

BRITISH COLUMBIA LABOUR RELATIONS BOARD

FORDING COAL LIMITED

(the "Employer")

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL UNION
7884

(the "Union")

PANEL: John B. Hall, Vice-Chair
Mike Fleming, Vice-Chair
Gord Van Dyck, Vice-Chair

COUNSEL: Peter A. Gall, for the Employer
Michael J. Park, for the Union

CASE NO.: 41103

DATE OF DECISION: April 11, 2000

DECISION OF THE BOARD

I. OVERVIEW

1 This decision addresses the effect of a Board decision to either "set aside" an arbitration award or "remit" matters to an arbitrator under Section 99 of the *Labour Relations Code*.

2 The underlying facts are largely irrelevant to the legal issues. The Union grieved a one-day work assignment missed by an employee. There was no dispute the Employer had made an honest mistake and should have called the grievor instead of the next senior employee. The issue at arbitration was whether the grievor should be "made whole" by a monetary award (as sought by the Union) or should receive a "remedy in kind" of additional work (as proposed by the Employer). The issue was resolved in the Union's favour by Arbitrator James M. McIntyre, Q.C. in an award dated April 21, 1999 (Ministry No. A84/99).

3 The Employer applied to the Board for review. It argued the award was inconsistent with principles expressed or implied in the Code and additionally lacked a reasoned analysis. The Employer sought to have the award set aside and the matter referred to a new arbitration board.

4 The original panel of the Board allowed the Employer's application in part (see BCLRB No. B366/99). The panel was unable to determine the basis for certain conclusions stated by the Arbitrator, and was accordingly unable to determine whether the award complied with the principles of the Code. It decided to remit the matter back to the Arbitrator "in order to permit him to clarify the award" and "provide a reasoned analysis" (paras. 47 and 48).

5 The Employer now applies under Section 141 for an order varying the original panel's decision. It submits the original panel erred by failing to determine the award was inconsistent with principles of the Code, and by only remitting the matter to provide reasons in support of the initial award. The Employer argues the award should be set aside and the matters remitted to the Arbitrator to consider "afresh".

6 The Union opposes the application. It submits the original panel's directions were correct in the circumstances. The Union points to the word "or" in Section 99 (reproduced below), and argues the Board can only take one of the remedial steps listed in that provision when remedying a defective award. It says further that the Board can only remit "matters referred to it" back to an arbitration award; in this case, the matter was the Arbitrator's failure to provide a reasoned analysis.

II. REVIEW OF AUTHORITIES

7 None of the prior Board decisions cited by the parties squarely addressed the
issues raised by the present application.

8 The starting point for our deliberations is Section 99(1) of the Code:

99. (1) On application by a party affected by the decision or award of
an arbitration board, *the board may set aside the award, remit
the matters referred to it back to the arbitration board, stay the
proceedings before the arbitration board or substitute the
decision or award of the board for the decision or award of the
arbitration board*, on the ground that

- (a) a party to the arbitration has been or is likely to be
denied a fair hearing, or
- (b) the decision or award of the arbitration board is
inconsistent with the principles expressed or implied in
this Code or another Act dealing with labour relations.

9 We are not persuaded by the Union's submission that the Board may only grant
one of the specific remedies in this provision (e.g. it may set aside an award or remit
matters to an arbitration board). The Board additionally has jurisdiction under Section
134 of the Code to specify that certain conditions be observed or performed as part of
any decision. But it is unnecessary to dwell on this point in the present case for reasons
which will shortly become apparent.

10 The Board has no remedial authority when reviewing an arbitration award unless
one or both of the grounds in Section 99(1)(a) and (b) have been established. Some
decisions have held that the lack of a reasoned analysis renders an award inconsistent
with principles expressed or implied in the Code, because the arbitration board has not
carried out its statutory mandate in Section 82(2) to have regard to the real substance of
the matters in dispute and the respective merits of the parties' arguments: see *Drifter
Motor Hotel (Rupert Management Ltd.)*, BCLRB No. 29/78; and *Inland Natural Gas Co.
Ltd.*, BCLRB No. 136/86. Other decisions have equated the failure to explain the basis
for an award to a denial of a fair hearing: see *Lornex Mining Corporation Limited*,
BCLRB No. 96/76, [1977] 1 Can LRBR 377; and *Health Labour Relations Association
Health and Benefit Plan (Kelowna General Hospital)*, IRC No. C72/89. More recently in
Baker v. Canada (Minister of Citizenship and Immigration), [1999] S.C.J. No. 39, the
Supreme Court held that in certain circumstances, such as a statutory right of appeal,
the duty of procedural fairness will require the provision of a written explanation for a
decision (para. 43).

