

(Leave for Reconsideration of BCLRB No. B275/94)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

SOVEREIGN GENERAL INSURANCE COMPANY and JIM DENT CONSTRUCTION

(the "Applicants")

-and-

OFFICE AND TECHNICAL EMPLOYEES' UNION, LOCAL NO. 378

(the "OTEU")

-and-

B.C. FEDERATION OF LABOUR, BUSINESS COUNCIL
OF BRITISH COLUMBIA and COALITION OF B.C. BUSINESSES

(Intervenors)

PANEL: Stan Lanyon, Chair
John B. Hall, Associate Chair (Adjudication)
Brent Mullin, Vice-Chair
Joanne Arnold, Member
John Newman, Member

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CASE NO.: 19929

DATE OF HEARING: September 1, 1994

DATE OF DECISION: November 21, 1994

DECISION OF THE BOARD

I. INTRODUCTION

This decision arises from a request for leave and reconsideration by the Applicants. The original panel denied them relief from picketing by the OTEU at a common site: see BCLRB No. B275/94. The OTEU was at the time engaged in a lawful strike against BC Hydro.

Subsequent to the appeal hearing before this Panel, but prior to any decision being issued, the OTEU and BC Hydro settled on terms for a new collective agreement. The present application has therefore been rendered academic for purposes of deciding whether the Applicants should have been granted relief from picketing. However, we believe this is an appropriate case for the Board to issue a decision which deals with Section 65(6) generally. This is the first occasion on which the new common site picketing provisions have been examined on appeal, and the matter is one of broader importance to the labour relations community. Further, full submissions were made on the interpretation and policy issues by both the immediate parties and the Intervenors.

The Applicants' request for leave to apply for reconsideration is thus denied on the basis that it is academic, insofar as it concerns the question of whether relief from picketing was properly denied: *Health Labour Relations Association*, BCLRB No. B69/93, at pp. 10-12. Consistent with this, we will not deal with the facts before the original panel. (Those circumstances were potentially unique, in that picketing was occurring at a BC Hydro sub-station to which there was a single access road, and the site was normally "unmanned" except for the construction work which led to the presence of both striking OTEU employees and the Applicants.) In taking this approach, we should not be seen as either adopting or affirming the reasons of the original panel. Instead, we intend to establish a general interpretive and policy framework for future applications under Section 65(6). This analysis will undoubtedly be subject to refinement over time, as different circumstances arise for consideration.

Finally, by way of introduction, we have not set out the detailed submissions made by all counsel; nonetheless, we wish to acknowledge the assistance provided by both their written and

oral presentations.

II. ANALYSIS

One of the most controversial and at times problematic areas of labour legislation in this Province has traditionally been the provisions which govern the scope of permissible picketing. To a certain extent, that is true of the present statute. Picketing was one of only four areas where the Sub-committee of Special Advisors did not reach unanimous agreement: see *Recommendations for Labour Law Reform* (September 1992).

An historical overview of the legislation governing picketing in British Columbia was recently provided in *KMart Canada Limited*, BCLRB No. B270/94 (Reconsideration of BCLRB No. B21/93), especially at pp. 17-21. The panel in that case traced a series of legislative amendments which have increasingly restricted the sites or places of lawful picketing by trade unions engaged in labour disputes with their employers. The intent and effect of those restrictions has been to not only limit the impact of labour disputes and picketing on third parties, but also to restrict and limit who is the "primary" employer.

A somewhat similar series of amendments has occurred respecting the Board's discretion to regulate common site picketing. A "common site" has typically been defined as a site or place "where 2 or more persons carry on business, operations or employment". Under the *Labour Code* as initially enacted, where picketing occurred at a common site there was an unqualified discretion in Section 86 for the Board to "...give directions respecting the picketing to *reasonably restrict and confine* the picketing to the person causing the lockout or whose employees are on strike" (emphasis added). Although the wording of the provision was altered in 1982, the same general discretion continued. The manner in which the Board exercised this jurisdiction is summarized in cases such as *Vancouver Symphony Society*, BCLRB No. L15/81, and *White Spot, Division of General Foods Inc. and Simon Fraser University*, BCLRB No. L226/82.

