

BCLRB No. B109/95  
(Leave for Reconsideration of BCLRB No. B346/94)

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

SURTEK INDUSTRIES INC.

(the "Employer")

-and-

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT  
WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 3014

(the "Union")

PANEL: Stan Lanyon, Chair  
Brent Mullin, Vice-Chair  
Robert Pekeles, Vice-Chair

COUNSEL: Don Baron, for the Employer  
John Bowman, for the Union

CASE NO.: 20411

DATE OF REASONS: March 17, 1995



## **REASONS OF THE BOARD**

### **I. INTRODUCTION**

1           The Employer has applied under Section 141 of the *Labour Relations Code* seeking leave  
to apply for reconsideration of a part of BCLRB No. B346/94. Specifically, the Employer seeks  
leave with respect to the decision of the original panel that two persons, Majespari Valandi and  
Ermelo Abas, were employees in the bargaining unit on the date that the Board received the  
Union's application for certification. The original panel held that those two persons were  
employees in the bargaining unit on the date the Board received the Union's application for  
certification.

2           The original panel granted the Union's application for certification.

3           In BCLRB No. B479/94, this panel concluded that Valandi and Abas should have been  
excluded from the bargaining unit on the date the Board received the Union's application for  
certification. With their exclusion from the bargaining unit, the level of Union membership in  
the bargaining unit dropped to between 45 and 55 percent. We accordingly ordered that the  
representation vote which had earlier been conducted, be counted. We indicated that reasons for  
the decision would follow. These are our reasons.

### **II. THE ORIGINAL PANEL'S DECISION**

4           The original panel set out the facts with respect to Valandi and Abas in the following  
terms:

Majespari Valandi tendered a written letter of resignation dated August 2, 1994. August 12 was indicated as her expected last day of work. Her last day worked was in fact August 12, 1994, thus she was at work on August 8, 1994, the date of application. She has advised her employer that she had obtained a job at another firm.

Ermelo Abas tendered a letter of resignation dated August 3, 1994

and gave August 12 as his expected last date of work. His actual last day worked was in fact August 11, 1994, thus he was at work on August 8, 1994. He has advised the Employer that he obtained a "green card" and is moving to the United States. (p. 3)

5           The original panel's analysis with respect to the inclusion of Valandi and Abas was as follows:

The issue of inclusion or exclusion of Valandi and Abas starts with a determination of the proper test for persons who are at work on the date of application. The Employer takes the position that such persons are subject to the sufficient continuing interest standard. The Union relies on the analysis in *P.A. Building Maintenance*, BCLRB No. B222/94, which found that the words of Section 23(1) of the Code are such that persons in bargaining unit positions who are at work on the date of application are necessarily included for the purposes of the calculation of membership support from the application for certification. I agree with this principle for the reasons set out in *P.A. Building Maintenance, supra*. Accordingly, Valandi and Abas, as employees who were in the unit on the day of application, are included for the purposes of calculation of support. (p. 5)

### III. ARGUMENT

6           The Employer argues that the original panel's decision is inconsistent with the principles expressed or implied in the Code. In particular, the Employer relies on two decisions of the Board, namely, *Dayboy Industries Ltd.*, BCLRB No. 7/87, and *Custom Gaskets Ltd.*, BCLRB No. B83/93. In the *Dayboy Industries* case, a person who had been given termination notice on the day prior to the filing of the Union's application for certification, but which was not to be effective until a little less than two months later, was held not to be entitled to vote in the representation vote. The termination notice in that case was not contested.

7           In the *Custom Gaskets* case, two persons who were held to be temporary casual employees, but who were working on the date that the Union filed its application for certification, were excluded from the calculation of union membership support on the basis that they did not have a sufficient continuing interest in the outcome of the representation issue.

8           The Employer submits that the original panel was wrong when it decided that it had no discretion under Section 23(1) of the Code to apply the sufficient continuing interest test to persons who were about to leave their employment with the Employer pursuant to a resignation. The Employer submits that in the present case Valandi and Abas did not have a sufficient continuing interest and ought to have been excluded.

9           The Union argues that the Employer's application should be dismissed. It argues that the type of argument advanced by the Employer was specifically rejected by the Board in *Kidd Bros. Produce Ltd.*, BCLRB No. B146/93. The Union argues that when an employee is working on the date that the application for certification is filed, the Board should not inquire into the sufficient continuing interest in the bargaining unit of that employee, because to do so would invite the Employer to manipulate the voting constituency through layoffs or transfers or terminations.

#### IV. ANALYSIS AND DECISION

10           In view of the differing approaches taken in the two cases cited by the Employer on the one hand, and in the *P.A. Building Maintenance* case and the original decision here on the other hand, we are satisfied that the Employer has demonstrated a good arguable case of sufficient merit that its application for leave to apply for reconsideration ought to be granted.

11           The original panel relied on the analysis in the *P.A. Building Maintenance* case. The panel in that case held as follows:

The real issue is the one identified in *Custom Gaskets Ltd., supra*: should the Board exclude these employees from the representation process? On the strength of the sufficient continuing interest doctrine, the Board has excluded employees from consideration for this purpose in both *Dayboy Industries* and *Custom Gaskets*. I have acknowledged the strength of this logic. In view of *British Pacific Restaurants*, it is not irresistible. But, the more important problem with the cases is that they are founded on a discretionary power which I am unable to locate.