11 We need not resolve the foregoing debate. It may be that a lack of adequate
reasons provides grounds for review under both Section 99(1)(a) and (b). The

important point for present purposes is that an arbitration board's failure to provide a reasoned analysis triggers the Board's remedial authority under the Code.

12 The principle that parties are entitled to a reasoned analysis of the issues in dispute was first distilled in the *Drifter Motor Hotel* case:

Needless to say, however, there are some limitations upon the Board's inclination to make the sympathetic assumption that an arbitration board, after due consideration, has made the determinations necessary to support the conclusions reached in the award. Parties to an arbitration are entitled to expect a reasoned analysis of the issues before the arbitration board. If an account of that analysis is missing in the award and if the result of the award appears incongruous in light of the positions of the parties and the relevant terms of the governing collective agreement, it may be that the arbitration board has not discharged its statutory mandate. Arbitration is intended, after all, to provide a final and conclusive settlement of the dispute arising under the provisions of a collective agreement; the fulfilment of that purpose in some instances may mean that an expression of the arbitration board's analysis of certain issues is essential. ... (p. 9)

13 The panel in *Drifter* found it was unnecessary "to attempt any diagnosis of a minimum standard for the length and depth of the analysis to be contained in an arbitration award" for two reasons: first, the award under review concerned a dismissal grievance, and there was no indication the arbitration board had appreciated the procedural approach compelled by the Code and the *Wm. Scott* decision; and second, the award referred to discharge for "cause" and not the statute's standard of "just and reasonable cause" (the arbitration board's erroneous analysis was confirmed by its recommendation that the grievor received pay in lieu of notice).

14 We mention these two reasons because the actual basis for overturning the award in *Drifter*, and the context of the reasoned analysis test, have often been overlooked in subsequent cases. The decision did not represent an expansion of the Board's limited supervisory role over the arbitration process, and the panel expressly affirmed prior authorities such as *Simon Fraser University*, BCLRB No. 16/76, [1976] 2 Can LRBR 54; and *Lornex Mining Corporation Limited*, *supra*.

15 The Board has appropriately recognized that the nature of the arbitration process leading to the award under review will influence what constitutes sufficient reasons. An obvious example is expedited arbitration procedures. In *Government of the Province of British Columbia*, BCLRB No. B494/98, the panel held that a requirement for "full detailed reasons" would be inconsistent with the very nature of the process. Nonetheless, the award was referred back for clarification because the panel was unable to infer the arbitrator had considered the actual language of the collective agreement.

16 This brings us to the appropriate remedy where an arbitration award is found to lack a reasoned analysis. In past decisions, the Board has at different times set aside awards either in whole or in part; remitted matters either generally or on express terms; and directed some combination of both remedies. The parties' arguments in this case require us to be more precise about the Board's remedial authority.

17 Most authorities seem to agree that when an award is set aside the whole arbitration process is set aside with it, and the parties are returned to the beginning of the exercise. If the agreement to arbitrate is a general one, such as normally found in a collective agreement between a union and an employer, then the agreement to arbitrate subsists. The parties will select a new arbitrator and proceed as though there had not been a previous hearing. On the other hand, matters can be remitted for reconsideration, and the powers of an arbitrator (who would otherwise be *functus officio*) are revived by the order to remit. See *P.Z. Resort Systems Inc. v. Ian MacDonald Library Services Ltd.*, [1987] B.C.J. No. 1295 (C.A.), as well as *Passmore Lumber Co. Ltd. v. International Woodworkers of America, Local 1-405 et al* (1964), 64 CLLC ¶15,502 (B.C.S.C.).

