

BRITISH COLUMBIA LABOUR RELATIONS BOARD

WESTMIN RESOURCES LIMITED, RESSOURCES WESTMIN LIMITEE

("Westmin")

-and-

SEAHAWK VENTURES LTD.

("Seahawk")

-and-

BRONCO TRUCK RENTAL & LEASING

-and-

DESTICON GAS LIQUIDS ENTERPRISES LTD.

-and-

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL
IMPLEMENT, WORKERS UNION OF CANADA
(CAW-CANADA), LOCAL 3019

(the "Union")

PANEL: Kate Young, Vice-Chair

COUNSEL: Colin Gibson, for Westmin

Stan Fuller, for Seahawk

John Bowman, for the Union

CASE NO.: 17672

DATES OF HEARING: January 17 and 19, 1994

DATE OF DECISION: January 27, 1994

DATE OF REASONS: February 2, 1994

DECISION OF THE BOARD

I. THE APPLICATION

The Union alleges Westmin breached Section 68 of the *Labour Relations Code* by engaging Seahawk to perform certain work during a lockout. The Union also seeks a declaration that Seahawk, by providing its services to Westmin during the lockout, is an ally of Westmin as defined in Section 65(1) of the *Labour Relations Code*.

The Union's application for a declaration that Desticon Gas Liquids Enterprises Ltd. is an ally of Westmin is withdrawn. The Union's application for a declaration that Bronco Truck Rental and Leasing is an ally has been adjourned generally, pending a settlement and withdrawal of the application by the Union.

II. THE ISSUES

1. Is Seahawk performing work ordinarily done by first aid attendants employed by Westmin, so as to permit two first aid attendants to perform work of employees in the bargaining unit that is locked out?
2. Has Seahawk become an ally of Westmin by assisting Westmin in a lockout?
3. Should the Board refuse to make the orders sought by the Union in view of the improper conduct of certain Union members on the Union picket line?

III. FACTS

Westmin operates two underground mines and a concentration mill at Myra Falls, and Discovery Terminal, a pier located at Campbell River. Production at the Westmin facilities ended April 24, 1993 when Westmin locked out its bargaining unit employees. The parties have been unsuccessful in negotiating a collective agreement, and the lockout continues.

Seahawk, a company owned and operated by Stan Fuller, a former RCMP inspector, is in the business of providing investigative, security, and document delivery services. Prior to May 1993 on four or five occasions Seahawk performed investigations for Westmin on matters such as employee sick leave abuse.

When in operation, the mine at Westmin employs four first aid attendants who are excluded from the Union's bargaining unit. The first aid attendants assist in the event of injuries and fill out documents associated with their first aid duties; perform fire hydrant, fire extinguisher and sprinkler systems checks; and conduct regular checks of the ambulance, fire truck and mine rescue equipment. On a least one occasion in the past a first aid attendant checked the water level in the water tank located at the periphery of the mine site. On one occasion a first aid attendant intervened to break up an argument in the bunkhouse, and filed an incident report. On occasion first aid attendants direct tourists away from unauthorized areas at the mine, but this is not a regular, assigned aspect of their job duties. Prior to the lockout at Westmin no employees were assigned to perform security services or perimeter checks, nor were any employees assigned to limit access to the premises. Westmin normally relies upon posted signs restricting access to certain areas, and informally maintains records of visitors for their own protection.

Since the lockout Westmin has not required the services of all four first aid attendants. Two have been assigned to perform bargaining unit work, the remaining two continue to perform first aid work.

In May 1993 Westmin contracted with Seahawk to provide security at the Discovery Terminal facility. At that location Seahawk checks persons who enter the property, prepares hourly reports, and periodically inspects the buildings. Seahawk also maintains surveillance of the picket line from inside the facility. This type of security, surveillance work was not previously performed by Seahawk for Westmin, nor did Westmin previously have this work performed by its own employees.

The Union maintains two picket lines, one on the road to the Myra Falls operation, the other at Discovery Terminal. There have been no problems at the picket line located at the Discovery Terminal.

In May 1993 approximately twenty persons picketing the road to Myra Falls Operation stopped a vehicle and refused to permit the vehicle to cross the picket line. The action of the picketers was evidently as a result of a failure by the driver of the vehicle to adhere to an agreement reached between the Union and Westmin which permitted the Union to inspect all vehicles crossing the picket line. As a result of this incident, on May 17, 1993, the Honourable Mr. Justice Catliff issued an Order (Vancouver Registry No. C932694) restraining the Union and others from "obstructing, impeding or otherwise preventing vehicles from proceeding to and from [Westmin's] place of business near Myra Falls, British Columbia, after such vehicles have first been stopped and their contents have been inspected".

