

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

FLETCHER CHALLENGE CANADA LIMITED  
(MACKENZIE PULP DIVISION)

("FCCL")

-and-

PULP, PAPER AND WOODWORKERS OF CANADA, LOCAL 18

(the "Union")

PANEL: Barbara Junker, Vice-Chair

COUNSEL: Donald J. Jordan, Q.C. and Roslyn Goldner  
for FCCL  
Dave Seright, for the Union

CASE NO.: 19878

DATES OF HEARING: July 22 and 25, 1994

DATE OF DECISION: August 2, 1994

## **DECISION OF THE BOARD**

### **I. NATURE OF THE APPLICATION**

Fletcher Challenge Canada Limited ("FCCL") alleges that the Union breached Section 65 of the *Labour Relations Code* by picketing at its MacKenzie pulp mill. As a result, FCCL seeks an Order declaring the picketing is illegal and that the Union cease and desist any picketing activity.

The Union contends the picketing is legal because the pulp mill is acting as an ally to the Mackenzie Wood Products Division of FCCL.

### **II. BACKGROUND**

FCCL filed an application under Section 143 on July 20, 1994. FCCL claimed the Union had informed management it would picket if chips were delivered by truck to the pulp mill. Therefore, FCCL sought a declaration that the Union would contravene Section 65 of the Code if it picketed at the pulp mill.

On July 22, 1994 at 8:15 am the Union commenced picketing at the pulp mill. FCCL filed an ancillary application alleging the pickets were illegal and sought an order prohibiting the picketing.

The Board scheduled a hearing via telephone conference call for 3:30 pm July 22, 1994. Both parties were notified of the hearing and provided with an opportunity to participate. At the time of the call, however, the Board could not reach Union counsel at the telephone number provided to the Board; nor could the Union's representative be reached. Therefore, the Union did not participate in the hearing. Counsel for the Union did acknowledge in writing on July 23 that the problems with contacting the Union and its counsel were within the Union's control and apologized for any inconvenience.

The result of the hearing was an interim order declaring the picketing illegal and

ordering the Union to cease and desist the activity. The interim order prohibited picketing at the pulp mill effective 4:30 pm July 22, 1994 until the disposition of the July 20 application. A hearing on that application was held July 25, 1994 as previously scheduled.

### III. FACTS

A majority of the evidence in the July 25 hearing was a repeat of the evidence heard by telephone on July 22. Where evidence heard in one or the other of the hearings was useful in rendering this decision, it is included in the findings of fact.

MacKenzie Pulp is a division of FCCL. A separate FCCL Wood Products Division operates a sawmill adjacent to the pulp mill. The Union is certified and on a legal strike at the sawmill. The Communication, Energy and Paper Workers Union, Local 1092 (the "CEP") is certified to represent the pulp mill employees. There is currently a collective agreement operating between FCCL and the CEP. Although the agreement expired April 30, 1994 the CEP has not taken a strike vote.

The pulp mill uses wood chips to produce pulp. The wood chips produced at the sawmill are used at the pulp mill and are transported directly from the sawmill to the pulp mill via a conveyor belt. Other chips are purchased from outside suppliers. Those chips are off-loaded at the sawmill and are transported to the pulp mill via the conveyor belt. The Union operates and maintains the conveyor belt. Since the strike and picketing activity commenced at the sawmill, the conveyor belt has not been in operation.

The pulp mill is operating with its existing supply of chips and has not yet received any chip deliveries. If chips were delivered they would be trucked directly to the pulp mill via the mill's access road.

If the pulp mill uses only its existing supply of chips, it can operate for another 15 days. If it augments its chips from outside suppliers it can continue to operate for about 40 days. If the pulp mill has to shut down, up to 211 of its 272 employees could be laid off.