18 The Court of Appeal's judgment in *P.Z. Resort Systems* was followed in *Powell River (District) v. Ready*, [1993] B.C.J. No. 384 (S.C.). In that case, the Industrial Relations Council had remitted a dispute to a consensual interest arbitration board and the employer sought to unilaterally revoke its agreement to arbitrate. The Court rejected the employer's position and held consent to arbitrate could only be revoked by agreement or operation of law. In the course of its reasoning, the Court confirmed the distinction between setting aside an award and directing an arbitration board to reconsider the matter (p. 5). It quoted from *P.Z. Resort Systems* and noted the interest arbitration award in question had not been set aside by the Council. Thus, the process had not become a nullity. The matter had been remitted to the arbitration board and its jurisdiction was "revived". See also *B.C.N.U. v. British Columbia (Labour Relations Board)*, (1995) 14 B.C.L.R. (3d) 363 (affirmed (1997) 33 B.C.L.R. (3d) 1), where the Supreme Court overturned the Board's decision "to order reconsideration as opposed to a new hearing" (para. 22). The Court of Appeal implicitly accepted that remitting a matter permits an arbitrator "to reach a fresh conclusion" (para 13).

19 This distinction between setting aside an award and remission fits comfortably in the labour relations context, and should guide the Board's use of its remedial powers under Section 99 of the Code. In some cases, the error committed by an arbitration board may be of sufficient magnitude to warrant setting aside the award (for example, a serious breach of the fair hearing standard). Setting aside the award means the whole arbitration process is rendered a nullity and the parties are returned to "square one". Unless the parties agree otherwise, they must appoint a new arbitration board and proceed as if there had not already been a hearing.

20 In other circumstances, such as a failure to consider an important piece of evidence or a key argument made by one of the parties, it may be more appropriate to remit the matter to the same arbitration board in order that it can carry out its statutory mandate. This will ensure the time and costs of the earlier proceeding are not lost, and

is consistent with the Code's premise that arbitration serve as an expeditious dispute resolution process: see *Simon Fraser University, supra*. Remitting the matter revives the arbitration board's jurisdiction, and provides it with authority to reconsider the matter. There is the potential for a different outcome based on the further evidence and/or argument not considered in the initial award.

21 That being said, an arbitration board's jurisdiction (and its ability to reach a different conclusion) will depend on what has been remitted. The Labour Relations Board may only remit "the matters referred to it [the Board] back to the arbitration board" as made plain by the opening words of Section 99(1). Remitting particular questions does not give rise to jurisdiction to consider anew the merits or other aspects of a grievance which have not been remitted: *Hub City Paving Ltd.*, BCLRB No. B71/85. The Board may also give directions which circumscribe an arbitration board's revived authority.

22 Where an award lacks a reasoned analysis because a critical component is missing, there should generally be a remission to the same arbitration board and it should be at liberty to consider "afresh" the matters which have been referred back. We agree with the Employer's point that an arbitration board cannot be directed to provide a reasoned analysis in support of a conclusion that may not be supportable after it has engaged in a reasoned analysis.

23 An example is *Howe Sound Pulp and Paper Limited*, BCLRB No. B169/94, where the Board remitted the issue of whether a grievor's conduct on a specific date constituted a culminating incident. The arbitrator had initially found cause for discipline and upheld the grievor's termination; however, she had failed to make a determination regarding certain evidence. After the matter was remitted and "a more thorough review of the evidence", the arbitrator concluded her original award had been in error and overturned the discharge. The Board dismissed the employer's argument that the arbitrator could not reverse her conclusion. It cited *Hub City Paving, supra*, and found the arbitrator had not exceeded her jurisdiction because her subsequent inquiry had been confined to the scope of the issue remitted.

24 Another instance of where the Board remitted matters for further consideration because the award lacked a reasoned analysis is *Board of School Trustees of School District No. 47 (Powell River)*, BCLRB No. B185/95. The arbitrator in that case had failed to address a key collective agreement provision in her reasons, and the panel was confident she would approach the case with "an open mind". See also *Inland Natural Gas Co. Ltd., supra*; and *Government of British Columbia, supra*, where the panel observed "[i]t may well be open to the Arbitrator to reach the same conclusion" (para. 15).