The Legislature repealed Section 86 in 1984 and included the common site picketing provision within Section 85(5) of the Code:

- (5) The board may, on application or on its own motion, make an order defining the site or place at which picketing that is permitted

by subsection (3), or that is permitted under subsection (4), may take place, and where the picketing is common site picketing the board *shall by the order reasonably restrict* the picketing to the employer causing the lockout, or whose employees are on strike, or to an ally of that employer. (emphasis added)

The Board generally followed its prior jurisprudence and, in spite of the 1984 amendment, denied relief entirely where an order limiting picketing would have constituted an unreasonable restriction: *Kelowna International Regatta Association*, BCLRB No. 172/86.

The most stringent regulation of common site picketing occurred in 1987 as part of the Bill 19 amendments. Section 85(5) was changed to read in part as follows:

...where the picketing is common site picketing the council *shall restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike*, or an operation of an ally of that employer. (emphasis added)

This mandatory direction to restrict picketing led the Industrial Relations Council to prohibit picketing altogether in one case where alternatives proposed by the striking union would still have continued to affect the third party at the common site: *Capital Regional District*, IRC No. C49/91.

As stated, the Sub-committee of Special Advisors could not agree on recommendations concerning picketing -- particularly those concerning common site picketing. Sub-committee member Tom Roper recommended that there be no alteration to Section 85 (Appendix 4, page 8). The other members of the Sub-committee agreed that third parties should be insulated from picketing, but saw limits to legislative protection. Member John Baigent wrote in part:

I agree that neutral employers should be insulated, as much as possible, from the effects of legal picketing. The language of the present statute allows the Council to insulate a neutral employer by eliminating an employee's right to picket where he or she works. My proposal would direct the Labour Relations Board to restrict the picketing to insulate neutral common site employers

provided that any restriction does not eliminate an employee's right to picket the place where he or she works. (Appendix 4, p. 1)

The statutory language which Mr. Baigent proposed was very similar to that which existed until 1984; i.e., "...the Board shall...give directions respecting the picketing to reasonably restrict and confine the picketing to the [primary employer]".

Sub-committee member Vince Ready also agreed that protection should be given to third parties:

My point of departure from the existing legislation has to do with its resolution of the conflict between the need to protect unaffected parties (either other employers or unaffected divisions of the same employer) and the right of a striking trade union to lawfully picket places where its members work as provided for elsewhere in the section. Currently, the Act would require the Board to eliminate picketing in a common site picketing situation where there was no way to confine the pickets to the operation of the struck employer without affecting the uninvolved party. I believe that the Board should have discretion in such circumstances. *I propose a section which would place primary emphasis on the protection of uninvolved parties unless the only restriction possible would result in a prohibition of picketing which is otherwise lawful. In that circumstance, I believe that the Board should have the ability to regulate the picketing in such a manner as it deems appropriate.* (Appendix 4, p. 5; emphasis added)

The language which Mr. Ready proposed ultimately became Section 65(6) of the current *Labour Relations Code*:

65. (6) The board may, on application or on its own motion, make an order defining the site or place at which picketing that is permitted by subsection (3), or that is permitted under subsection (4), may take place and where the picketing is common site picketing, the board shall restrict the picketing in such a manner that it affects only the operation of the employer causing the lockout or whose employees are lawfully on strike, or an operation of an ally of that employer, unless it is not possible to do so

without prohibiting picketing that is permitted by subsection (3) or (4), in which case the board may regulate the picketing as it considers appropriate.

