

BRITISH COLUMBIA LABOUR RELATIONS BOARD

RISSLING CONTRACTORS LTD.

(the "Employer")

-and-

SERVICE WORKERS UNION OF BRITISH COLUMBIA,
LOCAL 99

("Local 99")

-and-

CONSTRUCTION AND GENERAL WORKERS' UNION,
LOCAL NO. 602

("Local 602")

PANEL: John B. Hall, Associate Chair
(Adjudication)
Laura Parkinson, Vice-Chair
Brent Mullin, Vice-Chair

COUNSEL: Michael W. Hunter, for the Employer
Gil Perron, for Local 99
Richard L. Edgar, for Local 602

CASE NO.: 29576

DATE OF DECISION: July 4, 1996

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employer applies under Section 141 of the *Labour Relations Code* for leave
to apply for reconsideration of an oral ruling made by Vice-Chair Barbara Junker on
March 19, 1996. That ruling related to the disclosure of the list of employee names in
an Industrial Relations Officer's report to Local 602 after it was granted interested party
status in Local 99's application for certification. The order for disclosure was held in
abeyance by Vice-Chair Junker pending the present leave for reconsideration
application.

2 As the Employer's application raises an important issue of first instance, we are
satisfied that the Employer has established a good arguable case which meets the test
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.
Leave is accordingly granted and we will deal with the arguments raised by the Employer
on the merits.

II. FACTS

3 The history of the relationships between Local 602, Local 99 and the Employer is
set out below.

4 In January 1996 Local 99 filed an application for certification for a wall-to-wall
unit of employees of the Employer. Local 99 also asserted the existence of a voluntary
recognition collective bargaining relationship with the Employer for approximately five
years, spanning the term of two successive collective agreements.

5 That application did not proceed directly to a hearing at the time of filing because
of other earlier applications that remained pending before the Board.

6 In February of 1996 another panel of the Board in reasons issued in *Rissling
Contractors Ltd.*, BCLRB No B45/96, found that a Letter of Understanding entered into
between the Employer and Local 602 in 1979 was a valid collective agreement that
remained in effect. That decision is currently under reconsideration in an application
brought by the Employer. The Letter of Understanding requires all persons performing
labourers' work to be members of Local 602 and for confirmation of their dispatch from
Local 602 to be made.

7 After issuance of BCLRB No. B45/96, a grievance was filed by Local 602
alleging that the Employer continued in its failure to hire Local 602 members for

labourers' work. The Employer has refused to meet to discuss that grievance and the matter has been referred to expedited arbitration under Section 104 of the Code.

8 On March 19, 1996 a hearing on Local 99's application for certification was convened. Local 602 attended that hearing; it sought and was granted interested party status. (An application by Local 99 for leave to apply for reconsideration of that granting of status was recently denied in reasons issued in *Rissling Contractors Ltd.*, BCLRB No B159/96.)

9 At the certification hearing, after Local 602 was granted standing, it sought production of the Officer's report which had already been provided to the Employer and Local 99. The Employer opposed the disclosure of portions of the report to Local 602. In particular, the Employer opposed the production of "Form A1" entitled "Employee or Tentative Voter List". This list contains the names of the employees in the wall-to-wall unit that is the subject of Local 99's application for certification.

10 The original panel ordered that the report which had been produced to the other two parties be disclosed to Local 602. After the ruling was provided, the Employer sought a further ruling that the disputed portion of the Voter List in the report not be produced to Local 602 until such time as its application for leave to apply for reconsideration could be heard.

11 The original panel granted that request on the condition that the application for leave for reconsideration be filed immediately.

12 At the certification hearing before Vice-Chair Junker, Local 602 advanced a number of objections to the merits of Local 99's certification application, including an objection to the trade union status of Local 99. Local 602 also took the position that Local 99 would not be able to demonstrate support in Local 602's craft unit of labourers as the labourers who are currently employed should not properly be included in the unit for which Local 99 had applied. Local 602 added that if the Employer had called out labourers from the hiring hall as it was required to do so under the Letter of Understanding, Local 602 members would be working for the Employer.

III. ARGUMENT

13 The Employer submits that the ruling of the original panel on the disclosure of the report is inconsistent with the principles of the Code, namely the confidentiality that is usually granted to employee names, employer payroll information and union membership status. The Employer also invokes, by way of analogy, the policy of the Board not to disclose the list of names of employees to even the applicant for certification unless the panel hearing the certification application is satisfied, based on the Officer's report, that the applicant has at least 45% support among the employees

in the unit: *Pan-Afric Holdings Ltd.*, BCLRB No. B151/93, p. 5. The Employer argues that to disclose the report in the circumstances of the present matter to an interested party which has no support in the unit would be to place Local 602, as an interested party, in a better position than even an applicant for certification with less than 45% membership support.