25 To summarize our analysis, the Board has jurisdiction under Section 99 of the Code to set aside an arbitration award, and to remit matters referred to it back to an arbitration board. Where the Board sets aside an award, the entire proceeding is a nullity and, in the absence of agreement, the parties must undertake a new arbitration. Where matters are remitted, the arbitration board's original powers are revived and it

may reconsider or complete the matters remitted to it in accordance with any directions given by the Board. So long as the arbitration board remains within the terms of its revived jurisdiction, it may reach a conclusion which differs from that found in the initial award.

III. THE PRESENT APPLICATION

26 One of the factors considered by the Arbitrator in deciding whether to grant a monetary award, or a remedy in kind, was whether employees can be assigned work outside the bargaining unit. The Arbitrator referred at several points to the earlier award in *Domtar Inc. -and- Communications, Energy and Paperworkers Union, Locals 212 and 338*, (unreported) April 3, 1997 (D. Lavery). The *Domtar* award held that work outside the bargaining unit is not acceptable for a remedy in kind. The Arbitrator here observed the result would be a true "Catch-22" for an employer if non-bargaining work is unacceptable purely because of that fact, and bargaining unit work is also unacceptable because by definition it must go by seniority. However, he later rejected the Employer's proposal for a remedy in kind because it was "a management assignment of work outside the [collective] agreement" (p. 7).

27 The Employer argued before the original panel that the Arbitrator's conclusion ran counter to jurisprudence permitting the assignment of non-bargaining unit work to employees where there is no prohibiting clause in the collective agreement. The panel agreed that terms of a collective agreement may prevent the assignment of non-bargaining unit work to employees, but certification and the simple existence of a collective agreement do not alone preclude such assignments; the actual provisions of the agreement must be interpreted to determine whether an assignment of non-bargaining unit work is permissible. The original panel then stated it was "unable to discern" the reasoning adopted by the Arbitrator. The panel considered the language found in several passages of the award, and concluded:

Given the construction of the Award, we are unable to determine the basis for the conclusions stated in the Award. *Accordingly, we are unable to determine whether the Award complies with the principles expressed or implied in the Code.*

We conclude that it is appropriate in the circumstances to remit this matter back to the Arbitrator in order to permit him to clarify the Award by setting out his reasoning with respect to the points noted above. ... (paras. 46-47)

28 We agree with the Employer's submission that the original panel was required to determine whether the Award complied with principles expressed or implied in the Code. The panel did not have jurisdiction to remit anything to the Arbitrator without reaching this conclusion (or finding that one party to the arbitration had been denied a fair hearing). However, we do not agree with the Employer's further submission that the award should be "set aside" and the matters remitted to the Arbitrator to provide a reasoned analysis "on all of the issues before him".

29 The parties' submissions on reconsideration primarily addressed the original panel's decision and, more specifically, the nature of the remission to the Arbitrator. Whether the award itself is inconsistent with principles of the Code was understandably addressed in only an indirect fashion (see *Empire Iron Works (B.C.) Ltd.*, BCLRB No. B134/97, at para. 16). While the written submissions of the parties in the Section 99 application are on the Board's file, we did not hear the submissions made orally at the hearing before the original panel. In short, one party would likely be denied a fair hearing if we proceeded at this stage to determine whether the award complies with the Code.

30 We have accordingly decided that the troubling aspect of the Arbitrator's award must be remitted to the original panel for further consideration. If the panel concludes it is inconsistent with the Code, and that remission continues to be appropriate, it should give directions regarding the precise scope and nature of the Arbitrator's revived jurisdiction, having regard to the principles set out above.

IV. CONCLUSION

31 The Employer's application for leave and reconsideration is granted in part. The original panel must determine whether the arbitration award under review complies with the requirements of the Code. If not, the original panel may exercise its remedial authority under Section 99 of the Code in a manner consistent with this decision.

LABOUR RELATIONS BOARD

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VICE-CHAIR

"MIKE FLEMING"

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