

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

MICHAEL ANDERSON DECORATING LTD.

("Anderson" or the "Employer")

-and-

INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES,  
LOCALS NOS. 138 and 1163

(the "Union")

PANEL:Emily M. Burke, Vice-Chair

COUNSEL:Aiyaz Alibhi, for Anderson

Maureen Headley, for the Union

CASE NOS.:15054 and 15059

DATE OF HEARING: August 17, 1993

DATE OF DECISION: August 26, 1993

## **DECISION OF THE BOARD**

### **I. INTRODUCTION**

On January 20, 1993, the Labour Relations Board received an application from Certain Employees of Anderson under Section 34 of the *Labour Relations Code* to cancel the collective agreement held by the Union for a unit of employees employed by Anderson. A representation vote was held on January 29, 1993. On April 14, 1993, the Board considered the results of that vote and granted the application.

On April 29, 1993, the Union applied, under Section 141(2)(a), for reconsideration of that decision. Evidence previously unavailable to the Union at the time of the original decision, had come to light. In addition, the Union filed an unfair labour practice complaint under Sections 4, 6 and 9 against the Employer on the basis of this new evidence. The Employer filed extensive submissions opposing both applications. This decision deals with the Union's application under Section 141 and its unfair labour practice complaint.

Due to the likely overlap in evidence, the Panel conducted a hearing with respect to both applications. Just prior to the hearing, counsel for the Employer wrote advising the Board the Employer had ceased to operate in British Columbia. That submission argued the matter was now academic but counsel concluded by noting he was no longer retained by the Employer in this matter.

On the date of the hearing, Kelly Ford, an employee originally opposed to the Union's application withdrew both his opposition and his affidavit filed prior to the hearing. Ford also advised he did not object to the affidavit of John Spink dated April 27, 1993 and filed on April 29, 1993. The Employer did not attend the hearing. An Officer of the Board contacted the Employer to ascertain whether the Employer intended to appear. A message was received by counsel for the Employer advising that Anderson would not be attending the hearing as he had moved his company to Alberta. The case then proceeded to a hearing.

## II. BACKGROUND

Anderson is a painting and decorating company. A collective agreement was signed between Anderson and the Union for a three year term, commencing May 1992 to April 30, 1995.

John Spink, a painter previously employed by Anderson, testified on behalf of the Union. Spink had worked for Anderson for close to two years. In the fall of 1992, Spink and Ford were the only employees working for Anderson. Anderson approached Spink and suggested the employees consider decertification or Anderson would be forced to shut its doors. Anderson offered to split every job three ways, less his finder's fee, supplies and office costs. Spink and Ford would only be paid for thirty seven and a half hours per week. The Union would not become aware other employees were needed, which would ultimately affect the decertification application. Spink and Ford would be paid the money owing after the decertification went through. Spink accepted this offer. He was afraid of losing his job and was in difficult financial straits.

A letter requesting decertification drafted by Anderson, and signed by Spink in Anderson's office, was filed with the Industrial Relations Council. Included in that letter was a statement that Anderson had agreed to continue to pay the employees the same wages and benefits previously paid under the collective agreement. Shortly thereafter, Anderson told Spink he had been in contact with his lawyer, who advised that the application should be withdrawn. Anderson told Spink he was concerned the letter, as drafted, might implicate him. He advised Spink to refile the application once the new Labour Code was proclaimed. As a result, Spink withdrew the first application and filed a second after the new Labour Code had been proclaimed.

Meanwhile, Spink and Ford were regularly working over 45 to 50 hours per week for Anderson. Once the decertification application was successful, Spink and Ford were to be compensated on the basis of the original agreement with Anderson. Additional workers were hired by Anderson to work on a number of sites. These workers were not hired through the Union hiring hall. They were not on the payroll and not reported to the Union.

An informal hearing was held by the Board on April 6, 1993. At this time, Spink did not reveal any of this information. The Union withdrew its objection to the application having no evidence contrary to that supplied by the Employer. The application to revoke collective bargaining rights was granted by the Board on April 14, 1993.

Shortly thereafter, Anderson paid both Spink and Ford \$2,000. Spink was of the view however that he was owed between \$5,000 and \$6,000. As a result, on April 27, he approached Anderson regarding his failure to pay. A heated argument took place, at the conclusion of which Spink was fired. He has been unable to find work until quite recently. He now has a temporary position as a labourer.

Lorne McCrae, Business Agent for the Union, testified that once the Union was advised of the application in January 1993, it contacted the employees of Anderson and checked the records the Employer had submitted to the Union office. These indicated two employees working for Anderson with standard deductions. In addition, the Union visited a work site prior to the April hearing. As a result, the Union became aware of two other individuals working on the site. The Union was advised by the individuals, they were working for the Chateau Granville on a Chateau Granville work site. This was confirmed by the Chateau Granville at the time. The Union was unaware of any other work site of Anderson. These investigations all took place before the hearing scheduled for April 6, 1993.

The Union did not discover its information was incorrect until after the application revoking bargaining rights was granted. Shortly thereafter, Spink met with McCrae and advised of the Employer's involvement in the application. Spink admitted he had agreed to the deal to secure his livelihood. In addition, Spink provided information that individuals working on other sites had been hired by Anderson. After this discussion, McCrae arranged for Spink to meet with a lawyer. On April 27, 1993 Spink signed an affidavit outlining this information. On April 29, 1993, the appeal and unfair labour practice applications were filed by the Union in this matter. Both relied on information concerning the involvement of the Employer in the revocation application and the hiring of additional employees.

