

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CELTIC SHIPYARDS (1988) LTD.

("Celtic" or the "Employer")

-and-

MARINE WORKERS' AND BOILERMAKERS' INDUSTRIAL
UNION, LOCAL 1

(the "Union")

PANEL: Maria Giardini, Vice-Chair

COUNSEL: David McInnes, for the Employer
Bruce Laughton, for the Union

CASE NO.: 17512

DATES OF HEARING: March 10 and 11, 1994

DATE OF DECISION: March 28, 1994

DECISION OF THE BOARD

I. NATURE OF APPLICATION

The Union applied to be certified for a unit of employees at and from 3150 Celtic Avenue, Vancouver, B.C., except office staff. Preliminary challenges were raised by Celtic and the Musqueam Indian Band (the "Band") based on the relationship between Celtic and the Band. The preliminary issues were heard separately and a decision, with reasons to follow, was communicated to the parties on March 8, 1994.

The preliminary objections raised by Celtic and the Band were dismissed. I found that Celtic was the true employer and that there was no basis to conclude that the business carried on by Celtic was a federal undertaking. A formal decision was issued which sets out the nature of the preliminary objections and the background to the relationship between Celtic and the Band: *Celtic Shipyards (1988) Ltd.*, BCLRB No. B131/94.

This application deals with two other challenges to the Union's application for certification. The Employer says that the application was filed at a time when its workforce was at a seasonal low. It says 12 individuals, who it claims are seasonal employees who were laid off, should be included in the proposed bargaining unit. The Employer also says that a number of membership cards were signed by some employees because of a misrepresentation made by a fellow employee. Therefore, the Employer argues, those cards should not be relied on when determining membership support. At the very least, the employer says, I should exercise my discretion and order a vote.

II. BACKGROUND REGARDING "LAID OFF" WORKERS

Celtic operates a shipyard and carries out both repairs and new construction. Celtic repairs commercial fishing vessels, yachts and tugs as well as government vessels. Last year it constructed five fire boats for the City of Vancouver and now has an agreement to build at least two vessels for another customer. Celtic is incorporated under the *British Columbia Company Act* and is a wholly owned subsidiary of Musqueam Holdings Ltd. which is also incorporated

under the *British Columbia Company Act*. Its only issued share is held in trust for members of the Band by a Band member.

Celtic has employees, some of whom are Musqueam some of whom are non-Musqueam. One of Celtic's stated objectives is to provide skills and training to members of the Band. In order to do so it established an apprenticeship training program in certain trades. However, in addition to the apprenticeship training program Celtic provides employment to members of the Band in keeping with its needs and their skill level.

There are 12 individuals in dispute who were not working at Celtic on January 4, 1994 when the Union applied for certification. Several of the individuals are now working; one of them was hired as recently as two days before this hearing. Of the 12 individuals three are non-Musqueam eight are Musqueam and one's status is unknown. The non-Musqueams are:

- Jim Dool - First started at Celtic April 1993, worked June to August 1993 inclusive.
- Bruce Frampton - First started at Celtic January 1992, worked June to July 1993 inclusive.
- Tom Smith - First started at Celtic January 1992, worked June to August 1993 inclusive.

Jim Dool quit to work for another employer and is currently working with that employer. There was no evidence that Frampton was working. However, Jim Walker, Celtic's general manager, said he spoke to Frampton two weeks ago and told him that work would probably be available in April. Tom Smith is working with another employer but Walker says Smith has expressed an interest in working at Celtic.

The individual whose status is unknown is Kevin Harkey who was first hired in June 1993. On the evidence before me, I can only conclude that he worked at Celtic for one month (June 1993). He was recently rehired to work in the stockroom.

The individuals, whom the Employer seeks to include, who are Musqueam are:

- Marcelle Duncan - Shipwright apprentice
He first started at Celtic December 1988, worked June and July 1993.

- Mark Guerin - Security
He first started at Celtic February 1993, worked June to August 1993, rehired January 1994.

- Raymond Peters - Security
He first started at Celtic November 1988, worked June to August 1993. He is sick and has no anticipated return to work date. Walker did not know what his condition or illness was. However, Walker said that the illness was not life threatening and he anticipates Peters will return to work at some point.

