

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

PROFORM PRODUCTS CORP.

(the "Employer")

-and-

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

(the "Union")

PANEL:            A. Paul Devine, Vice-Chair

COUNSEL: Earl Phillips, for the Employer

John Bowman, for the Union

CASE NO.:            15371

DATES OF HEARING: June 15 and 16, 1993

DATE OF DECISION: July 8, 1993

## **DECISION OF THE BOARD**

### **I. INTRODUCTION**

This is an application by the Union under sections 6, 9, 45, and 61 of the *Labour Relations Code* alleging that the layoff of all of the members of the bargaining unit constituted an unfair labour practice, violated the "freeze" provisions of the *Labour Relations Code*, and constituted an illegal lockout. The Union alleges there has been a pattern of anti-union activity predating the Union's certification on February 9, 1993 which culminated in the total layoff of production staff contrary to the past practice of the Employer. The Union also alleges the decision to layoff the employees is in response to a recent strike vote of the employees.

The Employer acknowledges that it laid off all production employees in two stages during the month of May, 1993. The Employer submits it was not motivated by anti-union animus because the layoffs were a necessary response to business conditions.

The issues to be determined are whether the layoffs constituted either an unfair labour practice, a breach of the "freeze" provisions of the Code, or constituted an illegal lockout.

### **II. BACKGROUND**

The Employer's only witness was Peter Karesa, its General Manager and one of its shareholders. He testified that the Employer has been in the plastic manufacturing business since 1988. Its primary product is hard tops for Suzuki and Geo Tracker 4 Wheel Drive vehicles. The tops are marketed in Europe, Taiwan, the United States, and South America.

Karesa testified the manufacture of hard tops is seasonal. Business peaks in August and is slow between January and June. This usually results in layoffs of employees in January and February. Because of the seasonal nature of its business, the Employer took on the manufacture of hot tub shells for another company in 1990. It entered into a two year contract with the company to produce the shells. The contract expired in May 1992 and was not renewed. The

Employer found the volume of orders was too small and the number of models it had to manufacture was too large to make the venture economically viable.

Karesa testified the Employer was able to secure another contract to manufacture hot tub shells for a company which required a much higher volume. The Employer found this arrangement fit well with its production requirements. In addition, the Employer was able to use the cash generated from the manufacture of the hot tub shells to buy materials and produce a surplus of the four wheel drive hard tops. The Employer was then able to preload (presell) the hard tops in its European market. The Employer said it was unable to do this otherwise because its financing arrangements establish a sliding line of credit based upon current sales. It is therefore unable to use its line of credit to produce a large volume of hard tops which have not yet been sold.

The Employer serviced the new hot tub manufacturing contract throughout most of 1992. While there was a seasonal slowdown near the end of the year, it had assurances from the customer that it would renew the hot tub manufacturing contract again in 1993. Meanwhile, the Employer completed an unemployment insurance work share agreement with its employees in December 1992 and laid off twelve or thirteen employees at the end of January, 1993. At that time, the Employer still anticipated renewing its contract for the manufacture of the hot tub shells.

A second layoff occurred in February. The Employer attributed this to problems it had with an order of extruded sheet plastic it required to the manufacture the hard tops. In addition, as all of the hot tub shells were completed, it did not have the cash to produce hard tops to preload its European market.

On March 5, 1993, the Employer was told the hot tub contract would not be renewed. The Union was informed of this on March 8. Karesa testified he spoke to Roger Crowther, National Representative for the Union on or about April 27, and informed him that there would be further layoffs. Karesa proposed that the layoffs be out of seniority. Crowther resisted the proposal because of an agreement the Union had signed with the Employer earlier establishing a seniority list as part of a settlement of an unfair labour practice complaint.

Karesa said he determined after his meeting with Crowther that it would be inefficient to lay employees off by seniority. Instead, he kept employees working until they were no longer required and then laid them all off in two stages. The first layoff notice went out one week after the Employer learned that the Union had conducted a strike vote. Karesa testified that he advised the Union of the pending layoffs because it had requested that notice be given well in advance of planned layoffs. The plant is still shut down as the Employer uses up its current inventory.

Karesa denied the Union's accusation that the layoffs were, at least in part, related to the Union presence. Karesa said the first layoff occurred on January 25th before he knew that the Union was organizing. He said the decision to layoff had been made sometime before because employees had to agree to be involved in the work share agreement. He testified that the second layoff was unrelated to the certification. Instead, it related to the receipt of a defective shipment of extruded plastic which meant there was no work for some employees. The final layoff was unrelated to the strike vote. The parties remained in negotiations for a first collective agreement. Instead, the layoff was due to the lack of an anticipated market for hot tub shells and oversupply of hardtops. Karesa supplied extracts from the Employer's books to confirm the downturn in business this year compared to last year.

Crowther testified on behalf of the Union. He acknowledged that he was notified of the proposed layoffs on April 28th and informed the Employer then that they must be in the order of seniority. He acknowledged that the layoffs were not a bargaining item at the time. Crowther also acknowledged that he had requested the Employer give advance notice of any planned layoffs. Crowther said the Employer did not, however, advise that there would be a wholesale layoff of the bargaining unit.

### III. ARGUMENT

The Employer submits that it did not lay off its employees in May because of anti-union animus. It pointed to the unexpected collapse of the hot tub contract as the primary cause for the layoffs. Because of the loss of this business, it has no need for its hot tub employees. It also has no increased cash flow to purchase material to build extra hard tops.