At the commencement of the strike at the sawmill, Jim Hall, Human Resource Manager at

the pulp mill, asked Paul Dumoulin, a member of the Union negotiating committee, whether the Union would picket the pulp mill if chips were brought in from other suppliers. Dumoulin said yes and he further believed that picketing strategy would apply to any chip truck. Hall also spoke to Wayne Kipke, Union President. Kipke confirmed the Union's intent to picket the pulp mill if a chip truck that previously brought in chips to the sawmill delivered directly to the pulp mill. This included chips from the chipper plant in town. However, Kipke confirmed there would be no problem with chips brought in from out of town. Kipke also stated the Union would let Hall know if it decided to picket, in order to allow for an orderly shut down of the pulp mill.

At 8:15 am on July 22 about seven to nine members of the Union were standing outside the pulp mill. Picket signs were set up on vehicles. Hall spoke to two individuals he knew to be Union members. They advised Hall the reason they were there was that the FCCL Wood Products Division was "jerking them around". Hall advised the individuals that the picket line was illegal. He contacted Kipke who then spoke to the picketers; Kipke later told Hall that the picket line would stay up. By then, more individuals had joined the picket line.

In the meantime, a CEP representative advised management its members would not work behind a picket line and they would commence an orderly shut down of the pulp mill. A shut down takes from six to eight hours and a start up of the pulp mill about eight to twelve hours. During a shut down and start up no pulp can be produced. Each time the pulp mill is shut down and re-started the costs are high. The estimated cost for the time the pulp mill was down on July 22 was \$ 220,000. This includes lost pulp production revenues and maintenance expenditures.

On July 22, the shut down was completed by about 2:00 pm, at which time the pickets left. Hall called Kipke after the pickets left to ask whether the pickets would be back if the pulp mill re-started its operations. Kipke was unable to give that guarantee. As a result, the pulp mill start up was not commenced until after the Board issued the interim order.

#### IV. ARGUMENT

Because the July 22 interim order declared that the picketing occurring that day was illegal, FCCL limited its arguments in the July 25 hearing to the picketing anticipated if chips are actually delivered. It argued that if picketing occurred at that time it would also be illegal.

FCCL claims that having chips delivered to the pulp mill is only serving its own self interests and does not make the pulp mill an ally of the sawmill. In order to be an ally, FCCL says that the pulp mill would have to involve itself in the strike at sawmill with the intent to assist the sawmill. FCCL argues that the pulp mill has only changed its way of doing business in an effort to keep operating and the employees working.

Further, FCCL says that the strike and picket line has accomplished what it should: business at the sawmill has stopped; the conveyor belt is not in use; and, the pulp mill is not getting its regular chip supply. Although chips once passed through the sawmill, the pulp mill is now going to have chips delivered directly. FCCL claims there is no operating principle in the law that suggests that this action of obtaining alternate suppliers and changing the delivery method is inappropriate. Thus, picketing at the pulp mill would be illegal and a permanent cease and desist order should be issued against the Union.

The Union argues that the pulp mill should not be allowed to bring chips in at all. The handling of chips is the work of its members. Therefore the chip delivery should be construed to constitute struck work. If not, this allows FCCL to prolong the sawmill strike by surviving off of its pulp mill operations. As such, the pulp mill should be considered an ally and picketing declared legal.

## V. TELEPHONE ORDERS

This is the first significant case in which the Board has taken the opportunity to hold a hearing by telephone conference. It is therefore useful to set out an analysis as to why such a hearing might be held, and in addition, to provide guidelines that will apply to the prerequisites and procedures for requesting and holding such a hearing.

