

BRITISH COLUMBIA LABOUR RELATIONS BOARD

TELEFLEX (CANADA) LIMITED

("Teleflex")

-and-

NATIONAL AUTOMOBILE, AEROSPACE
TRANSPORTATION AND GENERAL WORKERS UNION
OF CANADA (CAW-CANADA), LOCAL 3014

("CAW")

-and-

CHRISTIAN LABOUR ASSOCIATION OF CANADA

("CLAC")

PANEL:	V. A. Pylypchuk, Vice-Chair
COUNSEL:	Andrea Zwack, for the Employer John Bowman, for CAW Greg R. Ancil, for CLAC
CASE NOS.:	31270, 31312, 31314 and 31389
DATES OF HEARING:	October 2, 21, 23, 24 and 25, 1996
DATE OF ORAL DECISION:	February 17, 1997
DATE OF ADDENDUM:	February 27, 1997

DECISION OF THE BOARD (ORALLY)

As is my practice, this decision is being taped. It will be made available in hard copy. I will be adding headings, paragraph numbers, case citations, improving the grammar and wording. It will be more readable, but in substance it will be as you hear it today. The period for reconsideration will run from the day that the Board notifies you that the hard copy is available, not from today.

I. NATURE OF APPLICATION

1 This matter concerns an unfair labour practice complaint filed by CAW. This complaint was filed in the context of several certification applications received by the Board. The first certification application was filed by CAW on September 17, 1996, pursuant to Section 18 of the *Labour Relations Code*, for a bargaining unit of employees described as: "employees at 3831 No. 6 Road, Richmond, B.C., except office, sales, engineering and other technical employees, managers and supervisors with authority to discipline". This is basically a production unit.

2 Within ten days of that application, CLAC applied for a unit of employees described as: "employees at 3831 No. 6 Road, Richmond, B.C., including office and technical staff". This application, filed September 24, 1996, was for an all-employee unit. In the alternative, CLAC applied for a production unit identical to that applied for by CAW, except described a little differently: "employees at 3831 No. 6 Road, Richmond, B.C., except office and technical staff". This alternative application by CLAC was received by the Board first in time and was treated as CLAC's primary application. The all-employee unit application was treated by the Board as the alternative application.

3 On September 30, 1996, CLAC advised the Board that it wished the all-employee unit application to be treated as CLAC's primary application.

4 CAW's production unit application came on for hearing before a panel of the Board on September 25, 1996. That panel was aware of the CLAC applications, but did not have them before it. Nevertheless, the panel ordered a run-off vote with regard to the competing production unit applications. That vote was held and sealed. There are some outstanding challenged ballots connected to that vote.

5 CLAC'S applications came on before me on October 2, 1996. By that time, CAW had filed its unfair labour practice complaint against CLAC and Teleflex and that matter also came on before me on October 2, 1996.

II. PRELIMINARY MATTERS

6 At that hearing a number of matters were raised. CAW argued that CLAC's applications should be dismissed because of alleged unfair labour practices. CAW also said that no run-off vote should have been ordered and that it was entitled to automatic

certification because it had more than 55% support in the production unit for which it had applied. Further, CLAC's application should be dismissed because CLAC failed to advise the Board which of its two applications was the primary and which was the alternative application. CAW also said that the production unit was appropriate although it conceded that the all-employee unit was equally appropriate.

7 I considered these issues and rendered an oral decision on some of them. I also gave some directions regarding how this matter was to proceed. These rulings were set out in a letter to the parties dated October 3, 1996 (summarized below).

8 First, in the context of the competing production unit applications, there were a significant number of cards signed by individuals applying for membership in both Unions. A question arose in my mind regarding four of the cards which turned on the issue of fraud.¹ The number of cards involved made no material difference regarding the status of support for either CLAC's applications or CAW's application in the circumstances of this case, if I were to simply discount all of the cards. However, the issue in my mind was one of potential fraud in which case, regardless of the numbers, one, two or all of the applications, might well have to have been dismissed. As a result, I directed that a further investigation be conducted. I will say more about that investigation later.

9 Further, I also directed that a vote be held in the CLAC all-employee application, pursuant to Section 24(1) of the Code, given the general equivocation in the choice of trade unions which seemed to have manifested itself in these proceedings. I wanted to ensure that at the end of the day, the employees expressed their true feelings on these matters.

10 I also reviewed three legal issues which arose out of CAW's submissions at the October 2, 1996 hearing. These were:

1. Whether CLAC's larger all-employee unit application superseded the production unit applications (both CLAC's and CAW's);
2. Whether the run-off vote should have been ordered in the competing production unit applications or, put otherwise, whether the *A & R Metals* (sic) case was still good law; and
3. Whether the alleged improper filing of the two applications by CLAC (in other words, failure to designate which is the primary), should result in their dismissal.

The parties had proposed that these issues be argued by way of submissions before the unfair labour practice complaint was heard.

