

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SUPERIOR POULTRY PROCESSORS

(the "Employer")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL:	Michael Fleming, Vice-Chair
COUNSEL:	Shafik Bhalloo, for the Employer Theo Arsenault, for the Union
CASE NO.:	42880
DATES OF HEARING:	June 30, July 6, 2000
DATE OF DECISION:	July 14, 2000

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employer applies under Part 5 of the *Labour Relations Code* ("the Code")
2 seeking an order directing the Union to provide nine week's notice of strike in order to
3 ensure the preservation of perishable property.

4 The Employer also seeks an order permitting it to re-direct or deliver poultry in the
5 Employer's possession or control to a third party including other poultry processors, and
6 a further declaration that any such third party taking delivery of the re-directed poultry or
7 other perishable property is not an ally for the purposes of Section 65(4) of the Code.

II. BACKGROUND

8 Given the requirement that this application be dealt with on an expedited basis,
9 only those material facts necessary to this decision are set out below.

10 On October 22, 1999 the Union was certified to represent employees in the
11 bargaining unit. The parties entered into collective bargaining and, in March 2000, a
12 mediator from the Board's mediation division was appointed pursuant to Section 74 of
13 the Code to assist the parties to reach a first collective agreement. The parties were
14 unsuccessful in those efforts and the mediator booked out. This application was filed on
15 June 23, 2000 and on June 26, 2000 the Union filed 72 hour strike notice. On June 27,
16 2000 the Employer filed a Last Offer vote with the Board which was conducted on July
17 7, 2000 with the employees rejecting the offer.

18 The Employer is in the business of the slaughter, processing and provision of
19 fresh and frozen poultry to its retail customers. The industry as a whole is service
20 oriented and very competitive. It is made up of three major groups: hatcheries, growers
21 and processors, each of which is comprised of independent businesses and all of which
22 together form an integrated system designed for the growing and processing of poultry
23 for the retail market.

24 Bruce Arabsky, General Manager at the Employer's plant, testified that he
25 prepares projections of the number of live poultry required for processing by the
26 Employer on a weekly basis. Arabsky is also employed as a Manager of Pollon
27 Express Ltd. ("Pollon"). In that position he acts as agent of the Employer entering into
28 agreements with individual growers to provide a specified number of live birds for
29 processing at the Employer's plant. Based on that agreement the growers then place
30 an order for eggs from a hatchery which are then incubated for 21 days, until they
31 hatch. The chicks are then divided by sex, if required by the Employer. They are then
32 housed in barns for a period of six weeks, after which they are transported by Pollon to

the plant for slaughter. The barns are then cleaned and sterilized over a period of approximately four to seven days in preparation for the next batch of hatched chicks.

7 At a time specified by the Employer, medication is removed from the bird's feed and the grower is advised when the birds will be picked up for delivery to the plant for slaughter.

8 The growers enter into similar arrangements with all the processors in the industry.

9 Pollon transports the birds to the Employer's plant for slaughter and processing. Pollon also transports live poultry for a number of processors charging them all, including the Employer, a hauling fee for its services.

10 Arabsky acknowledged that if the Employer was to be closed for some reason, Pollon would remain in business, hauling for other processors.

11 Once the birds arrive at the plant, the Employer is unable to feed or water them. As they will begin to die after about four hours in the trucks, the Employer slaughters the birds within four hours of their arrival at the plant.

12 The Employer processes between approximately 180,000 to 250,000 birds on a weekly basis. The number fluctuates according to the season and the demands of the Employer's customers. The Employer's projection for slaughter through July and August is based on poultry arriving at the plant on a daily basis.

13 Birds are generally delivered at the plant on a daily basis and are usually slaughtered and processed through the plant by the end of the day.

14 At any given time there are between 3,000 to 5,000 birds in a water chilling plant and in various stages of processing at the plant. The Employer has limited cold storage capacity and most of this product is stored off site.

15 The processed birds have a shelf life of approximately ten days and the Employer's customers will likely refuse delivery if the product is not shipped within one to one and one-half days.

