

BRITISH COLUMBIA LABOUR RELATIONS BOARD

ELKVIEW COAL CORPORATION
(a subsidiary of Teck Corporation)
(the "Employer" or "Elkview Coal")

-and-

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2952
(the "Steelworkers")

-and-

UNITED MINE WORKERS OF AMERICA INTERNATIONAL UNION, LOCAL 1996
(the "Mine Workers")

PANEL: Emily M. Burke, Vice-Chair

COUNSEL: Gavin H.G. Hume, for Elkview Coal
Arnold P. Berry, for the Steelworkers
Gwen H.G. Randall, Q.C., for the Mine Workers

Colin G.M. Gibson, for Certain Employees

CASE NOS.: 16146 and 16183

DATE OF DECISION: August 31, 1993

DECISION OF THE BOARD

I. BACKGROUND

On August 6, 1993 the Steelworkers applied to be certified for a unit of production and maintenance employees employed by Elkview Coal near Sparwood, British Columbia. On August 9, a notice sent to the parties indicated the Labour Relations Board would conduct a hearing into the application on Friday, August 13 at 9:30 a.m. Labour Relations Board Rules 15 and 24 require the Employer to post a copy of the notice in a conspicuous place at the business premises for five consecutive working days so that the employees affected by the application can see the notice. That notice was posted by the Employer on August 9, 1993.

On August 13, 1993, just prior to the hearing the United Mine Workers of America, Local 1996 filed a competing application for certification as bargaining agent for the same unit of employees. The Mine Workers sought standing at the hearing on the basis of its application in which it claimed to have over 45% employee support. The Steelworkers and Elkview Coal did not object to this request provided the Board was satisfied the Mine Workers had the requisite membership support.

As a result, an Industrial Relations Officer with the Ministry of Labour reviewed the cards filed by the Mine Workers to ensure the requisite membership support was present. After conversations with the Officer, the parties agreed a vote should be ordered in this matter. The Board was left to adjudicate the content of the ballot. The hearing reconvened to deal with this issue. The Employer argued the vote should proceed with two questions on separate ballots. The employees should first answer the question of whether they wished to be represented by a union. The second question should be which union the employees wished to be represented by.

For the purpose of argument on this point, the Employer relied on facts agreed to between the parties. Elkview Coal opened the mine in April 1993. Shortly thereafter, the Steelworkers commenced an organizing drive. On June 22, 1993 the Mine Workers Local 7292 applied for certification. Notice of that application was posted at the workplace on June 23. As a result, some employees protested that they had maintained membership in Local 7292 to protect the

pension plan. On June 29, Local 7292 applied to withdraw its application. The Board granted that request on July 5.

Meanwhile, the Steelworkers continued its organizing drive and filed this application for certification on August 6. Local 1996, a new local of the Mine Workers was created and filed a competing application on August 13.

The Employer was advised a number of employees signed Steelworker cards to block the initial application by Local 7292. The Employer then said some employees signed the present Mine Worker cards to block the Steelworkers' application. Accordingly, the Employer argued the true wishes of the employees was not properly reflected by the cards as filed. Some employees signed to block rather than to apply for certification. In order to accurately reflect the employee wishes, a representation vote should be ordered which provides for a no-union option. A vote would remove uncertainty. Both the Steelworkers and the Mine Workers opposed this position.

Shortly after the conclusion of argument I delivered an oral ruling on this issue:

I have considered the request of the Employer with respect to the form of the ballot that should be ordered in this case. After considering the submissions of the parties, I have concluded, as indicated in *Glennbrook Contracting Ltd.*, BCLRB No. B201/93 (leave denied in BCLRB No. B244/93) that the ballot should contain only the question of which union is to be representative of the employees.

On the basis of the application of the Steelworkers, the question is no longer whether there should be a union. The Employer cites evidence that individuals signed to block the organizing drive of a rival union. The signing of the cards, however, *prima facie*, demonstrates a desire for union representation. The "wish to block" in my view goes to the inter-union rivalry. This issue will be settled with a vote ordered with a single question of which union is to be the representative of the employees.

Accordingly, a vote in this matter is ordered as agreed to between the parties. The ballot will contain the question respecting which union and the vote should be concluded by August 23, 1993.

