

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SPACAN MANUFACTURING LTD.

("Spacan")

-and-

KCT CONSTRUCTION LTD.

("KCT")

(jointly the "Employers")

-and-

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL,
ORNAMENTAL AND REINFORCING IRON WORKERS, LOCAL NO. 97

(the "Ironworkers")

-and-

BRITISH COLUMBIA PROVINCIAL COUNCIL OF CARPENTERS ON
BEHALF OF ITS CONSTITUTENT LOCALS

(the "Carpenters")

PANEL: Keith Oleksiuk, Chair
Frances R. Watters, Associate Chair
(Adjudication)
Robert Pekeles, Vice-Chair

COUNSEL: Andrea Zwack, for Spacan and KCT
Greg Mullaly, for the Ironworkers
Casey McCabe, for the Carpenters

CASE NOS.: 37843 and 37844

DATE OF DECISION: August 12, 1999

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 The Employers apply under Section 141 of the *Labour Relations Code* seeking leave and reconsideration of BCLRB No. B357/98 and BCLRB No. B358/98 (the "original decisions"). In each case, the original decisions ordered disclosure of the lists of employees tentatively included in the proposed bargaining units. The Employers submit that the original decisions are inconsistent with principles expressed or implied in the Code in that they are contrary to the Board's policy concerning disclosure of such lists.

II. BACKGROUND

Spacan

2 The Ironworkers had applied for a craft bargaining unit of structural, ornamental and reinforcing ironworkers in the field in British Columbia. The tentative employee or voters' list in the Industrial Relations Officer's Report included 18 employees in the bargaining unit and indicated that the Union was in a position of having less than 45 percent membership support. The Union submitted that there were no more than 14 employees in the bargaining unit. If the Union's position was correct the Union would have greater than 45 percent support. The Union sought disclosure of the list. After reviewing the relevant jurisprudence, the original panel ordered disclosure to the Union of the list of employees contained in the Officer's report.

KCT

3 The Carpenters had applied for a craft bargaining unit of carpenters, joiners, lathers and carpenter millwrights in British Columbia. An initial report of an Industrial Relations Officer contained a tentative employee or voters' list indicating that there were 24 employees in the proposed bargaining unit. A second report indicated that there were 31 employees in the proposed bargaining unit, which placed the Union in a position of having less than 45 percent membership support.

4 The Union sought disclosure of the tentative voters' list and disclosure of the employee list of MAH Construction, a separate company owned by the brother of the owner of KCT. The original panel relied on the analysis of the relevant Board jurisprudence in BCLRB No. B357/98 and ordered disclosure of the KCT employee list from the Officer's report, but not the list of employees of MAH.

III. EMPLOYERS' ARGUMENT

5 The Employers argue that the original decisions mean that unions are always entitled to the disclosure of employee lists regardless of the level of union support. The Employers argue that the original decisions are contrary to the Board's jurisprudence

concerning reliance on an Officer's report. The Employers submit that the original decisions are inconsistent with the requirement in the Board's jurisprudence that a union must establish a *prima facie* case based on "specific reasons and materials" as to why the Industrial Relations Officer's report is wrong to a degree that would materially affect whether the union has met the 45 percent membership support threshold. The Employers submit that the original decisions are inconsistent with the Code purpose of promoting conditions favourable to the expeditious settlement of disputes. They are further inconsistent with maintaining the confidentiality of payroll and protection of employee privacy.

IV. ANALYSIS AND DECISION

6 The Board's practice concerning the disclosure of the tentative voters' list contained in an Industrial Relations Officer's report was reviewed in *Rissling Contractors Ltd.*, BCLRB No. B223/96. The Board noted its longstanding policy that the employee list is not disclosed unless the union has demonstrated threshold support. The Board went on to identify the tension between the natural justice based requirement to disclose an Officer's report to a party where the disclosure is necessary to ensure full participation in a proceeding, and the Board's policy of seeking to preserve the confidentiality of employer's payroll information where possible or appropriate: paras. 21-23. The result is that each case will be decided on its particular merits.

7 In *Rissling* the Board identified relevance as a necessary threshold to the disclosure of information contained in Industrial Relations Officers' reports stating:

...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. (para. 24)

8 The approach set out in *Rissling* respects the basic requirements of natural justice while providing the Board with the necessary flexibility to manage the vast array of factual circumstances which inevitably arise.

9 The flexibility of this approach has been demonstrated subsequent to *Rissling*. The Board in *Ledcor Industries Ltd.*, BCLRB No. B230/96 stated:

Thus, in the context of certification applications, it has been the Board's longstanding practice to follow an "administrative model" of adjudication which relies on information contained in reports prepared by Industrial Relations Officers. With the exception of confidential membership information, reports are now disclosed to the parties. The Board relies upon such reports to determine the level of membership support in a trade union. Additionally, reports may be relied upon where there is express agreement by the parties or where certain matters are not disputed. With respect to the latter, parties must offer "specific reasons and materials why" they believe the results of the investigation are incorrect. (para. 23)