### (1) Justification for Telephone Conference Hearings

In his text *Canadian Labour Law*, George Adams describes the government's rationale for establishing an administrative tribunal to oversee labour relations:

When the decision was reached for the government to step into the field of labour relations, it was only natural that the device of an administrative board was selected to carry out this policy; the same technique earlier adopted in the United States. As we have seen, the approach provided for the delegation of a broad regulatory discretion to an administrative tribunal where the legislature could not anticipate or predict the detailed regulation required for so diverse a field as labour relations relationships. The presence of an administrative agency allowed the government to distance itself from labour relations conflict. Moreover, the tripartite regulatory approach in Canada permitted the manning of the dispute resolution machinery, at least in part, by labour and management representatives and in this way created a commitment in the parties of interest to the workability of the system. Labour boards became instruments of self-regulation and represented an important alternative to administration of labour laws by the judiciary. The hope was that labour relations boards would provide the *expertise, speed and economy* required for effective regulation of industrial relations. (emphasis added; pp. 218-219)

The Labour Relations Board has always recognized the importance of holding a speedy hearing and of quickly rendering a decision. In labour relations in particular it is recognized that justice delayed may be justice denied. In fact, the *Labour Relations Code* recognizes as one of its purposes the promotion of conditions favourable to the orderly, constructive and *expeditious* settlement of disputes between employers and trade unions (see Section 2(d)). The Board will endeavour to deal with all matters before it with dispatch.

There are, of course, certain matters which come before the Board which are treated with even greater dispatch, whether as the result of a legislative directive or due to the particular urgency of the case. For example, Section 5(2) of the Code requires the Board to commence a hearing within 3 days of an unfair labour practice complaint under Section 5(1) being filed, and to render a decision on the complaint within 2 days of the completion of the hearing. Further, Section 24(3) of the Code requires that if a representation vote is necessary in an application for certification, that it be conducted within 10 days of the application for certification being filed. This necessitates a speedy hearing and resolution of any objections to the certification that are raised. Additionally, a specific time frame is established in the Code for the designation of essential services where a dispute poses a threat to the health, safety or welfare of the residents of

British Columbia.

Other matters that are routinely treated with greater than usual dispatch include unfair labour practices, decertification and applications relating to lockouts, strikes and picketing. Under Rule 27 the Board will normally hear a Part 5 complaint, at a minimum, 24 hours after service of the complaint on the respondent. In addition, the Rule allows the Board to set an application for hearing outside the 24 hour period. It is this latter situation that is of concern in the case before this Panel.

There is a wide range of potential urgency within the category of applications relating to strikes, lockouts and picketing (and now also replacement worker complaints). Wherever business has been halted and work has ceased there is the need to try to resolve the underlying dispute as quickly as possible. In circumstances where a strike or lockout is unlawful (eg. there is a collective agreement in force at the time of that strike or lockout), the Board will expedite any application brought before it. This becomes still more important where the effect of the strike or lockout flows beyond the borders of the parties to the dispute and begins to affect the public interest. In such situations, the Board must be even more vigilant in achieving an expeditious resolution. This is explicit in the Code which provides:

- 2(1) The following are the purposes of the Code:
- (c) to minimize the effects of labour disputes on persons who are not involved in the dispute;
  - (d) to ensure that the public interest is protected during labour disputes.

In the context of labour disputes which may affect the public interest there may be circumstances where the usual procedure of holding an oral hearing at the Board's offices may not be sufficiently timely to prevent serious harm arising from the alleged breach of the Code. In such circumstances, it may be appropriate for the Board to consider implementing a new expedited procedure. The Board may also consider a more expedited procedure where perishable goods may be affected or where there is evidence of some other irreparable harm that may result from a labour dispute. The *Labour Relations Code* provides the Board much flexibility in

determining the appropriate procedure.

Section 12 of the Labour Relations Board Rules provides:

12. Without limiting the right of the board to refuse to hear a party who fails to comply with a provision of these Rules, the board may, upon such terms as it considers advisable
  - (a) abridge or enlarge the time set by these Rules for doing any act, filing, serving or delivering any document, or taking any proceedings, and may do so although the application is not made until after the expiration of the time set by these Rules; or
  - (b) at the request of a party or on its own motion, permit a party to initiate or proceed with an application, or reply to an application, without fully complying with the requirements of these Rules.

Further, Section 17(2) provides:

17. (2) Regardless of sub-rule (1), or Rules 17A(3) or 17B(2) the board may in any proceeding hold any conference or meeting, or hear oral evidence and/or argument by telephone conference, if all parties are given notice of and provided with an opportunity to be connected to the telephone conference.