It is thus apparent -- both from the comments of the Sub-committee and the picketing provisions themselves -- that Section 65(6) addresses the convergence of two competing interests. On the one hand, there is the right of striking or locked out employees to picket at locations where they normally work. This right is qualified only by Section 65(6) itself. On the other hand, there is the right of third parties to be protected from the secondary effects of labour disputes. (In this context, "third parties" generally means other employers who are not allies, operations which are separate and distinct under Section 65(7) of the Code, and their employees.) This protection of third parties is consistent with Section 2(1)(c) of the Code which states that one of the statute's purposes is to "minimize [although not eliminate] the effects of labour disputes on persons who are not involved". As we will see, which of these rights becomes "paramount" depends on the stage of analysis under Section 65(6).

This leads to the next and perhaps obvious point that the Board's jurisdiction over common site picketing contemplates a two-step process. At the first stage, the Board is given a mandatory direction to "restrict the picketing in such a manner that it affects only the operation of the [primary employer]", *unless* this would result in a prohibition of picketing. Where a prohibition would result, one then moves to the second stage where the Board has an unqualified discretion to "regulate the picketing as it considers appropriate".

This simple formulation of Section 65(6) immediately gives rise to a number of questions, including: what is meant by the words "restrict" and "regulate"; what limitations can the Board impose in either restricting or regulating picketing; what constitutes a "prohibition" of picketing; what considerations are relevant at the first stage when the Board restricts picketing; and what factors are relevant in the exercise of the Board's discretion to regulate picketing? These questions and related issues will be addressed in turn below.

(i) "Restrict" and "Regulate"

Section 65(6) gives the Board jurisdiction to both "restrict" and "regulate" picketing.

Reference to dictionary definitions and ordinary usage illustrates that these words have considerable overlap in meaning. However, to ascribe the same interpretation to both would make the word "regulate" superfluous, and operation of the common site picketing provision tautological -- merely repeating under the concept of "regulate" what is prescribed under "restrict".

In an effort to harmonize and give separate meaning to each word, both "restrict" and "regulate" must be interpreted in the context in which they appear, the legislative history of the common site provision, and the overall scheme of the Code's picketing provisions. As stated by E.A. Driedger, in *Construction of Statutes*, 2d ed. (Butterworths: Toronto, 1983):

...A dictionary may give many definitions of a word, but it cannot have meaning until it is connected with other words or things so as to express an idea. ... (p. 3)

The Shorter Oxford English Dictionary, vol. II, 3d ed. (Clarendon Press: Oxford) provides similar definitions for both words. For example, "regulate" is defined in part as "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions". The word "restriction" is partially defined as "A limitation imposed upon a person or thing; a condition or regulation of this nature". There is, nonetheless, a distinction which becomes important for our analysis: the word "restrict" is defined as including "To restrain *by prohibition*" (emphasis added). A limitation to the point of prohibition is not contemplated by the definition of "regulate".

The *Industrial Relations Act*, in its exclusive use of the word "restrict", clearly contemplated a complete prohibition of lawful picketing at a common site. In our view, the new *Labour Relations Code* which employs the concepts of both "restricting" and "regulating" picketing does not envisage such a result; first, because a prohibition is expressly impermissible under Section 65(6) in restricting picketing; and second, because the concept of regulation does not include prohibition. This view is consistent with the statutory canon of construction that:

...the same words should have the same meaning, and, conversely, different words should have different meanings. ...
(E.A. Driedger, *supra*. p. 93)

Nonetheless, the commonality between the two words has led us to conclude that the types of limitations which the Board can impose in either restricting or regulating picketing are essentially the same. A distinction arises in the considerations relevant to the exercise of the Board's jurisdiction to impose those limitations. We will explore this distinction in detail below.

(ii) Potential Limitations on Picketing

Turning to the second question, the Board has in the past limited picketing in geographical and temporal terms. It has also attached conditions to its orders (e.g., that certain work not be performed if relief from picketing is granted). The latter might be described as a "functional limitation". Separately, or in combination, these alternatives allow the Board to either restrict or regulate the time, place and manner of lawful picketing. Implicit in our analysis is a rejection of the argument that *any* limitation on picketing which is *prima facie* lawful under Section 65(3) or (4) amounts to a "prohibition".