11 On the second issue I ruled immediately that the *A. & R. Metal Industries Ltd.*, BCLRB No. B240/96 continued to be good law and that it was proper for the Board to

¹ This has nothing to do with talk of forged signatures that was apparently circulating amongst some employees and which is briefly referred to at one point in the facts.

order a run-off ballot in competing applications despite the fact that one of the applications may have revealed support of over 55%. I further directed that CAW file submissions on the remaining two legal issues but that the other parties not respond until directed to do so by me. I wanted an opportunity to be satisfied that there was an arguable point being made before engaging the submission process for all concerned. Finally, I set the unfair labour practice complaint for hearing and issued some directions regarding how that matter should proceed.

12 CAW filed its submission regarding the remaining two points. After reviewing this submission, I ruled that the filing of CLAC's all-employee unit application did not automatically result in the dismissal of the smaller production unit applications. However, I noted that larger unit applications which meets the Board's requirements in keeping with Island Medical Laboratories Ltd., BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), (1993), 19 CLRBR (2d) 161, will encompass a smaller unit and be preferred. If a certification issues for that larger unit, it results in the cancellation of the certification for the smaller unit. That was one of the possible results in this case as well. But, given that I had all of the applications before me, it would make little sense to proceed with the production unit, on a first in, first out basis, as urged by CAW, only to cancel it if CLAC's all-employee unit application was to be ultimately successful. I determined to proceed in the most expeditious way once the issues surrounding the unfair labour practice complaint were resolved and I had received a further report from the Industrial Relations Officer ("IRO") regarding the issues of membership which had concerned me.

13 I issued that ruling to the parties by letter dated October 21, 1996. I also ruled in that letter that the remaining issue should be addressed by Teleflex and CLAC at the close of the hearing into the unfair labour practice complaints. On the morning of the hearing into the unfair labour practice complaints was to commence, all of the parties submitted that they would prefer to argue the last preliminary issue at the outset. I agreed to hear them.

14 CAW argued that the failure to specify which of CLAC's applications was the primary was a substantive defect and should result in instant dismissal. CLAC said that such specificity is not required, not substantive and does not change the fundamental character of the units applied for. Teleflex said no prejudice flowed from that failure and in any event, any misunderstanding was entirely cleared by the clarification submitted by CLAC on September 30.

15 I considered the parties' arguments and issued a ruling in a letter to the parties dated October 23, 1996. I held that I could see no requirement to specify which application was primary and which was the alternative. Each is an alternative to the other and any clarification as to which should be considered first or second is only to assist the Board procedurally. It involves no confusion to the employees or prejudice to the parties. Finally, given how these matters had unfolded before me, and given that the end result would turn on the outcome of the unfair labour practice complaint, I could see no material impact on the unfair labour practice complaint proceedings even if CLAC's application were to speak from the date of the clarification. As a result, CAW's

submission was dismissed. I proceeded to hear the unfair labour practice complaints and reserved my decision.

III. FURTHER INVESTIGATION

16 I am going to turn for a moment to the further investigation which was conducted into the four cards that had caused me some concern. As a result of my direction, an IRO conducted the further investigation into my concerns on membership evidence. He reported to me, at the end of November 1996. In his report he indicated that he had been able to contact two of the four employees concerned. Both indicated they signed applications for memberships in both unions. One explained that depending on how and by whom he is approached, he may use either a "Canadianized" structure of his name or sometimes a version which reflects his country of origin. After receiving that report, I was satisfied that in respect of these two cards, no fraud had occurred. It is in my judgment not necessary to disclose who these employees are or to undertake any further investigation by way of a hearing. The IRO further reported that he was unable to make contact with the remaining two employees.

17 I then directed that an Special Investigating Officer of the Board ("SIO") attempt to complete this investigation. An SIO was able to make contact with one of the remaining two employees. The other employee refused to cooperate in any way with the Board and I have simply discounted his card for purposes of support. However, that makes no material difference to any of the applications. The remaining employee who was contacted, confirmed signing one card, but declined to comment on the other. He did not deny signing the card. I was satisfied that there was no evidence of fraud uncovered in this case either. I was further satisfied that there was no evidence of fraud on the part of either union overall. The SIO's Report was received by me at about mid-January 1997.

18 I will now turn to my decisions regarding the unfair labour practice complaint.

IV. NATURE OF THE COMPLAINT

19 Turning to the unfair labour practice complaints, CAW alleged that Teleflex had breached Sections 6(1), 8 and 9 of the Code and that CLAC had breached Section 6(3)(d), 7(1) and 9 of the Code. Teleflex is alleged to have breached Sections 6(1) and 8 of the Code by publishing a letter to employees dated July 24, 1996 in which it states that it appreciates employees' past decisions to remain non-union. To that letter it also annexed two pages of a proposed employee handbook which gives a summary of the membership requirements to obtain automatic certification under the Code. The proposed pages also reiterate Teleflex's desire to remain non-union and suggest a number of questions employees should ask any union organizers so that an informed decision may be made by employees.

20 Further, CAW alleged that a memo to all employees from Harold Copping, President & General Manager of Teleflex, dated September 23, 1996, in which

employees are advised that if CLAC signs up 45% of employees prior to Wednesday, a run-off vote between the two Unions could be ordered by the Board, was also contrary to the Code. The memo pointed out that if insufficient membership support was obtained by CLAC, CAW would be automatically certified. The memo also advises that employees cannot be punished by Teleflex or either of CAW or CLAC for seeking representation from one or the other union. CAW alleged that this memo was improper and constituted an unfair labour practice.