The Officer advised the parties the ballot box would be sealed pending another Officer's investigation. A second Officer then conducted an investigation into the application of the Mine Workers.

The vote was held August 16 to August 18. On August 19, 1993, I sent a copy of the second Officer's report to the parties. The Officer's report indicated the membership evidence of the Mine Workers did not comply with Regulation 3 of the Labour Relations Regulation. In particular, the cards did not contain the following phrase required by Regulation 3(b):

In applying for a membership I understand that the union intends to apply to be certified as my exclusive bargaining agent and to represent me in collective bargaining.

The issue the Officer's report raised was whether the defect rendered the entire membership evidence of the Mine Workers defective, thereby undermining the basis for the vote. The parties made submissions on this and other issues. This decision deals with that and related issues raised by the parties. In addition, Certain Employees filed a petition protesting the lack of a no-union choice on the ballot.

II. ARGUMENT

The Mine Workers acknowledge its membership cards do not comply with Regulation 3 of the Labour Relations Regulation. It argues, however, that the membership cards contained a very similar phrase. Any question of the purpose of the cards has been resolved by the holding of the vote. The defect is therefore technical and can be relieved against by Section 156 of the Code and Labour Relations Board Rule 12. In any event, the Officer reviewed the cards, indicated they were in order, but should be changed for future applications.

The Steelworkers maintain the Mine Workers' application should be dismissed, the ballots destroyed and the Steelworkers granted automatic certification under Section 23 of the Code. Regulation 3 is a mandatory provision establishing minimum criteria for membership evidence. Even where membership requirements were rooted in policy rather than an express

provision, both the former Board and Industrial Relations Council required strict compliance with the minimum criteria: see *White Spot Limited*, BCLRB No. 201/85.

The Steelworkers argue the Board should disregard petitions received after the date of the application. The Steelworkers have satisfied all the requirements of the Code for automatic certification. But for the Mine Workers' application for certification, filed on August 13, the Steelworkers would have been granted automatic certification.

Elkview Coal asks that the ballots be destroyed and a new vote on the question of the Steelworker representation, be ordered under Section 24(1). The Employer concedes that under normal circumstances once the Steelworkers had signed cards with more than 55% of the employees in the bargaining unit, this would entitle the union to automatic certification under Section 23. The Employer maintains however, these are not normal circumstances. The signing of cards is *prima facie* evidence of a wish to be represented by a union, but is clearly a rebuttable presumption. The evidence now before the Board rebuts that presumption. There is strong evidence that a portion of the Steelworker cards were not obtained for the purpose of certification, but for the purpose of blocking the Mine Workers' application.

Furthermore, the Employer relies on a petition, its accompanying letter and a bulletin board posting from Certain Employees filed with the Board on August 19, 1993, in response to my decision that the ballot provide for only a choice between the Steelworkers and the Mine Workers. The Employer says compelling evidence is now before the Board indicating the majority of employees do not wish to be represented by either union. As a result, the Board should exercise its plenary jurisdiction under Section 24(1) and order a new vote: see *Haebler Construction Ltd.*, BCLRB No. B39/93; *Crestar Food Products of Canada Ltd.*, BCLRB No. B26/93; *Brinco Coal Mining Corporation*, BCLRB No. B6/93; and *Plateau Mills Ltd.*, BCLRB No. 87/76, [1977] 1 Can LRBR 82.

On August 25, 1993 a submission by Certain Employees was filed, requesting interested party status. Certain Employees submit the ballots already taken should be destroyed. On the basis of similar allegations to that of the Employer, Certain Employees maintain an intensive investigation should be conducted into the organizing campaigns of both unions. The Steelworkers' certification should be dismissed or a new vote scheduled to determine the true

wishes of the employees.

III. ANALYSIS AND DECISION

I have considered the submissions of all the parties in this matter. In view of the late receipt of the Mine Workers' application, the ballot box of the vote taken August 16 to 18 was sealed, pending investigation by an Officer into that application. This disclosed that the membership cards of the Mine Workers did not comply with Regulation 3 of the Labour Relations Regulation. In particular, the cards do not contain the phrase required by Regulation 3(b).