16 The Employer, through Pollon, also enters into agreements with growers for the provision of specialty birds. The special requirements to meet customer demand, results in the Employer providing much more direction to the grower in the growing and care of these birds.

17 The Employer pays the growers for the birds transported to its plant approximately seven days after they are slaughtered.

18 The Employer's processing system requires a specialized cage and transportation system which means the birds can only be unloaded at the Employer's plant and three other processors.

19 The birds cannot be returned to the grower once they have been delivered to the Employer's plant because by that point the barns have been sterilized and the incubation process is well underway for the next batch of chicks. In addition, the birds grow quickly and by the end of the six week growing cycle have begun to physically outgrow the available space in the barns.

20 Arabsky testified that once the incubation process commences, a grower cannot unilaterally sell or re-direct the birds because they belong to the Employer. He acknowledged that in the event the Employer refused or was unable to take delivery because of a labour dispute, it is likely the growers would initiate legal action for breach of contract. In addition, growers would likely be reluctant to take any more orders from the Employer in future.

21 He acknowledged the Employer's retail customers are free to buy processed birds from any processor and if the Employer's plant was closed due to a strike, those customers would likely decide to buy from another processor. He agreed that given the competitive nature of the industry, the Employer's services in the industry can be replaced.

22 He testified that, while it had never occurred, the Employer is able to sell or re-direct birds to whomever it chooses at any time during the growing cycle. However, he testified that the Employer has no knowledge of which other processors may have the capacity or be willing to take any birds the Employer may wish to re-direct. He said that in the event of a strike, a competitor could simply drop some of its customers and use its existing product to supply the Employer's customers, without having to take delivery of the Employer's birds to meet those needs.

III. ARGUMENT

23 The Employer argues that the definition of "perishable property" set out in Section 56 is not exhaustive and is broad enough to encompass live poultry which is liable to perish.

24 The Employer argues that neither Sections 56 nor 60(4) imports the concept of ownership, therefore the Employer is only required to establish the property is perishable and is not required to prove ownership in order for relief to be provided under Section 60(4).

25 The Employer argues further that Section 22 of the *Sale of Goods Act* establishes when a proprietary interest passes, and on the facts of this case, the Employer has an ownership or proprietary interest in the poultry from the point at which the eggs are placed in the incubation process, and is consequently entitled to the remedy sought in this application.

26 The Employer argues that, in the event of a strike, if birds are delivered to the plant, there is no evidence that other processors have either the willingness or the capacity to accommodate nine week's of supply. The Employer says it simply cannot

say with any certainty which, if any, of the other processors could or would take the product.

27 The Employer goes on to say that it doubts any other processors can accommodate the additional demand arising from its live poultry requiring processing. Even if they could, their interest lies in securing the business of the Employer's customers, which can likely be done without having to accept or process any of the Employer's live birds.

28 The Employer argues that if it were permitted to re-direct the live birds to other processors that might be willing to accept them, they could be prevented from spoiling.

29 The Employer says it chose not to call evidence from growers because of the expected negative economic impact on the Employer if growers learned the Employer was facing an imminent labour dispute. Similarly, no evidence was called from customers or other processors because that would likely result in an immediate and substantial loss of business.

30 Finally, the Employer says that while the Union argues that the live birds can always be re-directed to other processors in the event of a strike, the Union has not provided any evidence to establish that assertion particularly in the face of the Employer's evidence that other processors may not be able or willing to take the product.

IV. ANALYSIS AND DECISION

31 This is a case of first instance; therefore, this determination requires a brief examination of the purposes of Section 60(4) within the context of the principles and objectives of the Code.

32 The Code places certain restrictions on the use of strikes and lockouts so that a strike or lockout is only lawful once the conditions set out in Sections 59, 60 and 61 are met. At that point, the parties are permitted to engage in the use of economic sanctions up to and including strike/lockout to compel the other to agree to terms and conditions of a collective agreement.

33 Once the other requirements of Section 59 and 60 have been met, Section 60(3)(b)(iii) requires a union to provide 72 hour's notice of strike before engaging in job action. The purpose of that notice is to ensure an opportunity to take steps necessary to effect an orderly shutdown of operations before a strike commences.

