

BCLRB No. B49/94
(Reconsideration of BCLRB No. B105/93)

BRITISH COLUMBIA LABOUR RELATIONS BOARD

THE BOARD OF SCHOOL TRUSTEES OF
SCHOOL DISTRICT NO. 47 (POWELL RIVER)

(the "Employer")

-and-

POWELL RIVER DISTRICT TEACHERS' ASSOCIATION
OF THE BRITISH COLUMBIA TEACHERS' FEDERATION

(the "Union")

PANEL: Stan Lanyon, Chair

COUNSEL: D. Murray Tevlin, Counsel for the Employer
Allan E. Black, Counsel for the Union

CASE NO.: 14956

DATE OF DECISION: February 8, 1994

DECISION OF THE BOARD

I. INTRODUCTION

The Union applies under Section 141 of the *Labour Relations Code* for leave to reconsider BCLRB No. B105/93. In that decision, the panel found that picketing by Union members at one of the Employer's sites was contrary to Section 65(3) of the Code. The panel further declined to permit the Union to picket the site pursuant to Section 65(4).

II. BACKGROUND

The relevant facts underlying the original decision are relatively straightforward and for the most part undisputed. The Employer is a Board of Trustees constituted pursuant to the *School Act*. It operates twelve schools and four non-school buildings in the Powell River School District. Commencing March 29, 1993, the Employer engaged in a legal lockout of Union teachers. In addition to the Union members, the Employer employs approximately 30 members of the Canadian Union of Public Employees Local 476 ("CUPE") who work at the various schools and buildings operated by the Employer in the School District. CUPE has an existing collective agreement with the Employer that permits its members to refuse to cross a picket line. CUPE members have not crossed the picket lines set up at the twelve schools by the Union.

On March 29, 1993, Union pickets appeared at several non-school buildings, including the J.C. Hill Building. The J.C. Hill Building had in the past been an operating school within the School District employing members of the Union. Approximately eight years ago the J.C. Hill Building was closed. The building has sat vacant since its closure.

Approximately 1 1/2 years ago the Trustees of the School District visited the J.C. Hill Building. Appalled at its deteriorating condition, they instructed the School District building and grounds superintendent that when time permitted he should instruct CUPE members to begin repairs of ceiling tiles, broken glass, plumbing fixtures, etc. The superintendent testified that

repairs have been under way since he received those instructions from the Trustees. The superintendent further testified that when the labour dispute began on March 29th and CUPE members refused to cross the various picket lines at the schools he instructed some of the CUPE members to report to the J.C. Hill Building to continue the maintenance upgrade.

The original panel found as a fact that the work the CUPE members performed at the J.C. Hill Building after March 29th was work they undertook prior to the strike, although they worked at the site more frequently after the pickets appeared at the twelve schools.

In submissions filed with this application the Union asserts that the CUPE members dispatched to work at the J.C. Hill Building following the picketing of the twelve schools would not have been so directed but for the picketing. The Union further alleges that the dispatched CUPE members do not normally work at the site, but rather, regularly perform maintenance and other duties at other sites of the Employer. The Employer disputes these allegations, noting the finding of fact of the original panel referred to in the preceding paragraph.

What is not in dispute is that CUPE members did, on occasion, report to the J.C. Hill Building prior to the lockout to perform maintenance duties there. It is not relevant to our decision whether some, or even a majority, of the CUPE employees dispatched there after the pickets appeared at the other schools, would not have been so directed but for the picketing.

III. THE ORIGINAL DECISION

Prior to summarizing the original decision, it is convenient to set out the wording of the Code sections referred to in the decision.

- 65.(3) A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.

- (4) The board may, on application and after making the inquiries it requires, permit picketing
- (a) at or near another site or place that the employer causing a lockout or whose employees are lawfully on strike is using to perform work, supply goods or furnish services for the employer's own benefit that, except for the lockout or strike, would be performed, supplied or furnished at the site or place where picketing is permitted by subsection (3), or
 - (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,

but the board shall not permit common site picketing unless it also makes an order under subsection (6) defining the site or place and restricting the picketing in the manner referred to in that subsection.

- 68.(1) During a lockout or strike authorized by this Code an employer shall not use the services of a person, whether paid or not,
- (b) who ordinarily works at another of the employer's places of operations that is not directly involved in the dispute,
 - (e) the work of an employee in the bargaining unit that is on strike or locked out, or

The original panel held that Section 65(4) only empowers the Board to permit picketing at sites other than those described in Section 65(3) if the employer has transferred bargaining unit work from the struck operation. Since no bargaining unit work performed by the Union at the twelve schools had been transferred to or was being performed at the J. C. Hill Building, the Union was not granted permission to picket.