Regulation 3 is a mandatory provision. As recently set out by the Chair of the Board in *Dencan Restaurants Inc.*, BCLRB No. B255/93:

...membership in good standing in a trade union must be determined on the basis of the requirements prescribed in the Labour Relations Regulation. Non-compliance will be fatal to membership in good standing. ... (p. 4)

Missing from these cards is an essential part of that provision -- notice that the employee understands that the union intends to apply to be certified as his/her exclusive bargaining agent. Nowhere on the Mine Workers' cards is certification mentioned. The defect is not technical and cannot be relieved against. The content of a membership card is a substantive matter. Similar wording cannot overcome this fundamental problem. To accept the Mine Workers' argument would render meaningless the existence and protection of the mandatory provisions: see *White Spot, supra*. The Mine Workers have therefore not demonstrated adequate evidence of membership in good standing. Their application is deficient, and is dismissed. The vote taken as a result of this application was in error. Accordingly, the ballots are ordered not to be counted.

The Employer seeks a new representation vote and relies on petitions by Certain Employees filed with the Board. In addition, the Employer reiterates that employees signed membership cards to block another union's application. Certain Employees rely on similar points to support this request and to ask for further investigation.

The Employer's argument is premised on its position that the *prima facie* evidence of membership cards raises only a rebuttable presumption. This goes too far. Changes in the certification process created by the Code dictate that certification without a vote will normally occur where a union has 55% or more of the employees in the bargaining unit as members in good standing. Certification is now based on membership cards rather than a secret ballot vote. As set out in *Dencan Restaurants, supra*, the Board will in most circumstances rely on the membership cards produced by the union as the *only* evidence of the members' wishes (p. 8).

The Board retains a discretion to order a vote under Section 24(1). That discretion, however, has and should be exercised rarely. Where serious flaws exist in the manner in which the union signed up the majority of employees as members, a vote may be in order: see *Crestar Food Products of Canada Ltd.*, BCLRB No. B26/93. In *Dencan Restaurants Inc., supra*, where there were allegations to this effect, the Board determined it may conduct a further investigation or order a hearing to determine the extent and significance of the improprieties. If the nature of the improprieties casts doubt on the validity of the membership evidence, a vote may be ordered to determine the true wishes of the employees.

Plateau Mills Ltd., supra, a leading case cited by this Board in *Crestar Food Products, supra*, set out a further exception relied upon by the Employer: a bare majority is signed up: a vociferous minority oppose the union, and the composition of the unit is undergoing some change. I find this exception as "debatable" as did the panel in *Plateau Mills, supra*. No cases were referred to where this line of analysis has been followed or applied. It was not applied on the facts of *Plateau Mills* itself which arguably could have fit within the exception. In any event, there is no suggestion the composition of this unit is in flux.

The authorities the Employer has relied on are cases where the Board ordered a representation vote because of improper conduct by the applicant union in the organizing campaign. In *Dencan Restaurants Inc.*, BCLRB No. B113/93, the employer filed a complaint under Sections 7 and 9 alleging intimidation and coercion by the union in the collection of membership evidence. This complaint was supported by statutory declarations from a variety of employees attesting to improprieties. In *Haebler Construction Limited, supra*, the employer also filed complaints under Sections 7, 9 and 10 arguing intimidation and coercion in the organizing

activities of the union.

The application for certification by the Steelworkers was received by the Board on August 6; notice of a hearing into the matter was posted at the Employer's premises on August 9. That notice indicated the Board would decide whether or not the application would be granted without a representation vote. The hearing was set for August 13. No allegations of misconduct were made against the Steelworkers' organizing campaign. At the hearing, the Employer asserted evidence with respect to members signing to block another union. That evidence, I found, went to inter-union rivalry. It did not go to the question of whether the employees desire a union.

In dealing with this in the context of argument on the content of the ballot, I found on the basis of the Steelworkers' application, the question was no longer whether there should be a union. The original panel in *Glennbrook Contracting Ltd., supra*, said where two or more unions have at least 45%, the question is no longer whether there should be a union. The only question is which union. The principle is clearly applicable where one of the unions has 55% or more membership support. If two unions have 45% membership support, but less than 55%, the issue of whether the employees desire a union may yet be outstanding with a ballot determining that issue. In this case, the Steelworkers had over 55%, showing clearly that the employees want a union. That issue is no longer outstanding.