- Wayne Point - Shipwright apprentice
He first started at Celtic November 1988, worked June to August 1993 inclusive, but was off work in January 1994. He was at school on a program related to his apprenticeship (no details provided). He returned to work one week before the hearing.

- Art Stogan - Shipwright apprentice
He first began at Celtic October 1988, and worked June and July 1993. Walker expressed some concern about his productivity and overall aptitude, however, he stated that Art Stogan will be rehired sometime mid-June 1994.

- Walter Stogan - Security
He first started at Celtic October 1988 and worked June to August 1993 inclusive. Walker said, even though Celtic is being saturated on the security side, Stogan will be returning

to Celtic doing part-time security work and part-time general labour.

William Stogan - Security
He first started at Celtic August 1992 and worked June through August 1993 inclusive.

Basil Point - Clean-up
He first started at Celtic November 1988 and worked June to August 1993 inclusive. He quit his work but came back and was hired two days before this hearing.

The Employer did not provide any details about the work history of the 12 individuals from initial date of hire to the current time. All I have before me are the start dates and some particulars regarding the spring and summer of 1993. I have no evidence about the employment history prior to that time.

Walker said all 12 individuals were on layoff, however, he admitted he used the term "layoff" loosely. The term included people who had quit, who could not do the job or who he would not rehire. In using the term "layoff" Walker did not distinguish between individuals who were terminated and those who, he said, would be returning to work at Celtic.

Celtic is an unorganized employer. None of the 12 individuals the Employer wishes to include have any contractual rights to be called back. The individuals were not given a return to work date at the time they stopped working. Walker, however, testified that there was no reason why he would not call these individuals back provided they have good skills.

III. BACKGROUND REGARDING MEMBERSHIP EVIDENCE

The Employer called Janna Becker to give evidence about what took place when membership cards were signed. The Union stipulated that it was prepared to accept Becker's testimony as representative of statements that would be made by other witnesses if they were called. The Union also stipulated it was prepared to accept there would be a sufficient number of

such witnesses to affect the threshold level of 45% support required under the *Labour Relations Code*. In other words, if I rule in favour of the Employer's objection, that would be the end of the matter.

Becker testified that she works at the marine store at Celtic. In December 1993 she was approached by a fellow employee and was asked whether she wanted to join a union. She had questions she wanted answered and a short time later another employee, Allan Ikari, came to speak to her about the Union. Ikari asked whether she and her co-worker Michelle Point, who was also at the marine store, wanted to join a union. Becker replied she didn't know anything about unions and did not want to join anything she didn't understand. Becker said that Ikari pulled out membership cards and told her that the Union would protect her job, her salary, and her job security. She said Ikari also told her that the Employer would not be able to replace her with someone else.

Ikari then presented her with a card for signature. Becker said she told Ikari she did not want to commit herself to anything she did not understand. Ikari replied that this was just for interest and when there was enough interest shown the Union would meet with the employees and answer any questions or concerns they might have. Becker said she believed Ikari stated that the membership card was like an application which could be accepted or rejected. Becker said that Ikari also told her that after a meeting with the Union a secret ballot would follow. The secret ballot would determine if the employees were to be in a union or not. Becker said she did not believe she committed herself to anything by signing the card. She had only expressed an interest.

Within a couple of days of speaking to Ikari, Becker and others attended a meeting on December 30, 1993 at the Fraser Arms Hotel. George MacPherson and Peter Borzillo from the Union were at that meeting. The meeting lasted one to two hours and the employees who attended had an opportunity to ask questions and raise concerns. Becker said she was the first to leave. As she was preparing to leave MacPherson was looking through the cards. He said the certification would go through automatically because the Union had support of 55% or more of the employees in proposed bargaining unit. According to Becker, MacPherson said there would be a union. This was the first time that Becker heard there would be automatic certification.

Becker agreed that when she signed the union card she understood it was an application to

be in a union. She also understood that if there wasn't enough interest there would not be a union. Becker said she was not pressured into signing the card either by Ikari or the other employee. Neither was she pressured at the meeting with the Union representatives on December 30. However, Becker said, she was surprised when she learned there would be an automatic certification because she had been told by Ikari that there would be a secret ballot. Becker confirmed that neither MacPherson nor Barzillo promised the employees there would be a vote. The only person who said this was Ikari.