### III. ARGUMENT

The Union maintains sufficient grounds exist for reconsideration to be granted under Section 141(2)(a) on the basis evidence not available at the time of the original decision has become available (see *Brinco Coal Mining Corporation*, BCLRB No. B74/93). That evidence was material and determinative of the initial application. The number of employees on the voting list was incorrect and the vote was tainted by unfair labour practices.

The Employer initiated discussions with the employees. He told the employees an application for decertification should be made or he would close up operations. This, in and of itself, is intimidation and coercion. Anderson offered money to the employees in exchange for participation in this decertification process. After the application was successful, he paid each employee \$2,000. Anderson counselled and instructed the employees in the progress of the decertification. He deliberately misinformed the Union with respect to the hours worked and the number of employees employed by him. Only two employees were on the list because of an active plan by the Employer to deceive the Board.

This evidence was unavailable to the Union at the time of the hearing. The Union checked its records, investigated the work site; checked with the employees and with third parties. The Union did everything reasonable to review this matter. Once the Union was advised of the true facts, it immediately filed the appeal.

The Union also maintains it has established a breach of Sections 6 and 9 of the Code by the Employer. The Employer made offers of economic reward to two employees who were financially vulnerable. It then terminated Spink once the decertification was complete.

Despite appropriate notice, the Employer did not attend the hearing. In written submissions filed in response to the Union's application, the Employer argued the application under Section 141 did not satisfy the requirements for introduction of new evidence. The evidence was available at the time of the hearing, and could have been obtained through the exercise of reasonable diligence. The Employer also argued the Union's allegations under Sections 4, 6 and 9 of the Code were barred under the doctrine of *res judicata*.

IV. ANALYSIS AND DECISION

Section 141 of the Code provides that leave to apply for reconsideration may be granted if the party applying for leave satisfies the Board that evidence not available at the time of the original decision has become available. The Board dealt with this issue in *Brinco Coal Mining Corporation, supra*:

It is not necessary to show under subsection (2)(a) that the evidence came into existence after the original decision. However, a party seeking to introduce new evidence on reconsideration must satisfy the Board that the evidence was not available to it at the time of the original hearing, and could not have been earlier obtained through the exercise of reasonable diligence: *Lowell More et al*, BCLRB No. 426/83 (Reconsideration of BCLRB No. 14/83). Parties are expected to devote due care and effort to the preparation and presentation of their cases. Further, new evidence must be brought forward at the earliest practical opportunity; there must also be a strong probability that it will have a material and determinative effect on the original decision. Finally, Rule 29(2) requires verification by statutory declaration. Only in these circumstances will a decision be reconsidered on the basis of evidence having become available. (p. 9)

These conditions are relatively straightforward. I am satisfied, first, the evidence was not available to the Union at the time of the original hearing. The information concerned an arrangement between an Employer and employee to defeat bargaining rights of the Union. The Union was not privy to nor aware of this matter. The Union exercised reasonable diligence in considering the issues raised by the original application. Not only did it interview the employees, search its records, visit work sites, it also discussed the matter briefly with third parties, i.e., the Chateau Granville. I find, therefore, that the Union devoted due care and effort in the preparation and presentation of its case. The information could not have been obtained through the exercise of reasonable diligence. The allegations of new evidence were filed with the Board at the earliest opportunity. The Union was advised of this information sometime after the application was granted on April 14, 1993. The reconsideration application was filed by April 29, 1993. The new evidence has a material and determinative effect on the original decision.

The evidence establishes that at the time of the original application, the Employer induced its employees to file an application for decertification on the promise of monetary benefit. In addition, the Employer counselled the employees with respect to that application, both with respect to the initial filing of the application, subsequent withdrawal and filing of the new application under the auspices of the Code. This conduct clearly establishes an unfair labour practice committed by the Employer. The Employer was aware of these specific allegations detailed in a statutory declaration of Spink filed on April 29, 1993. The Employer chose not to attend the hearing, despite notice.

The Employer also argues this matter is *res judicata*. The Union is not entitled to split its case. I note, however, that Section 141 specifically allows for a matter to be reconsidered on the basis of new evidence. The protection against splitting a case is provided in the conditions upon which that new evidence can be admitted, in particular the requirement that the new evidence not be available to the party at the time of the original hearing. That condition has been satisfied in this case. I note further, the termination of Spink occurred after the application was granted. Evidence of that event in conjunction with the participation of the Employer in the decertification establishes the termination was tainted by a pattern of behaviour evincing clear interference with the Union rights. The Employer, once again, chose not to address this issue in the hearing.

Finally, the Employer argued the matter was academic and moot, as it had ceased operating in British Columbia. Nothing before me substantiates this allegation. That argument is summarily dismissed.

The Union's application under Section 141 is granted. The decision revoking its bargaining rights is quashed and the collective agreement in place between Anderson and the Union is restored. In addition, the Union's application under Sections 6 and 9 is granted. The evidence before me established both an unfair labour practice with respect to the decertification and the termination of Spink. The actions of the Employer are in breach of Sections 4, 6 and 9 of the Code. Accordingly, I order that Spink be reinstated with full back pay and benefits.

With respect to the request for punitive damages, I note remedies awarded must be compensatory and not punitive (see *Fritz Steisslinger*, IRC No. C231/91, and *Roberta Scott and Ronald Scott (Target Resources)*, IRC No. C169/92). Accordingly, this request is denied. The Union's applications under Section 141, and Sections 4, 6 and 9 are however granted.

LABOUR RELATIONS BOARD

EMILY M. BURKE  
VICE-CHAIR