The Steelworkers membership cards contain the phrase required by Regulation 3(b). That phrase, which is for the protection of employees, indicates the employee understands that the union will apply for certification and represent the employees in collective bargaining. This change in the membership regulations, in conjunction with the automatic certification provisions, makes clear that the Board will not go behind membership evidence lightly. Regulation 4 allows for the revocation of a membership card by signing and delivering a revocation to the Board on or before the date of application for certification. This now expressly incorporates a long-standing policy of the Board that revocations will only be considered if received prior to the date of application for certification: see *Phillips Cables*, BCLRB No. 52/77. These two Regulations ensure employee rights are protected in certifications and, in particular, in this case.

The Employer says the Steelworkers' cards were signed to block the Mine Workers, Local 7292 application. This was filed on June 22 and withdrawn on July 5. The Steelworkers

filed its application one month later. Significant time has lapsed since this withdrawal and the filing by the Steelworkers. In that period, employees were free to revoke their membership. In determining membership support, the Board considered any revocations filed before the Steelworkers' application. The employees' rights are protected by this process. The Steelworkers still satisfy the membership support requirements of the Code.

Deviating from strict adherence to this long-standing policy creates dangers as expressed by the Board in *White Spot Limited, supra*. In that case, when considering minimum requirements under the Code, the Board said:

...evidentiary hearings to determine majority support are not feasible due to both the length of time involved in such process and the threat to confidentiality. ... (p. 9)

In addition the Board noted:

The danger of deviating from this established approach without good reason was noted by the Board on a different aspect of this policy in *Cominco Ltd., supra*, [at 318-319]:

"...An expectation that the Labour Relations Board will not consistently apply its criteria for determining the status of membership could easily serve to produce a representation contest that would not otherwise have been attempted or prolong a representative contest that would otherwise have been abandoned. ..." (p. 12)

These dangers are evident in this case. I find no material difference between the employee petitions and revocations filed in these matters. Accordingly, I have not considered the employee petitions filed in this matter.

Plateau Mills Ltd., supra, bears remarkable similarities to this case. There, the union had been certified without a vote. A group of protesting employees appealed the certification to the Board, arguing the membership evidence was not a true indication of the wishes of the employees. They requested a vote. After reviewing the policy behind automatic certification,

the Board dismissed the appeal of the employees. As part of its analysis of the certification provisions, the Board dealt with the risk of a union being foisted upon a group of employees which is now strongly opposed to the union:

An examination of the practical reality indicates why this is unlikely. When the Board grants the union a certification, this does not give it "a key to the vault"; it simply gives the union a legal licence to bargain for the employees. But the fact that an employer must now bargain with the union does not impose any obligation on that employer to agree to the union's demands. How can a union secure an agreement from a recalcitrant employer? Only through the lever of the same majority support within the unit which originated the certification application. ... (p. 87)

In *Plateau Mills Ltd.*, 70 out of more than 200 employees indicated they did not want union representation. This was found by Chairman Weiler not to be "good enough":

The majority registered its verdict in the manner contemplated by the Labour Code. If the dissident minority is able to win over a majority of the employees to its persuasion, then they may apply for decertification after 10 months have elapsed. But in the meantime, the I.W.A. is entitled to certification under s. 45 of the Code, to act as the exclusive bargaining agent for all of the employees under s. 46 of the Code, and to have the employer live up to its legal duty to bargain in good faith under s. 6 and 63 of the Code. ... (pp. 89-90)

So too in this case. The Steelworkers are entitled to certification under Section 23 of the Code.

IV. CONCLUSION

The Mine Workers' application is dismissed. The ballots resulting from the vote taken August 16 to August 18 are ordered not be counted. The request by the Employer for a further representation vote under Section 24(1) is denied. The request for any further investigation in this matter is also denied. The Steelworkers have complied with the requirements under the Code and Regulations and are entitled to certification under Section 23 of the Code. The application for certification by the Steelworkers is therefore granted.

LABOUR RELATIONS BOARD

EMILY M. BURKE
VICE-CHAIR