14 The Employer also argues that production of the report is unnecessary for Local 602's purposes. The Employer says the names of the employees are irrelevant to Local 602's objection to the status of Local 99 as a trade union. Disclosing the names of the employees in the bargaining unit also does not assist Local 602 in making its argument regarding support among the labourers' craft unit, based on *Cicuto and Sons Contractors Ltd. et al.*, IRC No. C271/88, (1988), 1 CLRBR (2d) 63 ("*Cicuto*"). The Employer is prepared to admit that if there were labourers employed, they were not hired from Local 602. Local 602 can make its *Cicuto* argument without the names of employees, because whoever they are, they are members of Local 99 and not members of Local 602. Local 602 does not need to know the name of an employee in order to determine that he or she was not dispatched from Local 602's hiring hall as it admits that none of them were. The Employer asserts that as the names are in reality irrelevant for Local 602's purposes, its true motive should be apparent in its desire to obtain the names so that Local 602 can attempt to organize those employees.

15 The Employer also raises the question of whether the Board should give notice to the employees that their names appear on the list to be given to the Union.

16 Local 602 argues that for the Board to withhold the list from it would be contrary to the principles of the Code and would amount to a denial of natural justice. Local 602 says the Employer's claim that Local 602 does not need the information to make its *Cicuto* argument begs the question. A party is entitled to full disclosure so that it can assess its case, make inquiries and present its case with the same knowledge of the details of the application as the other parties.

17 Local 602 also disputes the Employer's claim of a lack of necessity for production of this information. It says its objection based on the improper hiring of labourers is also based on that part of the *Cicuto* decision which makes a distinction between empty units and those which have employees in them. It submits it is entitled to disclosure to determine whether or not the individuals named on that list are engaged in the craft of labouring. It also asserts the right to question the number of employees to determine if the application meets the threshold requirements for support.

18 As for the issue raised by it in relation to Local 99's status as a trade union, Local 602 says the report should be produced so that it knows the identity of employees and so it may ask questions of those employees about the quality of representation or lack of representation that they received.

IV. ANALYSIS AND DECISION

19 The issue of disclosure of an Officer's report is now directly addressed in Section 124(2) of the Code which provides:

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.

20 In this case, the issue is whether Local 602 is entitled as of right to disclosure of the Officer's report upon being granted interested party status. A "party" is defined in Section 1 of the Code as a "person bound by a collective agreement or involved in a dispute". However, an entity may be a party only for particular purposes. While Section 140(n) of the Code allows the Board to add a party at any stage of the proceedings, the Board nevertheless retains a discretion as to the extent of participation permitted. Rule 8 provides that the Board may determine the extent to which a person added as an intervenor or a party shall be entitled to participate in a proceeding. Rule 16(1) also provides the Board with a discretion, except as required by Section 124(2) of the Code, to disclose such evidence and information to the parties in whole or in part as the Board considers appropriate. As a consequence of that discretion, party status alone may not dictate disclosure of a report if the issues upon which status is granted to an applicant do not require such disclosure.

21 The Employer asserts that the Board's usual practice is not to circulate an Officer's report on an application for certification to an applicant who has failed to receive the 45% threshold membership support. The Board's long-standing policy has been until such time as a union demonstrates threshold support, it is not entitled to disclosure of the employee list. Once the Officer has determined that the applicant has the requisite support the Officer will prepare an Employee or Tentative Voter list: *Venice Bakery Ltd.*, IRC No C219/89, at p. 5; *Helping Hands Services Ltd.*, IRC No C91/90 (Reconsideration of No. C7/90), (1990), 8 CLRBR (2d) 95 and *Pan-Afric, supra*. However, under the Board's normal practice, that list is not prepared for circulation to the parties where the Industrial Relations Officer's investigation determines that insufficient membership support has been obtained by the applicant for certification. In those circumstances, the requirements of Section 124 are not engaged as there has been no report prepared. Where such a list is not created, no issue of disclosure arises.

22 The reason for that practice is that the Board, and the Council before it, have always treated an employer's payroll records in a confidential manner. While the

decisions cited above were decided in the context of different legislation where there was no comparable language to that now found in Section 124(2), those decisions do set forth some of the labour relations considerations at play. The other perspective that acts as a counterpoint to these confidentiality concerns over disclosure of information contained in employer payroll records is the need to ensure a fair hearing. Section 126 of the Code permits the Board to determine its own practice and procedure, but directs the Board to give full opportunity to the parties to a proceeding to present evidence and make submissions. In certain circumstances, the need for disclosure to meet that obligation under Section 126 of the Code may outweigh the concern to protect the confidentiality of that information.