10 In *Ledcor* the union had sought a province-wide bargaining unit. A report by an Industrial Relations Officer identified a number of construction sites operated by the employer in addition to the site that was the focus of the union's organizing drive. The panel of the Board determined that one or more Industrial Relations Officers would be requested to carry out an investigation "which can only be described as extensive, if not unprecedented": see para. 11. The Industrial Relations Officer was requested, among other things, to determine all of the Employers' construction projects ongoing as of the certification date, to verify the existence of those projects through tender or other documentation, to examine a series of payroll documentation, and to personally visit construction projects and interview employees: see para. 11. The Board went on to describe the extensive investigation conducted by the Industrial Relations Officers: see pages 4-6 of the decision. The Industrial Relations Officers' report was forwarded to the parties. The union did not bring forward any specifics as to why the supplemental Industrial Relations Officer's report was incorrect or inaccurate. It was given ample opportunity to carry out its own inquiries and bring forward information which might cause the Board to question the two reports on file: see para. 24. The issue before the Board was whether the union's application should be adjudicated on the basis of the Officer's report or should the matter proceed to a hearing on the merits: see para. 18. In the circumstances of that case, the Board relied on the lack of specific reasons and materials that would bring the Officer's Report into question to reject the Union's request for an oral hearing.

11 In *B.C. Garment Factory Ltd.*, BCLRB No. B331/97, the Board demonstrated the *Rissling* approach in the context of an unfair labour practice complaint stating:

I consider disclosure is required for the Union to be able to respond to the bargaining unit constituency. Disclosure of the total number of employees without the names of those individuals would not permit the Union to test whether or not an individual is properly placed on the list, either for purposes of employee status or for inclusion within the unit.

In arriving at this conclusion, I have considered, but rejected, the Employer's submission that in *Rissling* the Board refused to order disclosure of the list to the competing union. I find that submission is based on a misreading of the *Rissling* decision.

In that case, the panel indicated that the incumbent union that was granted interested party status would ultimately be entitled to the employee list if the bargaining unit constituency and membership support question remained a live issue after other legal issues were disposed of (at p. 7, para. 27). However, if the other issues to be decided first eventually disposed of the application, then there would be no need for the employee list to be provided. An order for disclosure was not denied, only withheld, until it became clear that issue would have to be decided and disclosure was necessary. (paras. 6-7)

12 In *B.C. Garment* the relevant issue was specifically whether an employee list should be produced by an Industrial Relations Officer in the context of an application for remedial certification. There were no other legal issues that would dispose of the application. The union would not be in a position to test the accuracy of the list without knowledge of the names on the list. Consistent with the *Rissling* policy, disclosure of the list was ordered.

13 These cases demonstrate the competing tensions in a request for disclosure of an employee list. On the one hand, the principles of natural justice may require disclosure of the list to enable parties to prepare their cases. On the other hand, payroll information should be respected and kept confidential where possible.

14 The *Rissling* approach continues to guide the Board in balancing those tensions. In making an application for certification under Section 18 of the Code, a union is asserting that it has the requisite threshold support. When that assertion is challenged as a result of an IRO's report the issue of disclosure may arise. Before disclosure is ordered, an inquiry is required to meet the competing interests outlined above and to determine whether the union's claim of threshold support is genuine. Practically such an inquiry takes place through case management by the Vice-Chair and/or a Special Investigating Officer of the Board to ensure that the union's application for certification is legitimately an application for certification and not an application for bargaining unit information. For example, in a construction case the union may have organized the employees of one construction project without knowledge of other construction projects engaged in by the employer. In such a setting, disclosure of those construction project sites to the union may well cause the union to withdraw its application for certification.

15 As another example, in a situation involving a single employer site not in the construction industry, the Board may ask the Union to disclose the names of the employees whom it claims to be properly included in the bargaining unit. We are not speaking here of disclosure of membership evidence. Rather we are speaking of disclosure of the employee list from the union's perspective. Once that is done, the employer may be asked to disclose the nature of the employment of the additional employees whom it claims to be included in the proposed bargaining unit. For example, are the additional employees, without disclosing their names, full time, part time or only occasional workers. What is the nature of their employment? When were they hired? What were their dates of actual employment? Probing questions from the Board on

these issues will test the *bona fides* of the request for disclosure of the employee list. Such questions will disclose whether the case involves the mischief of a union "fishing expedition". Our experience suggests that this sort of case management by the Board may dispose of many of these sorts of applications.

16 We now turn to the two cases at hand. On a sympathetic reading, we are satisfied the original panel did inquire into whether disclosure was warranted given the policy set out in *Rissling*. In each case the original panel exercised its discretion and ordered disclosure of the lists after the union provided reasons why disclosure was appropriate; i.e., it required disclosure in order to know the case it had to meet. Both cases fall within the parameters of the Board's policy concerning the disclosure of such lists. Thus, in each case the original panel applied the correct jurisprudence and exercised its discretion within the acceptable parameters of that jurisprudence.

V. CONCLUSION

17 The application for leave and reconsideration is dismissed.

LABOUR RELATIONS BOARD

KEITH OLEKSIUK
CHAIR

FRANCES R. WATTERS
ASSOCIATE CHAIR (ADJUDICATION)

ROBERT PEKELES
VICE-CHAIR