

LETTER DECISION
BCLRB No. B165/96
(Leave for Reconsideration of BCLRB No. B72/96)

May 16, 1996

To Interested Parties

Re: Re-Con Building Products Inc. (the "Employer") -and-
Cement, Lime & Gypsum Division of the International
Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths,
Forgers and Helpers, Local Lodge D400 (the "Union")
(Application for Certification - Case No. 29324)
(Application for Reconsideration - Case No. 29627)

(i) Nature of the Application

1 This is an application filed by the Employer under Section 141 of the *Labour Relations Code* for leave to apply for reconsideration of Letter Decision BCLRB No. B72/96. The original panel granted the Union's application for certification. The Employer argues the original panel was inconsistent with the principles expressed or implied in the Code and the jurisprudence thereunder.

2 The leave application states that the Employer reserves the right to make further argument, orally or in writing. The Board advised the Employer in accordance with the Labour Relations Board Rule 29(3) and *BC Gas Inc.*, BCLRB No. B339/93 (Leave for Reconsideration of BCLRB No. B293/93), that the Board's practice and procedure requires an applicant to submit its full application on the leave and the merits at the initial filing. The Employer was given until March 21 to make any further arguments. None were received. This decision is therefore based on the Employer's only submission received March 15, 1996.

(ii) The Original Decision

3 The parties agreed at the original hearing there were no improprieties alleged with respect to the certification application. The parties disagreed about the inclusion of 5 employees in the proposed bargaining unit of over 140 employees. Nevertheless, that issue did not affect the threshold requirements for certification under the Code. Hence, the parties agreed to attempt to resolve those issues.

4 The Employer argued before the original panel that the Board should order a vote under Section 24(1) of the Code to ascertain the true wishes of the employees as to whether they wished trade union representation. The Employer's alternate position was that the Board should order an investigation into the membership evidence. The Employer relied on the history of the Union's applications for certification for the bargaining unit in question (the "Bargaining Unit") in taking these positions.

5 The original panel set out the background to the certification application by quoting from an earlier decision between the parties (BCLRB No. B342/95) which read:

On August 11, 1995 the Union was automatically certified as the bargaining agent for all employees except office and sales staff employed by Re-Con Building Products Inc.

On August 15 and 16, 1995 the Board received numerous letters from employees indicating that they had not signed a Union membership card and inquiring whether their names were signed on cards received by the Board. The Board on its own motion initiated an investigation of the membership evidence relied on by the Union. The parties were notified of this investigation on August 18, 1995. On August 17, 1995 Certain Employees as well as the Employer called upon the Board to examine the membership evidence.

A Special Investigating Officer conducted an investigation of the membership evidence and sent a report to the parties on August 29, 1995 requesting submissions by September 1, 1995. This investigation found that many membership application cards did not coincide with the signatures on the petitions received by the Board. The Officer also found that through a random sampling of the remaining membership application cards checked against the personnel records, a number of signatures did not coincide. If the checked cards in both these situations were to be deleted the Union would not have met the threshold sufficient for a membership vote. (p.1)

The original panel then noted that decision indicated the Board was requested and did cancel the certification by agreement of the parties. Following that, the Union once again applied for certification. The disposition of that certification application was set out in the original decision, as follows:

On October 17, 1995 the Board dismissed the Union's second application for certification. The Board was unable to determine on the face of certain membership cards whether they had been signed within the required 90 day period. (see BCLRB No. B378/95, upheld on appeal BCLRB No. B35/96) (p.2)

6 The Employer's arguments in support of its position before the original panel were as follows:

The Employer argues that the Board should exercise its discretion under Section 24(1) and order a vote in view of the history of the previous applications. In particular, it points to the Union's first application for certification where it argues that "massive improprieties on an unprecedented scale were perpetrated". A vote, it argues is necessary to assure the employees of the integrity of the system. The Employer relies on *Dencan Restaurants Inc.*, BCLRB No. B255/93, (1993), 20 CLRBR (2d) 94, to argue where there is evidence which casts doubt on the reliability of membership cards, a vote should be ordered to "get a true index of the employee wishes".

The original panel then conducted an analysis of the Board's policy with respect to membership evidence in the context of the Employer's arguments and the history of the applications for certification. The original panel concluded there were no grounds for conducting a vote or a further investigation.

7 The following is a summary of the original panel's analysis on the Board's policy regarding membership evidence:

(a) The Board insists on a high degree of integrity with respect to the membership evidence submitted in support of an application for certification: *Dencan Restaurants Inc.*, BCLRB No. B255/93, (1993), 20 CLRBR (2d) 94.

(b) Where "reasonable doubt" is cast upon the integrity of membership evidence, the Board may order an investigation or vote.

(c) The action taken by the Board will depend on the seriousness of the allegations and the strength of the evidence presented.

The original panel then reviewed the evidence before it and compared it to the facts in *Dencan, supra*, and the events which occurred in the prior applications for certification of the Bargaining Unit.

8 The original panel found this was a new application for certification where the Union submitted all new cards six months after the initial application for certification. The panel noted the employees received notice of application for certification and were fully aware of the Board's process, as apparent from the decision in BCLRB No. B342/95. As well, the original panel pointed out the Union conducted its organizing campaign in a sensitized environment, and that no employee attended the hearing to indicate a concern with the application. Nor were there any employees who expressed concern in writing.