23 A tension may exist in some cases between the requirement to disclose an Officer's report to a party where necessary to ensure full participation and the need to preserve confidentiality of payroll information where possible or appropriate. In the exercise of our statutory mandate, we are charged with weighing these at times competing policy considerations.

24 In weighing the policy arguments for and against disclosure in the context of a request for production of the Officer's report by an interested party, we have determined that the appropriate response, given the variety of circumstances under which a report may be disclosed, is to deal with such requests on an issue-by-issue basis rather than with a uniform rule. As is the case with disclosure of any document, the Board will initially approach the disclosure of the Officer's report on the grounds of relevancy. The portions of the report which do not reveal confidential membership evidence will be disclosed if an issue is raised and disclosure is necessary to enable a party to advance its interests. However, if the report is not relevant to the issue and is not necessary to adjudicate the issue, production should be withheld. In this way, the potentially competing interests of disclosure and confidentiality can be accommodated and balanced as best possible. Ultimately, however, disclosure will be ordered if the report contains information relevant and necessary to the proper determination of an issue in the proceedings. We consider this approach to be consistent with Section 126 of the Code and also with the initiatives adopted by the Board in its case management process to narrow the proceedings as much as possible to those issues which are relevant and require adjudication.

25 Applying that issue-driven approach in these circumstances, we do not agree that production of the disputed portion of the report bearing the employees' names should be disclosed simply to provide Local 602 with a list of potential witnesses to interview to solicit evidence on its objection to the trade union status of Local 99.

26 As for Local 602's arguments based on the *Cicuto* decision, if, as implicitly appears to be the case, the Employer is conceding that there are labourers who were not hired from Local 602, that issue is a matter for legal argument only. That objection

can also be dealt with separately from the other issues as a discrete matter. If Local 602 wins on its arguments based on *Cicuto* that Local 99 is precluded in making its application for certification of a wall-to-wall unit, then no issue of disclosure need ever arise. However, if that is not the Employer's concession and there is an issue as to whether labourers have in fact been hired, disclosure may be required in order to allow Local 602 to test whether labourers have been employed so that the question of the effect of an empty unit under the *Cicuto* analysis can be considered.

27 However, on the remaining issues relating to the bargaining unit constituency and the levels of membership support, disclosure of the portion of the report bearing the names of the employees may be required in order for Local 602 to challenge whether Local 99 has established sufficient membership support to meet the threshold requirement of 45% for a representation vote or 55% for automatic certification. To withhold the report where such an objection is at issue may preclude the interested party from being able to respond to the bargaining unit constituency – membership support issue.

28 In answer to the Employer's query about the need to provide notice to the employees affected, we believe the Notice of Hearing posted at the worksite in relation to the original application for certification of Local 99 provides sufficient notice to the employees. We see a distinction between notice provided at the outset of a hearing upon the filing of an application and the need for a separate additional notice of a particular issue raised in the course of the proceedings. We consider the prior notice of the application provided to the employees to have met the obligation imposed on the Board to supply notice of the proceedings.

V. CONCLUSION

29 In summary, the Employer's reconsideration application succeeds to the extent noted above and we remit the issue back to the original panel. We affirm the wisdom of the original panel in holding actual disclosure of the report in abeyance pending the determination of this reconsideration application. We see that withholding of disclosure as continuing through until the first issue of the effect of the *Cicuto* decision is dealt with.

30 For the reasons canvassed above, on the assumption that the Employer has implicitly conceded that there were labourers employed other than through Local 602's hiring hall, we do not see that disclosure of the report is required to adjudicate that issue, if the evidentiary basis for the issue is in fact conceded. Nor do we see the objection raised by Local 602 on the status of Local 99 as a trade union as requiring disclosure of the report. However, if ultimately there remains a live issue between the parties as to the level of membership support obtained by Local 99, and the original

panel determines it is necessary to produce the report for that purpose, the report may be properly released to Local 602. We also leave it to the discretion of the original panel to make the determination on the scope of participation of Local 602 in the proceedings.

LABOUR RELATIONS BOARD

JOHN B. HALL
ASSOCIATE CHAIR (ADJUDICATION)

LAURA PARKINSON
VICE-CHAIR

BRENT MULLIN
VICE-CHAIR