On January 4, 1994 Becker attended a meeting with other employees called by Jim Walker. Walker told the employees who were assembled that he knew about the Union and wished the employees had gone to him first. Walker indicated he was "hurt" by the situation. A day after this meeting Becker revoked her membership. Becker acknowledged that between the time she signed the card and the meeting with the Union she had the opportunity to find out what a union was about. She further acknowledged that she also had an opportunity to make enquiries after the meeting with the Union representatives on December 30 where she learned that there would not be a vote. However, she said, at that point it was her understanding that the Union was a given.

Walker testified that he met with the employees after he had been told by an individual that there was a "union problem". He said he was told by the employees that signing the cards was just an expression of interest. Walker asked the employees why they didn't talk to him and he was told there had been a misunderstanding. The employees said they understood the cards reflected an interest only and were surprised to learn that automatic certification was a possibility. According to Walker he was approached by an employee who said he wanted to revoke his membership in the Union and asked for Walker's assistance. Acting on the employee's request, Walker approached a lawyer for the Band who prepared revocation letters. The letters were given to the employee for distribution to other employees who wished to revoke their membership.

IV. ANALYSIS AND DECISION

Should the "Laid Off" Workers be Included?

The first issue which I must determine is whether 12 individuals, who were not working at the time the application was filed, should be included in the proposed unit for the purpose of determining membership support. The test to be applied in such circumstances is whether there exists a continuing, tangible felt relationship between the individuals in question and the Employer: *Britco Structures Ltd.*, BCLRB No. 62/84, (1984) 5 CLRBR (NS) 352; *Western Canada Steel*, BCLRB No. 79/75, [1976] 1 Can LRBR 25. The test applies to circumstances where the proposed bargaining unit is already certified as well as in cases where it is not. However, in cases where the proposed unit is not certified and the employees are "laid off" the Board must conduct a particularly searching enquiry to determine whether a continuing, tangible felt relationship really does exist: *Glen River Industries (Delta) Ltd.*, BCLRB No. 70/77, [1978] 1 Can LRBR 168.

The application of the test and the factors which should be considered were succinctly summarized in *Superior Contracting Ltd.*, IRC No. C313/88 (Reconsideration of BCLRB Letter Decision dated June 16, 1986) as follows:

In every case, whether a person has a sufficient, continuing interest will depend upon the nature of the industry, the character and definition of their recall rights, if any, the duration of the layoff, and each individual's particular employment circumstances. For example, the seniority of a laid off person as well as the panel's subjective and objective judgment as to whether there is any remaining employment relationship, will be important. If a laid off person has returned to school, obtained satisfactory employment elsewhere, or embarked upon an extended vacation, then the panel may well find the person has no continuing connection with her employer. It is our view that this type of analysis not only protects the rights of those persons who have been laid off, but also prevents the exercise of those rights from frustrating the desire of employees who remain at work to participate in collective bargaining under the Act. (p. 7)

After applying the principles set out above to the facts of this case, I have no difficulty in finding that Dool, Frampton, Smith, and Harkey do not have a continuing, tangible felt relationship with the Employer such that they should be considered employees for the purpose of determining membership support. Dool and Smith are both working for other employers. The

Employer had not assured them employment at the date their work ended. They may have expressed interest in returning to Celtic but an expression of interest alone is not a sufficient basis on which to find employee status.

There was no evidence about Frampton's current status. Walker said he spoke to Frampton two weeks ago about returning to work at Celtic. In Frampton's case, as in that of the others, the Employer had not taken any concrete steps to assure Frampton's employment at the date his work ended, nor was there any evidence that Frampton himself is committed to returning to work at Celtic.

Harkey only worked at Celtic for one month in June 1993 and was recently (after the application for certification) re-employed. There is nothing in his employment history with Celtic to establish the necessary relationship.

Eight of the workers in question are Musqueam and Walker testified that, while he has some misgivings about the abilities of several of them, they are going to be working in the near future. Are Celtic's stated objectives to employ Band members and Walker's emphatic statements that work will be found for the eight Band members in question sufficient to establish a continuing, tangible felt relationship?