34 Section 60(4) of the Code reads as follows:

Despite subsection (3) (b) (iii), the board may direct a trade union to give more than 72 hour's notice of a strike, on application or on its own motion, for the protection of

(a) perishable property, or

- (b) other property or persons affected by perishable property.

35 Section 56 reads as follows:

In this Part "perishable property" includes property that

- (a) is imminently subject to spoilage, or
- (b) may imminently become dangerous to life, health or other property.

36 There is a requirement for evidence establishing with reasonable certainty that the property will perish imminently.

37 The purpose of Section 60(4) is to give the Board the discretion to extend the notice period in order to permit an employer to take steps necessary to preserve property, which is in danger of imminent spoilage because of the labour dispute. Section 60(4) is intended to provide the Board with the discretion to deal with extraordinary circumstances. The exercise of that discretion must be approached having regard to and in furtherance of the purposes of the Code set out in Section 2(1).

38 One of the fundamental purposes of the Code is to facilitate the practice and procedures of bargaining. An essential feature of the collective bargaining process is that parties may, once the requirements of the Code have been met, engage in economic sanctions aimed at forcing the other party to agree to terms and conditions of a collective agreement.

39 An applicant seeking relief under Section 60(4) is required to persuade the Board, on the basis of clear and cogent evidence, that the 72 hour notice of strike is insufficient to ensure the preservation of property which will spoil imminently.

40 In this case, the Union has fulfilled its obligations under Sections 59 and 60 of the Code and has now met the final requirement of filing 72 hour's notice of strike. The Union is therefore in a lawful position to engage in a strike aimed at forcing the Employer to enter into a collective agreement. That right is fundamental to the Code's collective bargaining scheme. Any intrusion into its exercise potentially alters the status quo and the relative balance of power between the parties. Any relief provided by the Board must reflect a measured response so as to ensure a balance is achieved, preserving the Union's ability to engage in economic sanctions while ensuring the preservation of perishable property.

41 I am satisfied, and the Union did not seriously assert a position to the contrary, that once live poultry arrives at the Employer's plant, it must be processed within four hours or it will die. I am satisfied that once the poultry leaves the grower's barn to be transported to the Employer's plant it is perishable.

42 The Employer argues that live poultry will be delivered to the plant, on a frequent and regular basis over the nine week growing cycle, resulting in the existence of

perishable property on a recurring basis which requires the relief sought in this application.

43 In my view, the nine week extension sought by the Employer would *prima facie* upset the status quo by significantly impairing the Union's ability to apply economic sanctions, while permitting the Employer to continue operating through a busy season of the year and thereby process its entire product existing in the system, over the nine week growing cycle.

44 I am not persuaded that the potential loss of business or potential legal liability faced by the Employer are relevant considerations to the matter before me. Rather, the focus of the determination of whether the 72 hour strike notice is to be extended under Section 60(4) is on the necessity of extending the notice in order to permit the employer to undertake concrete steps to avoid the spoilage, in this case death, of the perishable property.

45 The Employer in this case acknowledged that the reason growers could not sell or re-direct birds currently being grown for processing at the Employer's plant to another processor is because those birds belong to the Employer.

46 In my view, the issue of the actual ownership of the birds does not make a material difference. Ownership is encumbered by the agreement between the growers and the Employer. By virtue of their agreement the growers have no authority to market the birds to any processor other than the Employer and the Employer must take delivery of them from the growers.

47 In the absence of evidence to the contrary, a reasonably drawn inference is that those parties could release each other from their mutual obligations so as to permit the re-sale or re-direction of the birds to other processors.

48 There is no evidence of any concrete steps taken by the Employer to cause the live poultry currently in the growing cycle to be preserved by, for example, seeking to enter into arrangements to have it re-directed, resold or otherwise preserved in some fashion.

49 Based on the evidence, the reasonably drawn inference is that the Employer has taken no substantive steps to ensure alternatives to its processing of the live poultry. The Employer's assertions regarding the possible lack of capacity of other processors is based on speculation and provides no basis for the extraordinary relief sought in this case.

