

BCLRB No. B151/93
(Leave for Reconsideration of BCLRB No. B106/93)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

PAN-AFRIC HOLDINGS LTD. carrying on business as the
EXECUTIVE INN, BURNABY and TIVOLIS TOO

(the "Employer")

-and-

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT
WORKERS UNION OF CANADA (CAW-CANADA), LOCAL 3002

(the "Union")

PANEL: John B. Hall, Associate Chair (Adjudication)

COUNSEL: M. Grant Gayman, for the Employer

CASE NO.: 14975

DATE OF DECISION: May 21, 1993

DECISION OF THE BOARD

I. NATURE OF APPLICATION

The Employer applies under Section 141 of the *Labour Relations Code* seeking leave to apply for reconsideration of BCLRB No. B106/93. That decision concerned an application for certification by the Union under Section 18 of the Code. The primary issue before the original panel was the identity of "the true employer" of the employees in the proposed bargaining unit. The panel concluded that "Pan Afric Holdings Ltd. carrying on business as the Executive Inn, Burnaby and Tivolis Too at the Executive Inn, Burnaby" should be regarded as the true employer (p. 12).

The original panel then proceeded to deal with a further argument by the Employer:

I now turn to the Employer's argument that the Union's application must, nevertheless, be dismissed because it failed to prove that it enjoyed the membership support of not less than fifty-five percent of the employees in the unit on March 22, 1993. This argument overlooks Section 124(3) of the Code and the confidential portion of the IRO's report prepared pursuant thereto. Section 124(2), (3) and (4) provides as follows:

124. (2) The board may request and receive a report from a person it appoints to investigate an application or to investigate and attempt to settle a dispute under this Code, a collective agreement or the regulations, and, despite section 146 (3), the board shall disclose the report to the parties.
- (3) Information relating to membership or any record that may disclose whether a person is or is not a member of a trade union produced in a proceeding before the board is for the exclusive use of the board and its representatives.
- (4) No person shall, except with the consent of the board, disclose whether a person is or is not a member of a trade union.

Under Section 124(2), the Board must disclose to the parties the investigation report of an application for certification. That was done in this case. However, under Section 124(3) the IRO prepares an additional confidential report containing information relating to the applicant trade union's membership support among the employees in the proposed bargaining unit. This information is produced in the proceeding before the Board and in accordance with Section 124(3) is for the exclusive use of the Board and its representatives. It is this aspect of the IRO's report that enables the Board to determine whether a union satisfies the membership in good standing requirements of Section 23(1) of the Code. A union need not adduce evidence of membership in good standing at an oral hearing: see Section 124(4). (p. 12-13)

Relying on the IRO's report, the original panel was satisfied that the Union had met the required percentage membership support for automatic certification under the Code. The panel was also satisfied that "the Union is a trade union and that the unit is appropriate for collective bargaining" (p. 13). Accordingly, a certification was to be issued.

II. LEAVE REQUEST

The Employer seeks leave to apply for reconsideration on the basis that the original panel's decision is inconsistent with principles expressed or implied in the Code. More specifically, the Employer submits that the original panel breached its inherent obligation to act in accordance with the principles of procedural fairness and natural justice. A denial of fair hearing is said to arise through the original panel's reliance upon evidence which was not before the parties.

The Employer's argument proceeds from a ruling at page 9 of the original decision that "the Employer could not rely on the IRO's report as evidence in the proceeding". If the Employer could not rely upon the report as evidence, it is submitted that neither could any other party or the Board itself. The Employer accordingly argues:

The protection afforded by Section 123(3) is for obvious

policy reasons, with which I concur. However, what is to be kept confidential is "information relating to membership" or "any record that may disclose whether a person is or is not a member of a trade union". It is only that information which is for the exclusive use of the Board and its representatives. All other information must be disclosed to the parties. In the context of an application for certification, the only information that ought not to be disclosed to the Employer is the number and identity of those members of the proposed bargaining unit that have signed trade union membership cards. In other words, it is submitted that the IRO's "additional confidential report", prepared pursuant to Section 124(3), can at most, given the clear intent of Section 124(2), advise the Board that, for example, twenty-seven named individuals were members in good standing as at the date the application was received by the Board.

If this "additional confidential report", to use the Vice-Chair's expression, contains any other information which is not disclosed to the parties, then the report violates Section 124(2). The reliance of the Board upon unprivileged information which is not before the parties amounts to a denial of a fair hearing.