A geographical limitation on picketing is relatively straightforward and has traditionally been used where there is more than one access to a common site. See, for example, *Mitchell Installations Limited*, BCLRB No. 127/86. Temporal limitations can similarly be used to provide relief to third parties. In this regard, we reject the approach inherent in *Wescraft Manufacturing Ltd.*, BCLRB No. 54/75, [1975] 2 Can LRBR 324, that a relatively limited presence (i.e., a one and one-half hour delivery every two weeks) should be allowed to result in continuous picketing of a common site. This is a classic situation where the Board will either restrict or regulate the times at which picketing may take place.

Finally, there are a number of functional limitations which the Board may impose as part of its jurisdiction to restrict and regulate picketing. The example of certain work not being performed has already been referred to. Other past conditions include making an order contingent upon a licence being given to authorize persons to go on to private property for the purpose of picketing the struck employer (*British Columbia Railway Company*, BCLRB No. 24/78, [1978] 2 Can LRBR 350); requiring certain undertakings (*Ambassador Industries Ltd.*, BCLRB No. 13/81, [1981] 1 Can LRBR 288); and directing that certain persons not use a construction gate, requiring a sign-in by those who are allowed on site, and allowing the union to review the sign-in book and monitor entry and exit (*Mitchell Installations Limited, supra*). This list is certainly not exhaustive, but serves to illustrate the broad manner in which the Board can tailor such functional limitations to the circumstances.

(iii) "Prohibiting" Picketing

The next question is what constitutes a prohibition of picketing? The *Labour Relations Code* does not guarantee that a striking or locked out union will be able to engage in effective picketing. Persons may choose to cross lawful picket lines and continue to do business with a struck employer. Nonetheless, restrictions on picketing (which in some respects do not amount to a complete ban) may for practical purposes constitute a prohibition of picketing. The Board must accordingly consider the impact which any restrictions will have -- and, more particularly, the ability of striking or locked out employees to continue to persuade persons not to do business with their employer (see Section 1(1) of the Code). For instance, it could not be seriously argued that restricting picketing to the middle of the night, when no one is present at a common site, would constitute anything other than a prohibition.

There is also another perspective from which the effect of picketing must be considered; namely, whether it demonstrates that the real purpose is to apply pressure on neutral third parties. Even prior to Section 2(1)(a) of the Code, it was a fundamental premise of the statute that neutrals be insulated from the effects of labour disputes over which they have no control; i.e., they should not be subjected to secondary picketing. As stated in *Metro Canada Limited*, BCLRB No. 37/84:

There is another factor which we have considered in deciding to allow these applications: the purpose of the picketing. In this case the Panel concluded that the purpose of the picketing was to put pressure on the applicants so that they would put pressure on B.C. Hydro. As the Board has stated previously, "...the tactic of exerting secondary pressure of that nature is prohibited by the Code." (The Municipality of Saanich, BCLRB No. 42/81, [1981] 3 CLRBR 26 at 39) (see also The Government of British Columbia, BCLRB No. L83/81 and P.C.L. Construction Ltd., *supra*). (p. 10)

See also *Dillingham Corp. (Canada) Ltd.*, BCLRB No. 91/75, [1976] 1 Can LRBR 129, at pp. 131-132 (citing *Camosun College*, BCLRB No. 14/75, [1975] 2 Can LRBR 94). The same point was recently made in *KMart, supra*, which recognized that neutral secondary employers should not be adversely affected by industrial activity related to a labour dispute to which they

are not a party. The policy rationale for this is clear: a third party has no ability to settle the labour dispute. Precluding picketing of this nature does not constitute a "prohibition".