As the Union submits, there is nothing in the language of Section

23(1) which admits of any discretion to exclude employees from the calculations necessary to administer that section. It will be observed that it is one of the few provisions of the Code which utilizes the mandatory "shall". Doubtless that was one of the reasons the Council, in *Act One Uniform Rentals Inc., supra*, came to the conclusion that it did not enjoy any "residual discretion to deal with exceptional circumstances".

In my view, persons who are "employees in the unit" on the day of application cannot be excluded from the calculation under Section 23(1). In some cases this will appear to work a hardship for the applicant, and in some it will appear to assist. That is the regrettable but inevitable consequence of any line drawing exercise. The advantage is, as the Council said in *Act One Uniform Rentals*, a "certain and easily ascertainable", albeit somewhat "arbitrary cut off point" ... (p. 17; emphasis added)

12 Section 23(1) of the Code reads as follows:

23. (1) If the board is satisfied that on the date it receives an application for certification not less than 55% of the employees in the unit are members in good standing of the trade union and that the unit is appropriate for collective bargaining, the board shall certify the trade union as bargaining agent for the employees in the unit. (emphasis added)

13 In the particular circumstances of this case, we are prepared to assume, without deciding, that Valandi and Abas were employees on August 8, 1994, the date on which the Board received the Union's application for certification. Even assuming that to be the case, were they employees "in the unit"? Under Section 23(1), the Board must be satisfied that the employees are "in the unit". We note that similar phrases are used in other certification provisions of the Code: see for example, Sections 18(1) and (2), 19(1), 20 and 24(1) and (2). The Board has the exclusive jurisdiction, under Section 139(1)(l) of the Code, to decide whether a person (which includes an employee), is included in or excluded from an appropriate bargaining unit.

14 To the extent that the original decision in the present case, or the *P.A. Building Maintenance* case, stand for the proposition that the Board does not have the power to exclude employees who are at work on the date that the Board receives an application for certification, we

do not agree. Under Section 23(1) of the Code, the Board must also be satisfied that the employees are "in the unit". Under Section 139(1)(l) of the Code, the Board has the jurisdiction to decide whether an employee is included in or excluded from an appropriate bargaining unit.

15 We note that the Board has taken the same two step approach in cases involving persons having a close familial relationship with a principal of an employer. In those cases, the Board first determines whether the person is an employee. If so, it goes on to consider whether that employee is to be included in the bargaining unit applied for: see for example, *Bruce Clarke Ltd.*, BCLRB No. 56/78, [1979], 1 Can LRBR 149; *Waldun Forest Products Ltd.*, BCLRB No. B158/93; *Skeena Concrete Products*, BCLRB No. B254/93. In each of those cases, the Board held the persons in question to be employees, but went on to hold that they were excluded from the bargaining unit.

16 The Board has also taken that two step approach in cases involving casual or part time workers: see for example, *Edoco Healey Technical Products Ltd.*, BCLRB No. 81/79, [1980], 1 Can LRBR 570; *Waldun Forest Products Ltd.*, BCLRB No. B158/93. In each of those cases, the Board held the casual workers in question to be employees, but went on to hold that some or all of them were excluded from the bargaining unit.

17 We do not propose to set out an exhaustive analysis as to when the Board will exercise its authority to exclude an employee, who is at work on the date the Board receives an application for certification. We do propose to set out some general principles that will serve as a guide to the labour relations community.

18 First, a decision to exclude an employee who is working on the date that the Board receives an application for certification, should only be made in exceptional circumstances.

19 Second, we should avoid a policy that will enhance the potential for manipulation of the bargaining unit through employer initiated action such as layoffs, transfers or firings.

20 Third, to the extent that a decision will not conflict with the second principle above, persons who will not be working in the bargaining unit very shortly after the date that the Board receives the application for certification, should not be included in the bargaining unit. That is

because they will not have a sufficient, continuing interest in whether or not the union is certified. By the time the union is certified, if it is, or by the time the union begins to draft its collective bargaining proposals, those persons will have no interest in collective bargaining between the union and the employer, because they will no longer be working for the employer.

21 For the reasons that follow, we have concluded that Valandi and Abas were not employees in the unit on the date that the Board received the Union's application for certification. First, it is significant that we are dealing here with employee resignations, as opposed to layoffs, transfers, firings or other employer initiated actions. Thus, whatever concern there might be about potential manipulation of the bargaining unit, is simply not a factor in this case. In saying that, we do not rule out the possibility that some resignations may be induced by an employer and thus may really be more of a firing than a resignation. There is nothing in the facts of the present case to suggest such a firing. Second, the facts set out in the original panel's decision are that Valandi and Abas left their employment with the Employer three to four days after the Union's application for certification was received. One had obtained a job at another firm. The other was moving to the United States. Neither of them could have had any interest in whether or not the Union was certified. In these exceptional circumstances, we have concluded that Valandi and Abas should have been excluded from the bargaining unit as of the date the Board received the Union's application.

22 With their exclusion from the bargaining unit, the level of Union membership support in the bargaining unit on the date that the Board received the Union's application for certification, dropped to between 45 and 55 percent. Under Section 24(2) of the Code, a representation vote had to be ordered to determine whether or not the employees in the unit wished to have the Union represent them as their bargaining agent.

23 We accordingly ordered the counting of the representation vote which had earlier been held.

LABOUR RELATIONS BOARD

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VICE-CHAIR

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