In the circumstances of this case, there was no evidence presented in the course of the hearing by either party, or by the Board itself, as to the number of employees in the proposed bargaining unit on the date that the application for certification was received by the Board. The officer's report was ruled to not constitute evidence. There was no way that Vice-Chair Gordon could have determined what percentage membership support the union enjoyed, unless the officer's report informed her not only of membership numbers and identities but of the number of employees employed on the date in question. That information is hardly confidential and is certainly not privileged from disclosure by virtue of Section 124(3). ...

In short, the Employer submits that the Board "had no right to rely upon that information" found in the confidential portion of the IRO's report. The original panel's decision should accordingly be set aside, and the order of certification cancelled.

III. LEAVE DECISION

The test for leave under Section 141 of the *Labour Relations Code* was established in *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93). In simplest terms, an applicant must demonstrate "a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration" (p. 11). Even where this test has been satisfied, the Board retains the discretion to deny leave based on other relevant factors.

The Employer's leave request here is really in the nature of a reconsideration on the merits. As noted above, the relief requested in its submission is that the original panel's decision "be set aside and the order of certification cancelled". The Board noted in the *Brinco* case that "the basis for granting leave and the grounds for reconsideration will inevitably be intertwined" (pp. 4-5). The submissions made by the Employer will therefore be examined in light of the "good arguable case" standard required for leave.

As a context for the Employer's application, it is important to record the investigatory process which the Board follows in an application for certification. More specifically, in the typical certification application, an Industrial Relations Officer is appointed to carry out a factual investigation and report the results to the Board. This will generally involve separate meetings and/or discussions with both the employer and the trade union. There are three components to the resulting report.

The first component of the IRO report (which is a six-page standard form) contains basic information such as the full name and address of both the employer and the trade union; the nature of the certification application (e.g., whether the application is a "raid"); the number of employees in the proposed bargaining unit; the number of persons excluded from the proposed unit; any issues which may be raised by the parties; and so on. The second component of the report is an employee or tentative voter list which is prepared where it appears that the union has the basic membership support required by the statute. The third and final component is a document which lists the names of the same employees and also indicates whether or not they have signed up as members of the trade union and, if so, the date of application. Additionally,

this list contains the IRO's calculation of the trade union's percentage membership support.

The third component of the IRO's report (i.e., the employee list which indicates membership support) is for the confidential use of the Board only. The other two components (together with any attachments to the standard form) are provided to the parties in advance of the certification hearing. It is the original panel's reliance on the confidential component of the report which is the subject of the Employer's request for leave.

The Employer's submissions rely on concepts of fair hearing and natural justice. However, under closer scrutiny, they take on the air of technicality. The parties knew at the time of the certification hearing both the number of employees said to be in the proposed bargaining unit, as well as the identity of those employees. The former was contained in the first component of the IRO's report; the latter was evident from the second component. Except for some suggestion during cross-examination that a number of persons on the list were supervisors, and should therefore be excluded from the unit, the Employer took no issue with persons who would be included in the proposed bargaining unit (see original decision at p. 13). Nor does the Employer raise any arguments at this stage that the list of employee names before the original panel was at all suspect or inaccurate. If the certification were cancelled, the Union could simply re-apply (using the same membership support), call the "evidence" which the Employer asserts was lacking, and obtain a new certification. It is accordingly questionable whether any practical utility would be served by granting leave: *Brinco, supra*, at p. 12.

The complete answer to the Employer's leave request is that it proceeds from an unduly restrictive and erroneous interpretation of Section 124(3) of the Code. That Section provides:

124. (3) Information relating to membership or any record that may disclose whether a person is or is not a member of a trade union produced in a proceeding before the board is for the exclusive use of the board and its representatives.

The confidential third component of the IRO report is similar to the "detail sheet" which has always been prepared in certification applications and kept confidential. The information contained in the document is necessary for the Board to make a determination as to whether the

trade union has the requisite percentage support for certification. The Employer argues that the only confidential information provided to the Board should be the names of persons who are members in good standing. The logical extension of this argument is that the Board would be precluded from receiving a confidential report which allows it to make a determination as to percentage support. Further, Section 124(3) expressly refers to "any record that may disclose whether a person is *or is not* a member of a trade union" (emphasis added). It is entirely consistent with this provision for a confidential report to be prepared which includes a list of all employees, and indicates whether they have *or have not* joined the union.

The Employer has failed to establish a "good arguable case" as required. Its request for leave to apply for reconsideration is therefore denied.

LABOUR RELATIONS BOARD

JOHN B. HALL
ASSOCIATE CHAIR (ADJUDICATION)