In making this determination the original panel considered earlier decisions of the Board

and its predecessor, the Industrial Relations Council, which summarized the previous interpretation of Section 65(4) and its predecessor sections. These decisions, *Acklands Ltd.*, IRC No. C115/91, *Stan V. Wright Ltd.*, IRC No. C212/92 and *MacMillan Bloedel Limited, Alberni Pulp and Paper Division*, BCLRB No. 212/86 ("Alpulp"), established that in order for picketing to be permissible under Section 65(4), the employer must continue to operate during a strike by having *bargaining unit* work performed at the other sites. If no work normally performed by the striking or locked out bargaining unit members is being performed at the other site, the Board will not exercise its discretion to permit picketing there.

Before the original panel, the Union argued that the transfer of any work, not just work of the striking bargaining unit, from a struck operation to another location should give rise to permission to picket under Section 65(4). Since Section 68 prevents an employer from asking CUPE members to do striking or locked out bargaining unit work at another location, the Union says that Section 65(4) must now be given this broader interpretation. The section must now be interpreted to prevent an employer from moving *any* work from behind a picket line.

The original panel concluded that the interpretation of Section 65(4) advanced by the Union was supportable on the wording of the section but declined to adopt it. It decided that there were no grounds before it to justify varying the interpretation of Section 65(4) endorsed by previous panels. Since no work normally performed by the Union was being performed at the J.C. Hill Building, Union pickets at that site were in violation of Section 65(3) and the Board would not exercise its discretion under Section 65(4) to permit the picketing.

IV. MOOTNESS

By the time this application came before the Board, the labour dispute between the parties had been resolved. The parties were therefore asked to make submissions as to whether this application raised an "academic" or "mootness" issue. We have reviewed the submissions on this issue and have concluded that although the labour dispute has been resolved and there is no longer a live issue between the parties concerning the J. C. Hill Building, it is nonetheless appropriate to adjudicate the merits of the application.

The issue raised by the application is an important one for the labour community. It also

involves a consideration of the recent amendments to the Code. The application can be determined on the basis of the submissions of the parties so the parties will not incur further expense if the Board renders a decision on the merits of the application. In these circumstances the Board feels it is appropriate to depart from its normal practice of declining to proceed with an application for reconsideration once a labour dispute has been resolved. The application will be adjudicated on its merits.

V. THE LEAVE APPLICATION

The Union does not assert that the original panel erred in holding that the picketing of the J.C. Hill Building was not permitted by Section 65(3) of the Code. The Union's reconsideration application is restricted to the original panel's conclusion that the picketing of the J. C. Hill Building was not permissible under Section 65(4).

The Union's leave application raises an important issue of law and policy with respect to the interpretation of Section 65(4) of the Code in light of the recent legislative amendments. We are satisfied that the Union has raised a serious question as to the correctness of the original panel's interpretation of Section 65(4). Leave to reconsider the original decision is granted. We shall now consider the merits of the reconsideration application.

VI. POSITION OF THE PARTIES

The Union says that the original panel failed to properly interpret and harmonize Section 65(4) in light of the recently enacted Section 68. It asserts that to continue to interpret Section 65(4) in the former way effectively means that the only time the Union could ever obtain permission to picket the J.C. Hill site would be when someone is performing its bargaining unit work there. Such an interpretation is inconsistent with the intention of the Legislature in enacting Section 68, and, according to the Union, renders Section 68(1)(b) and (e) meaningless. In other words, this interpretation of Section 65(4) results in permission to picket only when an employer breaches Section 68(1)(b) and (e). Picketing in that case would not seem necessary since presumably the Board would order the conduct to cease.

The Union further submits that Section 68 has codified the intention of the Legislature to

prohibit the use of persons who are not on strike to perform struck work. Section 65(4) should therefore be interpreted to permit picketing at locations where employees are relocated by the employer to avoid the effects of picketing, and where they are required to perform their own (as opposed to the striking bargain unit) normal and regular duties which, but for the strike or lockout, would be performed at their normal work site.

The Employer states that the original panel correctly held that Section 68 refers to the use of replacement workers to perform the work of an employee in the bargaining unit that is on strike or locked out. Since none of the work performed at the J.C. Hill Building was work ever performed by the Union, Section 68 had no application.

The Employer says that the Union has misinterpreted the effect of the original panel decision and disputes that there was a failure to properly interpret and harmonize the two sections. The original panel's decision not to deviate from the past jurisprudence of the Board and predecessor Council provides no grounds for reconsideration.