Together, these two Rules permit the Board, where it deems necessary, to hold a hearing by telephone conference. In some circumstances it may be necessary to conduct a telephone conference with minimal notice from the applicant. It is important to stress that this remedy is an extraordinary remedy and not one which the Board would use except in the most urgent of circumstances.

In this case, the pulp mill had already undergone considerable expense to shut down its operations. If it remained shut down lost pulp revenues could have been significant. There was no certainty if the pulp mill did re-start operations that it would not once again be picketed and have to shut down. The pulp mill's predicament was serious and there was significant economic impact. In addition, the Board had already scheduled a hearing to deal with the anticipated picketing at the pulp mill. Therefore, when picket activity actually occurred, the Board found it appropriate to schedule a hearing by telephone conference prior to the July 25 scheduled hearing.

(2) Guidelines

Although the procedure for requesting a telephone conference hearing and the prerequisites for obtaining such an order may vary according to the circumstances of each case, the following general guidelines will apply in most circumstances:

1. The applicant should contact the Registrar in advance of filing any materials to advise of the matter and discuss details such as service, the timing of a hearing and the nature of the hearing (i.e., at the Board or by telephone conference).
2. When contacting the Registry to request a telephone conference, the applicant must establish an extreme case of urgency (usually irreparable harm to the applicant or injury to the public interest) as to why the application should proceed by telephone conference.
3. If the Board agrees to schedule a hearing by telephone conference, the Registry will prepare a Notice of Hearing which will be sent by facsimile to the applicant and must be served by the applicant along with its materials in support of the application. The Notice will contain the following information:
  - (i) the Board's acknowledgement of the pending application and its decision to conduct a hearing;
  - (ii) the arrangements which have been made for a

- telephone hearing including the time and other details;
- (iii) directions which have been made for service which, if complied with, will be regarded as sufficient notice of the hearing; and
  - (iv) the name and telephone number of the Board officer or other person assigned to the application.

None of the above will, of course, preclude the Board from taking the steps which it normally does in advance of a hearing (eg., assigning an SIO to contact the parties directly and attempt a resolution).

4. Once served, the respondent is required to contact the Board officer assigned to the matter and provide a telephone number at which they can be reached. It is the duty of the respondent to notify the Registry if the contact number changes or if legal counsel are appointed to represent them.

5. As supporting materials, the Board will require the applicant to file and serve a short written document which at minimum contains:

- (i) the full names, addresses, and telephone and facsimile numbers of the parties involved;
- (ii) the section(s) of the Code under which the application is being made;
- (iii) a brief statement of the alleged unlawful conduct giving rise to the application and the reason for the urgency; and
- (iv) the nature of the relief sought.

6. In accordance with Rule 10(1), the Registrar may require that a statutory declaration be filed with the Board prior to the telephone conference. The Panel assigned to the telephone conference hearing may also require a statutory declaration to support any statement of fact relied

on during the conference call. Therefore, all parties must be prepared to provide a statutory declaration supporting any facts upon which they have relied.

7. Where possible, parties having direct knowledge of the facts in support of the application should be available to be connected to the conference call to give evidence if such evidence is necessary.

8. Pursuant to Section 133(5) of the Code, the Board has the authority to issue interim decisions. In most cases heard by telephone conference, and especially where there are material facts at issue, the Panel may issue an interim decision: pending the setting of an expedited hearing before the Board; or, pending a review of written submissions and statutory declarations if requested; or, the Panel may adjourn the matter without rendering a decision until an expedited hearing can be held. Where a further hearing is necessary, the Board's usual hearing practices will apply.

By way of general information, the Board maintains an on-duty telephone number for emergency hearings on weekends and statutory holidays. This telephone number is 644-3033.