Further, it says there is no past pattern of anti-union animus. The layoffs in February

were the result of faulty materials. The first layoff was seasonal and the job sharing arrangement had already been agreed to by the employees before the Union began organizing the Employer.

The Employer also submits that none of its actions breached the "freeze" provisions of the Code. It says that it had proper cause to layoff the employees in May 1993. The Employer submits that even if it had an anti-union animus, which it denies, there must be evidence of anti-union behaviour. That is, there must be a connection between its actions and its sentiment towards unions. The Employer submits there is no evidence of such action. The parties are in bargaining and are making progress towards a collective agreement.

Finally, the Employer says there is no evidence that it laid off employees in order to be in a bargaining advantage. Therefore, there is no evidence of an illegal lockout.

The Union submits there is a pattern of anti-union conduct. It points to the earlier unfair labour practices which were settled with the Employer. It says that the first layoff came within days of the Union's application for certification; the second after it issued notice to bargain. It says the present plant shutdown occurred a few days after the Union gave notice that it had taken a strike vote. The layoff of all employees is contrary to the Employer's past practice to lay off only part of the bargaining unit. Its historical practice has been to lay people off in January and February due to slow sales. It has not done so in May and June. Further, the Employer's financial records show that its situation is improving. The Union submits there are alternatives to the complete lay off of the employees but the Employer did not discuss these with the Union.

The Union submits that the Employer also breached the "freeze" provisions of the Code. It acknowledges that the test is business as before. Here, there is no past practice that all employees are laid off. The Employer should have sought permission before taking such an extensive action.

Finally, the Union points to the April 28th meeting between the Employer and the Union in which the Employer proposed to layoff employees out of seniority. The Union submits this is the bargaining concession that the Employer wanted. This action constituted an illegal layoff.

#### IV. ANALYSIS AND CONCLUSION

I will first address the Union's complaint that the Employer unlawfully locked out its employees. There is no evidence the Employer sought a concession in bargaining by the layoff of the employees. The Employer simply notified the Union of its intention to lay off the employees because the Union had requested early advice of such layoffs. When the Union would not accept the layoff out of seniority, the Employer proceeded in a different manner. It did not attempt to compel the Union to agree to anything in bargaining. The Employer's actions do not constitute a "lockout" as defined in the Code because it was not an action taken to compel its employees to agree to conditions of employment.

Concerning the unfair labour practice complaint, the onus is on the Employer to satisfy me, pursuant to section 14(7) of the Code, that it did not lay off the employees for anti-union reasons. Karesa testified about the business reasons which motivated the decision to layoff employees in the bargaining unit in May 1993. The Union called no evidence to contradict his explanation. The Union pointed to the evidence that the Employer did not lay off production employees in a similar manner previously. There was, however, no parallel to the Employer's situation this year compared with past years. The Employer has been in business for three years. Its loss of the hot tub manufacturing contract which it had in 1992 had domino effect which impacted upon its plans to manufacture sufficient hard tops to presell to its European market.

The documentary evidence subpoenaed by the Union confirms the downturn in the Employer's business consistently with the *viva voce* evidence of Karesa. I accept, based on all of that evidence, the Employer acted without the anti-union animus when it laid off its employees.

I deal finally with the complaint that the Employer is in breach of Section 45 of the Code because it altered a term or condition of employment by laying off its employees within the four months after the trade union was certified. The Employer submits that it had proper cause to lay off the employees and so complies with Section 45(4) of the Code.

The test for "proper" cause is similar to that developed in the common law; it is less strict than the arbitrable standard of "just and reasonable" cause (*Haebler Construction Ltd.*, B175/93). The Industrial Relations Council, interpreting a similar provision under Section 61 of the *Industrial Relations Act*, stated that the Employer must satisfy the "business as before test".

That is, during the four months following certification of the trade union, the Employer must conduct its business as it has in the past unless there are sufficient *bona fide* reasons for it to alter the prior practice (*Poco Pub Ltd.*, IRC No. C220/92, where the slowdown in the employer's business was a breach of the *Industrial Relations Act* because of an improper transfer of work).

In the present case, there is no consistent history of past practice. The Employer has laid off employees and entered into work sharing agreements when business is slow. Business was brisk in 1992 and layoffs were not required until near the end of the year. At that time, the Employer entered into a job sharing agreement with its employees as it had during prior layoffs.

The business reversals which occurred in 1993 were unplanned. As noted earlier, the layoffs were required by business conditions. The Employer's history was that it laid off employees when work was slow. That was the nature of "business as before".

A lack of work leading to a layoff of employees may constitute "proper" cause under Section 45 of the Code (*Accurate Rubber Products Ltd.*, BCLRB No. B109/93, where a shortage of work due to the loss of contracts by the employer justified the layoff of a junior employee). On the evidence before me, I am satisfied the Employer did not have work for its employees when it conducted layoffs in May, 1993. It satisfies the "proper" cause exception under Section 45 of the Code. The evidence, however, also confirms that current stock is being consumed by existing orders. I would expect the Employer to call back its employees soon or to provide the Union with a satisfactory explanation of any delay in resuming production.

For the reasons stated above, the Union's complaints are dismissed.

LABOUR RELATIONS BOARD

A. PAUL DEVINE  
VICE-CHAIR