In *Britco Structures Ltd.*, *supra*, the Board said:

...only in very exceptional circumstances, will an individual who has previously worked for an employer but who has been laid off, be found to be an employee for the purposes of an application to represent unorganized employees who are not covered by a collective agreement. Such exceptional circumstances might occur where it can be established that there really does exist a continuing, tangible felt relationship between the *individual* and the employer. That relationship must be established at the date of the lay-off and it must be shown to be a continuing one during the period of the lay-off. We reject Counsel's submission that the appropriate date to consider whether such a relationship exists is just before the employee is recalled to work. (pp. 364 - 365; emphasis added)

In this case, the obligation which the Employer has acknowledged is a general one; that

is, to hire Musqueam Band members. The Employer does not have and has not made any concrete, binding commitment to the eight individuals in question. The Employer needed additional security guards in January, 1994. It chose to employ Mark Guerin, who is one of the most junior Musqueam workers and has very little previous service. The Employer also hired Harkey in January, 1994. He too has very little service. If there was a real commitment to the other Musqueam workers in question, some of whom according to the Employer have service dating back to 1988, why were those individuals not offered the work?

The above examples underscore my conclusion that, even when it comes to hiring Musqueam workers, there are no guarantees and the choice of worker is at the Employer's discretion. The Employer has not provided an evidentiary basis which would allow me to conclude that a continuing, tangible felt relationship exists between it and the eight Band members in question. Consequently, the Employer's application to include certain individuals in the proposed unit for the purposes of determining membership support is dismissed.

Membership Evidence

The Employer argues that the validity of the Union's membership evidence has been cast into doubt such that the membership cards should be totally disregarded. Alternatively, if the cards are not disregarded, a representation vote should be ordered. The Employer says that a "misrepresentation" by a fellow employee is enough to cast doubt on the integrity of the membership evidence because the effect of the misrepresentation was to mislead employees about the nature of what they were signing.

Was there a misrepresentation about the effect of signing a union membership card? Based on the evidence before me, I find there was not. Becker understood that she was signing a card to become a Union member and, if there was not sufficient interest among the other employees, there would not be a union. What appears to have caught her by surprise was the fact that the Union could be automatically certified. Yet, it is significant to note that when she learned of that fact at the meeting of December 30, 1993 she did not raise any protest nor did she ask to have her card returned. At that point, Becker took no steps to initiate a revocation. In fact, steps to revoke membership were initiated by another employee after the January 4, 1994 meeting with the Employer's general manager.

There are no allegations of coercion or intimidation by the Union. In fact, there are no allegations of coercion or intimidation by the fellow worker, Ikari. The allegation is that Ikari said there would be a secret ballot and there was not. That representation, however it is characterized, is not sufficient to call the validity of the cards into question. The statement made by Ikari is in part correct. If the Union obtained less than 55% membership support in the unit there would, indeed, be a vote.

The new Code reflects a clear statutory policy that certification should be based on membership cards rather than on a secret ballot vote where 55% or more of the employees in a unit are members of a trade union. Therefore, where a union demonstrates the necessary membership support, a representation vote will only be granted in exceptional circumstances: *Plateau Mills Ltd.*, BCLRB No. 87/76, [1977] 1 Can LRBR 84; *Crestar Food Products of Canada Ltd.*, BCLRB No. B26/93. One such exceptional situation is where there are serious flaws in the manner in which the union signed up majority support; namely, where there is intimidation, fraud, or a "serious cloud of unfairness". (pp. 88-89).

In the circumstances of this case, I find that the test set out in *Plateau Mills Ltd.*, *supra*, has not been met. In this case, there was no serious or egregious conduct on the part of the Union or its agents. Ikari's statement alone is not sufficient to raise a *bona fide* doubt about the membership evidence. Accordingly, the Employer's challenge to the validity of the membership evidence is dismissed.

IV. CONCLUSION

The Employer's challenges to the Union's application for certification are dismissed. The 12 individuals named by the Employer should not be included in the proposed unit for the purpose of determining membership support. Furthermore, I am satisfied about the validity of the membership evidence therefore a representation vote will not be ordered. The Union has sufficient support for automatic certification and it is entitled to be certified for the proposed unit.

LABOUR RELATIONS BOARD

MARIA GIARDINI
VICE-CHAIR