The above is intended to provide guidelines to the community on how the Board intends to handle emergency applications, where the usual procedure of holding an oral hearing at the Board's offices is not sufficiently timely to deal with the serious results arising from the alleged breach of the Code. These guidelines will be subject to amendment as the Board gains experience with these new procedures for telephone conference hearings.

## VI. THE PRESENT COMPLAINT

The Code contains the following provisions regarding an ally:

65. (1) In this section "ally" means a person who, in the board's opinion, in combination, in concert or in accordance with a common understanding with an

employer assists the employer in a lockout or in resisting a lawful strike;

(2) A person who, for the benefit of a struck employer, or for the benefit of an employer who has locked out, performs work, supplies goods or furnishes services of a nature or kind that, except for a lockout or lawful strike, would be performed, supplied or furnished by the employer, shall be presumed by the board to be the employer's ally unless he or she proves the contrary.

(4) The board may, on application and after making the inquiries it requires, permit picketing

(b) at or near the place where an ally performs work, supplies goods or furnishes services for the benefit of a struck employer, or for the benefit of an employer who has locked out,

The provisions of Section 65(4) are intended to deal with situations where a struck employer is seeking assistance from a third party in an effort to avoid the effects of lawful picketing. If a third party employer changes its way of doing business and does so to assist the struck employer, then it could be an ally. However, a non-struck third party employer may take self-help steps in order to continue running its operations. In *Farmer Construction Ltd.*, BCLRB No. 26/75, [1975] 2 Can LRBR 103, the Board confirmed that it would not preclude such self-help measures:

When a primary employer is shut down by a strike, the firms for which it has performed work, supplied goods, or furnished services will now be deprived of each of these. They will have to take measures of self-help to reduce the impact of the primary work stoppage on their business and ability of their own employees to continue working. Some firms may perform this work themselves, others will find alternative suppliers. These adjustments are not done to assist the primary employer in resisting the strike. Indeed, it will likely have the opposite result. When the struck employer sees its customers turning elsewhere for work, services or goods, it will, if anything, become more amenable to settlement with the union. The true thrust of the ally doctrine as set out in s. 85(2) of the Code is not satisfied. (p. 107)

Nevertheless a third party cannot take positive steps which would aid in continuing struck

operations. To determine if that is the case requires an examination of the scope of the struck operations, the work that is performed, the goods that are supplied and the services furnished by the operations: *Northwood Pulp and Timber Ltd.*, BCLRB No. 228/86 (Appeal of No. 198/80), (1987) 13 CLRBR (NS) 245.

Here, the sawmill operations have completely shut down. The performance of the struck work involving the supply of chips via conveyor belt from the sawmill has been discontinued. The conveyor belt is not operating and the pulp mill is receiving no chips from the sawmill. Although the pulp mill has yet to receive any outside deliveries of chips, to do so would not be a deviation from normal operations. The only difference might be the amount of chips supplied by outside sources. The delivery directly to the pulp mill is different than normal operations. However, this reveals only the fact that the picket line is working successfully to prevent any access to the sawmill.

I find that the pulp mill has not changed its business operations to assist the sawmill in an effort to avoid the effects of the picket line. It has only changed the its operations in order to continue running and keep its employees working. As a result, I am satisfied that obtaining chips from outside sources and having them delivered to the pulp mill does not aid in the continuance of the struck operations. Thus, I conclude the pulp mill is not an ally as defined by the Code. As a result, picketing is not permitted pursuant to the provisions of Section 65(4)(b).

## VII. SUMMARY

The Union is ordered to cease and desist picketing at the pulp mill operations of FCCL. This Order includes future circumstances where the pulp mill receives delivery of alternate chip supplies, unless there are material changes in the circumstances surrounding the supply of chips to the pulp mill and the purposes for which they are received. Nevertheless, the Union would be required to apply in advance to picket on an ally basis.

As part of this decision, the Board has set out guidelines with respect to telephone hearings and orders.

LABOUR RELATIONS BOARD

BARBARA JUNKER  
VICE-CHAIR