In a news release issued on September 17, 1993 Westmin announced that limited production at its Myra Falls operations would resume in the first week of October. Union members first heard of this plan through the media, and a large number of them attended the picket site on the road to Myra Falls and blocked a truck removing concentrate from the mine site. Westmin sought orders from the British Columbia Supreme Court that the Union be fined for contempt of court, that the numbers of persons picketing be restricted, and that police be authorized to enforce the order. The Honourable Mr. Justice Vickers declined to make the orders sought (Vancouver Registry No. C932694). In reasons for judgement issued October 1, 1993 Mr. Justice Vickers concluded that the Union was led to believe that Westmin would only bring in goods relating to the care and maintenance of the Myra Falls operations through the Union's picket lines, noting:

As the material upon which the order was obtained indicated [Westmin] had no intention of operating the mine, it is very easy to see how misunderstandings have arisen. This conclusion is also reinforced by the inspection portion of the order. A person might reasonably infer that the right to inspect had a purpose. It would not be unreasonable to expect that the purpose was to ensure that activities were limited to those things which [Westmin] said it intended to do.

In these circumstances and given the Union's consistent concerns to maintain a peaceful picket line, I am not now prepared to make a finding of contempt of the Court Order. In my view, there is a clear misunderstanding of what [Westmin] is entitled to do and to that extent an equally clear misunderstanding concerning the

objective of the order.

Given the Union's consistent concern to ensure peaceful picketing and the presence of a Code of Conduct that the Union has enforced, it would be wrong to anticipate future unlawful activity and restrict numbers at the Mine Road site at this time. (pp.8-9)

In November 1993 Union employees were observed filming at the mine site, and Westmin contracted with Seahawk to secure the area during the night, and to keep a log of persons entering the area. No Westmin employee had performed this duty prior to the lockout.

In November 1993 the Union was aware that Seahawk was providing security services at Discovery Terminal and also at the mine site. No complaint was pursued by the Union at that time.

Westmin continues its limited operation and on December 20, 1993 a cement truck attempted to cross the picket line to deliver cement from Tilbury Cement in Bamberton to the mine site. Ron Weatherall, the President of the Local Union, and another member of the Union executive approached the driver of the cement truck. Larry McNeely, the Employee Relations Superintendent at Westmin, testified that he heard from Lyle Wiseman, the Employee Relations Supervisor at Westmin, that the cement truck driver was told that the picketers were upset by the truck crossing their picket line, and the Union was unable to control the actions of its members once the truck was off the Westmin site. Weatherall denies making the statement as alleged to the cement truck driver.

On December 20 Westmin asked Seahawk to escort the cement truck from the mine site to the cement depot at Bamberton, and back to the mine site because it was concerned about the safety of the cement truck and its driver. Fuller and another Seahawk employee escorted the cement truck down the Island Highway as requested. Fuller noted that a vehicle containing at least one Union member also accompanied the cement truck. Later a second vehicle was observed following the cement truck. The other vehicles slowed down with the cement truck, and traffic infractions appear to have occurred as the vehicles manoeuvre to stay close to the cement truck along the narrow twisting road. Later other vehicles were observed following the cement truck. The Seahawk vehicle and these other vehicles accompanied the cement truck in a

convoy to the Tilbury cement plant at Bamberton. After the truck was filled with cement, the truck proceeded to leave the Tilbury Cement plant. The occupants of the vehicles which had followed the cement truck got out of their vehicles and stood across the road delaying the cement truck from leaving the Tilbury Cement plant for approximately ten minutes. After the cement truck left, Fuller was delayed by a further five or ten minutes by the occupants of the vehicles. Fuller was told in an unpleasant manner he shouldn't be escorting the cement truck.

The cement truck, the Seahawk vehicle, and the other vehicles then proceeded back towards the Westmin mine. At the mine-site picket line the cement truck stopped. Wiseman went ahead to speak to the picketers. Mr. Hoadley, the Seahawk employee driving with Fuller, also approached the picket line. The picketers reacted unpleasantly to the approach of Hoadley. Bill Kerr, one of the Union picketers, appeared to shove Hoadley. Fuller pulled out a camera to take a picture. This caused a further confrontation at the picket line.

