

BRITISH COLUMBIA LABOUR RELATIONS BOARD

FLETCHER CHALLENGE CANADA LIMITED (CROFTON PULP AND PAPER
DIVISION)

("Fletcher")

-and-

THE PULP, PAPER AND WOODWORKERS OF CANADA, LOCAL NO. 2

("Local 2")

-and-

SKEENA CELLULOSE INC. (SKEENA PULP OPERATIONS)

("Skeena")

-and-

PULP, PAPER AND WOODWORKERS OF CANADA, LOCAL NO. 4

("Local 4")

PANEL: Stan Lanyon, Chair
Emily M. Burke, Vice-Chair
Suzan Beattie, Vice-Chair

COUNSEL: Thomas A. Roper and Sharleen L. Dumont, for Fletcher
Eugene Jamieson, for Local 2

Peter F. Parsons, for Skeena
Wayne Moore, for Local 4

CASE NOS.: 12790 and 12530

DATE OF DECISION: July 9, 1993

DECISION OF THE BOARD

I. INTRODUCTION

The Unions apply for reconsideration of *Fletcher Challenge Canada Limited*, IRC No. C128/92 and *Skeena Cellulose Inc.*, IRC No. C136/92. In each, the panel concluded the Unions and their members would be engaging in an unlawful strike by refusing maintenance work on a statutory holiday. The issues raised in the cases are essentially the same. Accordingly, this decision will deal with both cases.

II. TRANSITION

The *Labour Relations Code*, S.B.C. 1992, c.82, (Bill 84) came into force on January 18, 1993, pursuant to Section 176 of the Code and B.C. Regulation 6/93. Section 115(1) of the Code continues the Industrial Relations Council as the Labour Relations Board; Section 115(2) provides that all business pending before the Council shall be continued before the Board. Section 161 of the Code further provides that:

161. All applications, proceedings, actions and inquiries commenced under the *Industrial Relations Act* shall be continued to their conclusion and treated for all purposes under and in conformity with this Code so far as it may be done consistently with this Code.

As the provisions at issue in this application are to all intents and purposes the same in both statutes, the Panel is satisfied that this matter may be determined without further argument from the parties on this legislative change. See *Speed-Erect Foundations and Framing Systems Ltd.*, BCLRB No. B1/93.

III. BACKGROUND

A. Fletcher Challenge Canada Limited (Crofton Pulp and Paper Division) -and- The Pulp, Paper and Woodworkers of Canada, Local No. 2 - IRC No. C128/92

Fletcher Challenge applied under Sections 38 and 79(1) of the *Industrial Relations Act* for an anticipatory declaration that Local 2 and its members had declared an illegal strike by refusing to perform maintenance work scheduled for September 7, 1992, a statutory holiday.

The Employer scheduled maintenance work over the Labour Day weekend. Local 2 argued it was not obliged to do the maintenance work as the collective agreement provided both parties must agree before work can be done on a designated statutory holiday. Therefore, any refusal to do that work would not constitute an unlawful strike. This the Union argued, was a clear case of a right to refuse work under the collective agreement similar to that in *Pacific Press Limited*, BCLRB No. 171/86, (1987), 13 CLRBR (NS) 74 (reconsideration of BCLRB No. 140/85, dismissed).

The original panel disagreed. It distinguished *Pacific Press Limited, supra*, by concluding the collective agreement did not clearly and unambiguously permit the union to refuse to do the work in question. A decision on whether the impugned conduct did breach the collective agreement could only be made after an evidentiary hearing and an interpretation of the collective agreement. That being so, it was a matter for an arbitrator to determine whose interpretation is correct. The circumstances were not those where a refusal could be justified on the clear language of the agreement.

The panel noted Section 93(2) of the Act required the union members to "work now and grieve later". Although exceptions to that rule exist, the facts here did not fall within the recognized exceptions. Accordingly, the panel determined the activity contemplated by Local 2 and its members would constitute an unlawful strike and contravene Section 79 of the Act.