50 In the absence of clear and cogent evidence, there is no basis upon which to conclude that the Employer's services cannot be replaced such that the continuation of the Employer's operation is the only viable alternative to prevent the spoilage or death of its live poultry.

51 Accordingly, I decline to grant an order extending the strike notice for a period of nine weeks.

52 Under the circumstances, I am satisfied that poultry and processed birds already at the Employer's plant, as well as birds which are in transport to the plant, are perishable within the meaning of Section 56. I am persuaded there are no viable alternative measures that can be taken to prevent spoilage and consequently it is appropriate that the strike notice be extended for an additional 72 hours to clear those birds through the plant. If the Union does not engage in strike action at the end of that period, the Union will not engage in any strike action that would result in the spoilage of the product prior to the provision of 48 hours notice to the Employer, to permit any poultry at the Employer's plant or in transit to the plant, to be processed and shipped.

53 Turning to the Employer's application for a declaration that any processor who may agree to take delivery of live birds is not an ally, I begin by noting that Section 65(4) is designed to prevent a third party from changing its way of doing business so as to assist a struck employer to avoid the effects of lawful picketing.

54 Where an employer's operation is shut down by virtue of lawful picketing, its suppliers are able to take steps to reduce the impact of that work stoppage on their business. They may perform the work themselves or find alternative buyers for the product. Actions of that nature would not generally assist a struck employer and in fact may cause the struck employer to be more amenable to entering into a collective agreement: see *Fletcher Challenge Canada Limited*, BCLRB No. B303/94.

55 The extent to which the prohibition under Section 65(4) will extend to a situation where an employer or other party is obliged to make arrangements of an ongoing nature with a third party to take delivery of perishable property during a labour dispute will require an examination of the nature of the work performed, the financial arrangements between the parties, etc.

56 In this case, there is no evidence of any actual negotiations or arrangements reached between the Employer and any third party processor. What the Employer seeks is an anticipatory or declaratory opinion. In the normal course, facts must have sufficiently crystallized to engage in that exercise. If facts are uncertain or subject to change, a declaration may prove useless. If an opinion is granted, and the facts are subject to change, either deliberately or through unanticipated developments, there will be considerable incentive for parties to engage in future litigation negating any benefit from an anticipatory declaration in the first place.

57 In this case, in the absence of any evidence of specific arrangements entered into or even contemplated, there is no basis to grant a blanket order of the type sought by the Employer. Even if I were persuaded to do so, it would be of little practical use because the specific arrangements entered into by the Employer would be open to challenge under Section 65(4).

58 The Employer appears to be seeking the order to permit it to enter into negotiations with a third party. Without knowledge as to the nature of the arrangements which may ultimately be entered into, there is no way of determining whether they fall within the prohibition under Section 65(4).

59 The issue which is likely to arise in any such arrangement will be the extent to which the processing of live poultry by a third party results in financial assistance to the Employer so as to directly assist the Employer in resisting a strike. In my view, without deciding the issue in advance of any crystallized facts, the more an arrangement has as its focus the prevention of the destruction of live birds and the less it is of direct financial benefit to the Employer, the more likely the third party will not be found to be an ally.

60 While I appreciate the need for concrete steps to be taken aimed at ensuring live poultry does not perish without being processed, I am unable to grant the relief sought in the absence of evidence regarding the specific arrangements entered into.

61 The Board processes Part 5 applications expeditiously. Under Rule 27 the Board will normally hear a Part 5 application 24 hours after service on the Respondent unless an expedited hearing is requested. The Board's concern to ensure an expeditious approach will be more pronounced where perishable goods are involved.

V. CONCLUSION

62 The application under Section 60(4) is granted in part. Notice of strike is extended for a period of 72 hours to permit the Employer to process birds at the plant or in transit to the plant. If at the end of that period the Union does not engage in strike action at the plant, the Union will not engage in any strike action that would result in the spoilage of the product prior to the provision of 48 hours notice to the Employer, to permit any poultry at the plant or in transit to it, to be processed and shipped.

63 The application seeking a declaration that any third party taking delivery of live poultry not be subject to Section 65(4) is dismissed.

LABOUR RELATIONS BOARD



MICHAEL FLEMING
VICE-CHAIR