingly.

IT IS SO AWARDED.

Nicholas Glass

Nicholas Glass, Arbitrator.

January 14, 2015.