B. Skeena Cellulose Inc. (Skeena Pulp Operations) -and- Pulp, Paper and Woodworkers of Canada, Local 4 - IRC No. C136/92

Skeena Cellulose also applied under the Act for an anticipatory declaration that its members would engage in an illegal strike by refusing to perform certain repair work during the Labour Day weekend.

Local 4 argued the panel must first conclude the employees were required to perform the work under the collective agreement in order to determine the union and its members were engaging in an illegal strike. Local 4 maintained the collective agreement interpretation was a matter inextricably intertwined with the issue before the panel.

The original panel affirmed the principle in *Pacific Press, supra*, that a union, and its members do not engage in a strike by refusing to perform work which the employer has agreed is not required under the terms of the collective agreement. Where there is a dispute between the parties on the scope of that work, the panel concluded clear and unambiguous language in the collective agreement defining the scope of the work was necessary. Once an employer establishes the work requested is of a nature and kind normally performed by its employees, the onus shifts to the union to establish the collective agreement clearly and unambiguously exempts the employees from performing the work.

In this case, the panel could not conclude the work at issue was clearly outside the scope normally required. The panel noted the arbitration process could afford an adequate remedy if the work order was found invalid. Accordingly, the original panel determined the action of Local 4 and its members contravened Section 79 of the Act.

IV. ARGUMENT

The focus of the challenge to the interpretation of law and policy in *Fletcher Challenge Canada Limited, supra*, and *Skeena Cellulose Inc., supra*, by the Unions is to the "clear and unambiguous" test articulated in the decisions. The Unions argue the interpretation of the collective agreement was essential in order to properly adjudicate whether the employees' refusal

constituted a strike. The test effectively prevents the tribunal from making this determination and fetters its discretion.

The Unions maintain the policy of fostering the arbitral process articulated by the original panel, cannot overrule consideration of a factor relevant to a matter or issue which the tribunal must determine. Given the final and conclusive determination of the parties' legal rights and obligations under the Act, the Unions submit the original panel's refusal to determine an issue that is "necessarily incidental" to the matter before the tribunal is fundamentally flawed. (See *Nanaimo Times Ltd.*, (1983), 3 CLRBR (NS) 205.)

Local 4 also argues the standard of proof adopted in *Skeena Cellulose Inc.*, *supra*, renders illusory the principle of law in *Pacific Press*, *supra*. The standard as expressed demands virtual certainty. This effectively negates the availability of the defense of not being required to perform the work under the collective agreement. By necessary implication it repeals the substantive law of the statute as expressed in the *Pacific Press* line of cases.

In concluding its argument, Local 2 maintains if the proper test is the clear and unambiguous test, the panel made an error in determining the test had not been met. Local 2 also quarrels with the panel's decision to issue an anticipatory declaration. It argues the proper response was to defer the collective agreement issue and decline to make a substantive declaration. The employer failed to have the matter arbitrated in a timely manner. Where a party has long standing knowledge of the interpretation dispute between the parties and ample time between occasions when the dispute is likely to arise, the tribunal should exercise its discretion and refuse to provide the orders the employer might otherwise be entitled.

V. ANALYSIS

Our decision will be abbreviated. We agree with the reasoning set out in *Fletcher Challenge Canada Limited* and in particular the analysis contained in *Skeena Cellulose*, *supra*. We will deal with the main points raised by the Unions in their appeals.

The original panel in *Fletcher Challenge Canada Limited*, *supra*, concluded in order to

fall within the exceptions to the "work now, grieve later" rule, a refusal to work must be justified on the clear language of the agreement. The panel in *Skeena Cellulose Inc.*, *supra*, articulated the test to be applied in determining the clarity of the necessary language. The employer must establish the work requested was of a nature and kind normally performed by its employees. The onus then shifts to the union to establish the collective agreement clearly and unambiguously exempted the employees from performing the work. If the union cannot establish this, the activity in question will fall within the definition of strike.