Following the discussion between Wiseman and the picketers, the driver of the cement truck backed his vehicle up. Approximately one hour later the RCMP arrived. Fuller observed that one of the mirrors on the cement truck was broken, and one of the tires was flat. Following a discussion between the RCMP and Wiseman the cement truck was permitted to proceed through the picket line. When the Seahawk vehicle sought to proceed through the picket line, abuse was shouted at Fuller and Hoadley.

On December 29, 1993 the Honourable Mr. Justice Vickers made an interim order that the Union "and those having knowledge of the order be restrained from intimidating, coercing, obstructing or threatening harm to [Westmin] employees, agents, customers, supplier, or other in privity of contact with [Westmin]". Peace officers were authorized to arrest and remove any persons who contravened the order. This interim order was effective until January 28, 1994.

IV. IS WESTMIN USING REPLACEMENT WORKERS?

Section 68 of the Code prohibits Westmin from using the services of employees of Seahawk to perform:

- (f) the work ordinarily done by a person who is performing the work of an employee in the bargaining unit that is...locked out.

The issue before me is a factual one: Are Seahawk employees performing the work ordinarily performed by the first aid attendants so as to permit two first aid attendants to perform bargaining unit work?

The work performed by Seahawk employees since the commencement of the lockout is not work ordinarily performed by any Westmin employee. The security and picket line escort work is not work which was previously performed by the first aid attendants. The three events relied upon by the Union: the incident of a first aid attendant intervening in a bunkhouse dispute; the first aid attendant going to the water tower; and first aid attendants directing tourists away from unauthorized areas; are so wholly different in nature to the work now performed by Seahawk, that I conclude Seahawk is not performing work ordinarily done by the first aid attendants.

The Union argues that the first aid attendants are competent to perform the work now performed by Seahawk and should have this work assigned to them. The Union says the first aid attendants should not be free to perform bargaining unit work. Westmin does not dispute that the first aid attendants are likely capable and competent to perform the security work now done by Seahawk. This, however, is not the test applicable to these facts. Section 68 applies to the performance of work ordinarily done by the first aid attendants not to the performance of all work which they are capable of doing.

In conclusion this aspect of the Union's complaint is dismissed.

V. IS SEAHAWK AN ALLY?

Section 65(1) defines an ally as:

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;

This definition, although extremely broad, has always been interpreted in the context of the

legislation as a whole, and in a manner consistent with industrial relations realities.

Although a third party which continues to maintain existing arrangements with a struck employer may be viewed as assisting that struck employer during a strike or lockout, the Board has not interpreted the definition of "ally" to include these parties, *London Drugs Limited*, BCLRB No. 71/79, [1980] 1 Can LRBR 15; *Can West Steel*, IRC No. C268/88. When a third party with an pre-existing arrangement alters that arrangement, in order to provide additional or special assistance to the struck employer, the third party become an "ally": *Liquor Distribution Branch*, BCLRB No. 32/78, [1978] 2 Can LRBR 334; *Chevron Canada Limited*, BCLRB No. 21/78, [1978] 2 Can LRBR 316.

Seahawk has not maintained its pre-existing relations with Westmin. It has significantly and fundamentally altered those relations since the lockout by Westmin. First, it provides on-site security at Myra Falls and Discovery Terminal. Second, it has begun escorting trucks bringing gas and cement to the mine and will likely be escorting trucks of concentrate from the mine to Discovery Terminal.

The on-site security provided by Seahawk at the two Westmin sites pre-dates the decision of Westmin to commence limited operations, and bears no direct relationship to the limited production now being undertaken by Westmin. This service is to preserve the assets of Westmin during the course of the lock-out so as to enable Westmin to start up operations at the conclusion of the work stoppage. Although the on-site security service provided by Seahawk assists Westmin, it does not assist Westmin to withstand the adverse economic impact of the lockout. The on-site security does not contribute to the limited operation of Westmin.

The more recent activities of Seahawk are quite different. Seahawk is now escorting vehicles carrying products which enable Westmin to engage in limited operations. Seahawk is assisting Westmin in its attempt to diminish the economic impact of the lockout.

Westmin argues that it has engaged Seahawk as a defensive measure to prevent illegal actions and to assist it in preparing the necessary information to enjoin such actions. Citing *Liquor Distribution Branch*, BCLRB No. 32/78, [1978] 2 Can LRBR 334: the Employer argues that Seahawk is not providing *undue* assistance to Westmin.