(iv) Two-Stage Analysis

We come now to a more detailed examination of the Board's inquiry at both the first and second stage of Section 65(6). It might initially seem that there is very little distinction given the determination that the same options are available in both restricting and regulating picketing (i.e., time, place and manner). However, there is an important difference to which reference has already been made: at the initial stage, primary emphasis is placed on the protection of third parties -- the Board is directed to restrict the picketing in such a manner that it only affects the operation of the struck or locking out employer, unless to do so results in a complete prohibition of the picketing; at the second stage, regulation of picketing may result in third parties being affected.

Except for the stipulation that restrictions on picketing not amount to a prohibition, the first stage adopts language found in the *Industrial Relations Act*. That is, both the former Section 85(5) and the current Section 65(6) contain an express direction that "...the board *shall* restrict the picketing in such a manner that it affects *only* the operation of the [primary employer]" (emphasis added). This language does *not* engage any of the discretionary factors which were previously adopted by the Board in cases such as *Vancouver Symphony Society, supra* (e.g., functional interrelationship or lack of "neutrality").

Given this primary emphasis at the first stage on insulating third parties, we believe that there should be a concomitant obligation on persons seeking relief under Section 65(6) to specifically propose the minimum restrictions necessary for their protection. The onus will then shift to the union to demonstrate that these restrictions would amount to a prohibition, before the Board will move beyond the first stage.

At the second stage, primary importance is no longer placed on the protection of third parties. Instead, the Board must balance (perhaps "weigh" is a more appropriate description) their rights with those of the striking or locked out employees. This requires a broader examination of the competing interests -- recognizing that in no circumstances will there be a

complete prohibition of picketing. Although the right to picket may be diminished as well through regulation at the second stage, unlike the first stage, there may also be a continuing effect on third parties. Further, if no regulation short of prohibition is possible, the Board may exercise its discretion to deny relief entirely.

The Board's discretion at the second stage brings into play criteria which have previously been considered in common site picketing situations. In our view, there is no meaningful distinction between the Board's discretion under Section 65(6) to "regulate the picketing as it considers appropriate" and the discretion which existed under Section 86 to "reasonably restrict and confine the picketing"; stated simply, the Board would not consider an unreasonable restriction to be appropriate.

A significant factor previously considered by the Board in determining whether relief should be granted from common site picketing is the concept of "functional interrelationship" -- or "functional integration", to use the term found in more recent decisions. As past cases recognize, there is a valid distinction between two employers who share a single site by "accident of geography" and those who have a direct contractual or other connection.

We hasten to add that the existence of a functional interrelationship will not necessarily be determinative in the exercise of the Board's discretion to regulate picketing. Further, simply because there is a contractual relationship between two parties will not mean that the necessary integration is established; nor should the normal "benefit" which flows to a struck employer from a contract serve as a basis for denying relief from picketing. Finding functional integration in these situations would be inconsistent with, and potentially undermine, the "separate division" basis for relief from picketing under Section 65(7) of the Code.

We expressly adopt the analysis found in *Dillingham, supra*. The CPU in that case went on strike against Belkin and established pickets at the access road to a construction site for which Dillingham was the general contractor. The construction involved an addition to the Belkin plant which would house a new paper making machine. In considering the relationship between Dillingham and Belkin, the majority of the Full Board stated:

Notwithstanding the union's argument, *there can be no realistic doubt about the neutrality of Dillingham in the labour dispute*

between Belkin and the CPU. There is no corporate interconnection or association between Dillingham and Belkin. Dillingham came on the Belkin premises as an independent contractor, at a time and in a situation which was entirely removed from the labour dispute. This is a contract for an addition to the plant building, not for any functions which are part of the normal operations in the plant. Prior to the strike, there was no more than the normal interaction between the employees of the contractor and of the owner. The CPU strike was successful in closing down the plant operations and Belkin has made no attempt to frustrate the strike in that way. In this situation, and for the reasons stated earlier, *Dillingham must be entitled to relief under s. 86 from picketing produced by a labour dispute between Belkin and the CPU, a dispute in which Dillingham is not involved and which it has no power to resolve.* (p. 135; emphasis added)