The decision reached upon application of that test, involves a consideration of the merits of the case. It is not an inflexible application of a blanket rule. Accordingly, it does not result in a fettering of our discretion.

The Unions argue this analysis leads to a refusal to make an determination necessary to conclude whether the proposed activity is a "strike". The flaw in this argument however is its reliance on certain language in *Pacific Press*, *supra*, in isolation of the law and policy dictated by the *Industrial Relations Act*, now the *Labour Relations Code*. The law and policy dictates were set out by the original panels in both *Fletcher Challenge Canada Ltd.*, *supra*, and *Skeena Cellulose*, *supra*. A number of basic propositions are evident. The resolution of mid-contract disputes without stoppage of work is a cornerstone of the legislative scheme of the Act. As the *quid pro quo* for the prohibition of strike action, binding arbitration is statutorily in place to settle grievances (Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1989) at p. 91).

The appropriate response where a dispute exists between the parties over the collective agreement is to "work now, grieve later". The rationale for this scheme is set out by the original panel in *Skeena Cellulose*, *supra*, quoting Professor Shulman in *Ford Motor Company*, 3 L.A. 779. The workplace "is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. . .". Responsibility and authority for production is vested in management. As Shulman indicated, this is found to be fairly vested because the grievance procedure is capable of providing an adequate remedy for abuse of authority by supervision.

Exceptions to this policy exist. Employees may refuse to perform work which is unsafe

or unhealthy (Section 83(3)(a)). Refusal to work by reason of a non-affiliation clause in the construction industry is also permitted (Section 83(3)(b)). Sections 63(3)(a) and (b) of the Code presently reflect these exceptions with some changes not relevant to this case. Finally, as set out in *Pacific Press, supra*, employees may refuse to perform work which the parties have agreed is not within the scope of work as defined by the collective agreement.

In determining the scope of work, the original panels were cognizant of the strong Legislative mandate to resolve mid-contract disputes without stoppage of work. The policy contained in Section 93(2) [now Section 84(2)] is a policy of deference to arbitration. Through deference to arbitration, the Legislature indicates a preference for the resolution of disputes in a consensual forum. The test as developed by the Panel takes this into account. The standard set out by that test does not eliminate the principle in *Pacific Press, supra*, but rather places it in the context of the Act as a whole. Acceptance of the Unions' argument would render illusory the Legislative sanction of this policy. Without the standard and test as articulated by the original panels, unions and their members could resort to mid-contract work stoppages, seeking expedited interpretation of collective agreement disputes through the Board.

Both panels considered and concluded the arbitration process could afford an adequate remedy for the Union and its members if the work order was found to be invalid. Neither Union was effectively able to assail this conclusion. Where the arbitration process is not capable of providing an adequate remedy, a difference over the interpretation clause may give rise to an exception to the "work now, grieve later" principle. (See *Duke Point Development Limited*, [1980] 1 Can LRBR 221, at p. 237.)

Local 2 alternatively argued it had met the standard of "clear and ambiguous" right to refuse work. The original panel in *Fletcher Challenge* determined otherwise. It found a decision on this issue could only be made after an evidentiary hearing. This conclusion was made after hearing evidence and argument from the parties. In view of this, we do not find it appropriate to revisit that issue on appeal (see *Robinson Little*, BCLRB No. 32/75; [1975] 2 Can LRBR 81).

Local 2 quarrels with the panels decision to issue an anticipatory declaration in *Fletcher Challenge, supra*. We agree that where a party has long standing knowledge of an interpretation dispute, the tribunal may refuse to provide relief as requested by an employer. The parties must

take responsibility for the resolution of interpretative disputes. A judgement on this issue however is discretionary. We are satisfied the panel was cognizant of the equities before it. We see no reason to disturb its conclusion.

For all these reasons, the appeals by the Unions are dismissed.

LABOUR RELATIONS BOARD

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