...it's not good enough to make simplistic, cut and dried findings about whether the struck employer received any assistance at all, or of one kind rather than another. We are persuaded that the Labour Code contemplates a more sophisticated, industrial relations judgment: about whether a third party has provided *undue* assistance to the struck employer, sufficient to justify an escalation in picketing activity by the union. These are the kinds of questions which the Board puts to itself: Has a third party markedly altered its relationship with the struck employer? Does the third party have compelling reasons of its own for adopting these arrangements? How significant is the help which has been received by the struck employer in its conflict with the trade-union? The ultimate conclusion in any concrete case must be an amalgam of all of these elements in our inquiry. As far as the Board is concerned, anyone who isolates a single theme in a particular decision, and holds this up as the litmus test for an "ally", does so at his own peril. (p. 350 emphasis in original)

Westmin has engaged Seahawk because it is concerned for the safety of persons and property which enter and leave the mine-site. Seahawk's presence is not only to observe and record picket line activities, it is to deter any interference with delivery trucks and their drivers. Seahawk is available to protect and assist should any physical interference be encountered. This goes beyond a defensive role, aimed at maintaining legality, as argued by Westmin. Seahawk has an active role and is participating in the continued activity of Westmin when it is performing convoy duty for the trucks crossing the line and when escorting the trucks through the line. It is assisting Westmin in Westmin's efforts to diminish the economic impact of the lockout and is participating in its operations.

I do not reach the same conclusion with respect to the on-site security provided at the Myra Falls operation and Discovery Terminal. In my opinion Seahawk is not providing undue assistance to Westmin in its conflict with the Union by providing this limited service.

In conclusion, Seahawk has markedly altered its relations with Westmin. It has not done so under circumstances which amount to "self-help". Westmin has engaged the services of Seahawk to protect the trucks and their drivers when they are passing through the picket line and when they are engaged in transporting products for Westmin's operations. Just as Westmin is

entitled to carry out its operations during the lockout, there is no legal impediment to Seahawk assisting Westmin to operate during the lockout. But by doing so Seahawk has lost its neutrality, has allied itself with Westmin, and is subject to picketing under the provisions of the Code.

VII. HAS THE UNION ENGAGED IN ILLEGAL ACTIVITY SUCH THAT IT SHOULD BE DENIED THE ALLY DECLARATION?

Westmin relies upon Section 71 of the Code which reads:

71. The board may refuse to make an order under Part 9 in respect of a matter arising under this Part if it believes it is just and equitable to do so in view of the improper conduct of the person applying for the order.

Westmin argues that illegal conduct has occurred on the picket line from as early as May 1993, and that the events of December 20, blocking the road to Myra Falls, tire-spiking, and smashing mirrors should prevent the Union from being able to obtain the assistance of the Board.

I find I need not make any determination as to the extent of any improper conduct which may have been engaged in by the Union as I am not prepared to exercise my discretion under the Code to refuse the relief sought by the Union.

Withholding the remedy of an ally declaration is not appropriate where there are other practical avenues for the Union to be penalized if it has engaged in improper conduct: *Dover Corporation Limited*, IRC No. C101/92. The correct and effective response to these alleged violations is to seek the assistance of the RCMP, and the civil courts. Westmin has effectively sought this assistance. The discretion of the Board need not be withheld in order to impose a punishment upon the activity of the Union members, if any punishment is justified.

VII. CONCLUSION

Seahawk is not performing work ordinarily performed by persons now performing work of an employee in the bargaining unit that is locked out, and the Union's complaint under Section 68 is dismissed.

Seahawk is declared to be an ally of Westmin by reason of its work escorting vehicles which pass through the picket line on the road to Myra Falls. Seahawk is not an ally by providing security services for the Discovery Terminal nor for the security provided at the Myra Falls operation.

The Union seeks permission to picket under Section 65(4)(b). The Employer says that picketing authorized under Section 65(4)(b) may be common-site picketing. Prior to making an order under Section 65(4)(b) and 65(6) I require further submissions and possibly further evidence with respect to proposed picketing locations. The Union is permitted to bring this matter back before the Board on 24 hour notice to the Employers and any interested party for the appropriate order permitting picketing.

LABOUR RELATIONS BOARD

KATE YOUNG
VICE-CHAIR