9 The original panel found no nexus between the prior applications and certification application before it. Thus, the original panel concluded that to accede to

the Employer's request for a vote or further investigation on the basis of suspicion or speculation defeated the legislative intent in Section 23 of the Code. Finally, the original panel confirmed it had carefully examined the membership evidence in the case before it and found that the Union had the requisite support for certification without a vote.

(iii) Grounds for Leave Application

10 The Employer bases its application for leave on the grounds that the original panel's decision is inconsistent with the principles expressed or implied in the Code and the jurisprudence of the Board. It says because of the unique history of the Union's organizing drive, the original panel erred in relying on the membership evidence presented as being representative of the employees' true wishes. The Employer also says that in relying on the membership evidence, despite the cloud of illegal or unethical conduct hanging over the organizing drive, the original panel failed to take the steps necessary to defend the integrity of the card-based membership system.

11 The Employer sets out at length the history of the applications for certification of the Bargaining Unit as background to its application. I need not repeat that background here, as it is set out in summary form at para. 5.

12 The Employer says the Board has a wide discretion to order a vote under Section 24(1) of the Code. It argues that the Board should have exercised that discretion in this case and says to have done so would have conformed with the purposes of the Code set out in Section 2(1)(a). Only with a secret ballot vote supervised by the Board, would the employees have had the opportunity to express their true wishes with respect to trade union membership.

13 Secondly, the Employer says the integrity of the card-based system can only be maintained where the Board is prepared to ensure the wishes of the employees are ascertained by the medium of a vote, once the certification process has been tainted. After setting out the Board's certification process, to which it notes the employer is prohibited from becoming involved, the Employer submits that in circumstances such as this case where there is an original taint, that fairness demands a vote.

14 As a result, the Employer argues the original panel should have exercised its discretion and ordered a vote in order to defend the integrity of the card-based membership system. It relies on *Dencan Restaurants Inc., supra*, for the proposition that the Board must insist on a high degree of integrity and precision in the cards presented to it as evidence of union membership. The Employer also refers to *Eagle Park Health Care Facility*, BCLRB No. B193/95, saying that an applicant union must act with a high degree of integrity with respect to the signing of the membership cards. The Union failed to act with a high degree of integrity with respect to the signing and submission of membership cards during its organization attempts. Thus, the Employer submits the scope of the original panel's analysis should not have been limited to the current application for certification but rather, the conduct of the Union throughout its

organization efforts should have been considered. It urges that the original panel's decision be held in abeyance and a vote ordered under Section 24(1) as a reassurance that the integrity of the card-based system is maintained.

(iv) Analysis and Decision

15 In order to be successful on an application for leave under Section 141, an applicant must demonstrate a good arguable case of sufficient merit that it may succeed on the established grounds for reconsideration set out in *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶¶16,043. There are three grounds on which the Board will reconsider an original decision:

(a) where "new evidence" has become available to a party, if the evidence could not have been earlier obtained through the exercise of reasonable diligence, and there is a strong probability that it will have a material and determinative effect on the decision;

(b) where the decision is said to be inconsistent with the principles expressed or implied in the Code, or in any other statute dealing with labour relations; and

(c) where the original panel is alleged to have acted contrary to principles of procedural fairness and natural justice.

The question to consider is whether the application raises arguments that suggest the original panel's decision is inconsistent with the principles of the Code, or that the law or policy of the Code was not properly interpreted by the original panel. The Board requires that a written application for leave must demonstrate a good arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration. The tests for leave requires that an applicant go beyond establishing a *prima facie* case, by raising a serious question as to the correctness of the original decision. Leave is rarely granted where a party is seeking to challenge a discretionary remedy. Further, the purpose for granting leave is not to hear arguments properly considered by an original panel.

16 As pointed out in the Employer's submission, the Board does have a wide discretion as to how it will deal with alleged improprieties in membership evidence. The action taken by the Board will depend on the seriousness of the allegations and the strength of the evidence: *Dencan Restaurants Inc., supra*. The parties agreed before the original panel that there were no improprieties with respect to the application for certification. Nevertheless, the Employer argued before the original panel that the improprieties from the previous application for certification needed to be considered because they created a taint over the present application for certification. The original

panel found no nexus between the prior applications and the certification application before it. In doing so, the original panel then exercised its discretion and determined it would not order a vote or further investigation.

17 The Employer takes the position that the original panel's decision was inconsistent with the principles of the Code, or that the law or policy of the Code was not properly interpreted. I have reviewed the original decision in detail and the grounds raised by the Employer for reconsideration. I am satisfied in making its application for leave that the Employer is merely quarrelling with the original panel's exercise of discretion and the decision rendered in respect of the vote and investigation. Furthermore, I am satisfied that the outcome and analysis in the original decision is consistent with the Code and current Board policy.

(v) Conclusion

18 The Employer's application for leave to apply for reconsideration is denied.

LABOUR RELATIONS BOARD

BARBARA J. JUNKER
VICE CHAIR

Interested Parties:

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