Similarly, the Board held that inspections by a struck employer did not result in a loss of "neutrality" (*MJD Construction Ltd.*, BCLRB No. 16/81, [1981] 1 Can LRBR 492, at p. 494), and that no functional integration existed where the employees of the non-struck employer for whom construction was being undertaken did "basic preparation work and the tie-in work that would conclude the project" (*Mitchell Installations Limited, supra*, at p. 6). Conversely, a functional interrelationship existed where, among other things, there was an interchange or commonality of employees between the two employers (*Vancouver Symphony Society, supra*, at p. 3), and an intertwining of financial and other arrangements (*Kelowna National Regatta Association, supra*, at p. 4).

Past Board decisions considered functional integration on the basis that it might affect the "neutrality" of a secondary employer. Another rationale is that the degree of integration may be so significant that what would otherwise be considered a "common site" (absent the functional integration) has become analogous to a single, primary site. However, we emphasize that consideration of this factor only arises at the second stage of analysis, if restricting picketing at the first stage would result in a prohibition; this is the cumulative effect of the 1987 and 1993 amendments to our picketing provisions. Further, it obviously remains open to employers to determine the manner in which work will be carried out at a common site -- they ultimately control the extent of functional integration.

There will certainly be other factors which become relevant in particular cases to the Board's exercise of discretion in balancing or weighing the picketing rights of striking or locked out employees against the right of third parties to be protected from such activity. Those factors might include whether the primary employer is continuing to operate at the common site; the normal presence and number of striking or locked out employees at the site, as compared to the activities of the third party and its employees; whether other operations of the primary employer are being affected by the labour dispute; and whether the picketing causes disproportionate harm to the third party. All of this serves to underscore the fact that the Board must broadly consider the rights and interests of the striking or locked out employees (and their union), the primary employer, and the third party and its employees, when exercising the discretion to regulate picketing at the second stage of Section 65(6).

There are, however, at least two considerations which will be irrelevant to the Board's exercise of discretion. First, we do not see a valid distinction being made between third parties based on the length of time they have been present at a common site. In our view, this does not automatically translate into a greater or lesser impact from picketing. An entirely different situation arises, however, where a third party seeks to attain access to a site after a labour dispute has commenced (in this respect, see *Dillingham, supra*, at page 132). Where a contractor is first invited to perform work during a strike it cannot truly claim that there is a "common site" so as to obtain relief from picketing.

A second consideration which will not be relevant to the exercise of discretion under Section 65(6) is the potential for relief under *force majeure* or other clauses of a commercial contract. The Board should not embark upon the course of interpreting such provisions and then speculating as to what relief may be available. Further, where compensation is within the control of the primary employer, this may become a somewhat meaningless inquiry if relief is deliberately withheld.

Before concluding our discussion of the manner in which the Board may regulate picketing, an additional observation should be made; namely, the inability of the Board to prohibit picketing does not mean that picketing might not be regulated by imposing time, place or manner limitations to provide protection from irreparable harm which might otherwise occur. For example, a panel might determine that a construction contractor should not be granted relief

from common site picketing, or conclude that such picketing could not be limited on an on-going basis without constituting a prohibition. The panel might nonetheless decide to regulate picketing by expeditiously imposing limitations on an interim basis, so as to secure the construction project and prevent the infliction of significant financial damage on the contractor: *Dillingham, supra*, at p. 133.

VII. CONCLUSION

The labour dispute which resulted in the application before the original panel has been resolved. Accordingly, a consideration of whether the Applicants were properly refused relief from picketing in the first instance is academic, and their request for leave to apply for reconsideration of BCLRB No. B275/94 has been denied on that basis. We have taken the opportunity, however, to set out the general interpretive and policy framework which will govern the Board's adjudication of future common site picketing applications under Section 65(6) of the Code.

LABOUR RELATIONS BOARD

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