VII. DECISION AND ANALYSIS

Prior to examining the arguments advanced by the Union, we point out that the phrase in question "to perform work, supply goods, or furnish services for the employer's own benefit" is not limited to Section 65(4)(a) but also is found, in virtually identical form, in Section 65(4)(b) which pertains to ally picketing. Thus, any consideration of the interpretation of the phrase must involve a consideration of both subsections and the jurisprudence generated by them.

Sections 65(3) and 65(4) are identical to Sections 85(3) and (4) of the former *Industrial Relations Act*. The origin of these sections is found in the amendments made to the *Labour Relations Code* in 1984. Since then, the Board has consistently interpreted the phrase in question to relate to work performed by the bargaining unit on strike or locked out. Prior to the 1984 amendments, the focus had been on the employer's business. The 1984 amendments shifted the focus from the business to the employees in the bargaining unit and the work that they perform. See *Slade and Stewart Ltd.*, BCLRB No. 317/84; (1984) 7 CLRBR (NS) 258; *Alpulp, supra*; and *Acklands Ltd., supra*. To date, the Board has refused to interpret these sections in the

manner endorsed by the Union.

The Union advances two main arguments to support its contention that the Board must now interpret Section 65(4) in the manner it advocates. Both arguments involve a consideration of the new replacement worker provision of the Code, Section 68.

The Union says that the original panel concluded that the only way that the Union could be permitted to picket under Section 65(4) is if the employer is violating Section 68(1)(b) and (e) and that such a conclusion must be wrong. I disagree with the Union's characterization of the decision of the original panel. The original panel decision cannot be given so broad a reading. Section 65(4) addresses many situations, not just those also addressed by Section 68(1)(b) and (e). While it may be that a situation falling within Section 68(1)(b) and (e) also satisfies the criteria for permissible picketing under Section 65(4), the original panel did not consider the relationship between the two sections, nor on the facts before it was such a consideration necessary. The original decision leaves open the question of whether any other activity, not expressly prohibited by Section 68, can give rise to permissible picketing under Section 65(4).

The Union also argues that the original panel's interpretation fails to harmonize Section 65(4) with the new Section 68. It says that Section 68 codifies the intention of the Legislature to prohibit the use of persons who are not on strike to perform struck work. The Union says that "struck work" means any work normally performed at the site being picketed, even if it is normally performed by employees not in the striking or locked out bargaining unit. To harmonize the two sections, the Union says Section 65(4) must be interpreted to permit picketing whenever an employer, in order to avoid the effect of a strike, moves an employee to a location other than the site where the employee normally performs the work (i.e. the site where bargaining unit members are striking or locked out).

There are two main flaws in this reasoning. First, we cannot agree that the intention of the Legislature in enacting Section 68 was a blanket prohibition against replacement workers in general. Section 68 does not prohibit all persons not on strike from performing struck work. The section does not start from the presumption that the use of replacement workers in general is unlawful. Rather it simply enumerates specific instances where the use of such workers is contrary to the Code. In *Weston Bakeries Limited*, BCLRB No. B182/93, the Board concluded

that an employer is permitted to continue to run its operation, albeit on a reduced basis, as long as those performing the work do not contravene Section 68. Here, it is agreed that the work performed by CUPE at the J.C. Hill Building is not prohibited by Section 68(1)(e) or (f).

Section 67 of the Code establishes that picketing is contrary to the Code unless specifically provided for in the Code. There is no parallel provision establishing that the use of replacement workers is contrary to the Code unless specifically provided for. The interpretation of Section 65(4) developed by previous panels following the 1984 amendments and applied by the original panel is not inconsistent with the wording of Section 68.

Second, the interpretation advanced by the Union is, in effect, a reversal of the legislative intention embodied in the 1984 amendments to the Code. Those amendments have guided the development of both Section 65(4)(a) and (b) for almost a decade. Had the Legislature intended to reverse the previous interpretation of these subsections, it would have done so in a much clearer way. The Union says that given the presence of Section 68(1)(b) and (e), it must have the right to picket in circumstances involving the transfer of work that do not fall within those subsections. While that argument may have some merit it does not lead inexorably to the conclusion that the original panel's interpretation is inconsistent with the new section. There is a forceful policy argument on the opposite side of the coin that an employer's right to utilize its workforce in a manner not expressly prohibited by Section 68 should not be effectively rendered academic by too broad an interpretation of Section 65. As indicated, the full interrelationship of Sections 65(4) and 68 shall be investigated as cases arise. However, the precise issue before the original panel was whether to deviate from the previous interpretation of Section 65(4). For the reasons outlined above, the original panel committed no reviewable error in deciding that the case before it did not warrant such a deviation.

The Union's application for reconsideration is dismissed.

LABOUR RELATIONS BOARD

STAN LANYON

CHAIR