21 CAW further alleged that Teleflex violated Section 6(1) of the Code by permitting CLAC to campaign on company time and violated Section 9 of the Code by allowing CLAC representatives to make coercive and intimidating statements.

22 CAW alleged that Teleflex violated Sections 6(1) and 9 of the Code by permitting the posting of two bulletins on bulletin board which compare CLAC to CAW. The bulletins used terms such as "militant" and "violent" to describe CAW and painted CAW as a disruptive union which would have a negative impact on the work place.

23 CAW also alleged that CLAC violated Sections 6(3)(d) and 9 of the Code by constantly threatening employees with plant closure and by campaigning entirely on company time on behalf of Teleflex, contrary to Section 7(1) of the Code.

24 Finally, CAW alleged that CLAC failed to maintain and respect the confidentiality of membership evidence. As a remedy, CAW seeks declarations of the breaches outlined and that CLAC's applications for certification be dismissed.

V. FACTS

25 A hearing into these allegations was conducted. Much of the evidence was directed at describing various meetings which took place at the work place and what was said between or amongst various employees. There was disagreement amongst witnesses when certain of the conversations took place and the detail of what was said. There was also disagreement as to dates on which certain meetings of employees took place.

26 The material facts are as follows. Rick Bernard, who was a CLAC supporter, spoke to Rod Gilmore, the day CAW certification application notice from the Labour Relations Board was posted in the work place. The conversation was in the Shipping Department in the presence of five or six other employees. Bernard said that employees should look at another union. CAW was a bad idea and had a bad reputation. If CAW was certified, Teleflex would likely close. He gave no indication that he knew this as a fact from any authoritative source. Gilmore conceded that the tone of the conversation was not threatening, that he chose to engage in it and while he said he felt threatened, he chose not to seek more information about CAW although he could have done so had he wanted.

27 Eric Fetchko, an employee engineer, who works in the front office of Teleflex, spoke to Gilmore a day or so later on work time. Fetchko echoed Bernard's comments.

Gilmore conceded that he also chose to engage in that conversation that it too was not threatening in tone and the content was not enough to get him to take any action such as seeking more information from CAW.

28 A day or two after the CAW Notice of Application for Certification was posted in the workplace, a meeting of employees was held in the office area. CAW's evidence was that that meeting took place on or about September 18. CLAC's evidence was that it took place on or about September 20. The meeting was called by Bernard. Mostly office employees attended, -- some 30 in number. Some shop employees were present as well. The meeting was in a common area at or around the time most office employees take their afternoon break.

29 The office is not very structured in terms of time, when people take breaks or, for that matter, report to work or go home. Office employees work flex schedules as long as the work gets done. Employees who organized the meeting thought no permission for the meeting was required and none was sought.

30 During that meeting, Bernard spoke initially. He said he had spoken to a lawyer and obtained advice about getting another union if they were worried about CAW. He said arrangements had been made to meet with CLAC representatives that night. He was worried about the power of CAW and wanted a union that all could be more comfortable with.

31 The meeting then broke off into small groups of employees continuing to discuss the issues while other returned to work. During those discussions Ka-Wood Hon said to some people that someone should get some more information and a comparison between the two unions be made so all could chose intelligently. He denied ever saying to anyone that the company had selected a union. He said the conversation after the meeting involved discussions such as if a strike was to occur, there would be no jobs; if there were more conciliatory negotiations there would be less likely to be a strike.

32 Craig Fisher testified that that evening seven employees met with two CLAC representatives at a restaurant to obtain some information. Fisher also testified that he came into the workplace on Saturday after he had met with CLAC. Bernard had obtained more information. They drafted and typed a comparison of the two unions. Bernard did the drafting while Fisher prepared it on the computer. There was no management personnel about. Employees often do personal projects on company computers and use company equipment for personal reasons. Teleflex does not prohibit such use. It is a flexible work place. No permission to use the computers was needed and no permission was sought.

33 A number of copies of the bulletin were produced and placed on a table in the lunch room. Others were posted on the employee bulletin board which employees use for personal reasons such as advertising items for sale etc. A copy was also posted on the bulletin board near the time clock in the shop. Originally, this bulletin had the

names of the authors on it, but these were removed and it was a truncated version that was distributed in the manner described.

34 Fisher explained his motivation for participating in these activities. He said Teleflex is a U.S. owned company. It is one-third of the marine group, two-thirds of which are located in the U.S. Teleflex engages in light manufacturing. It has two product lines. First, it produces a helm pump which, when tied to the motor of a pleasure boat, gives it the capability of hydraulic steering. Second, it manufactures a small diesel fired furnace which fits under benches of school buses for example, or motor homes, and provides heat. It is called "Pro Heat".

35 The customer base for Teleflex products is in the U.S. The only reason the U.S. parent has kept Teleflex operating in Canada is because it has been sold on the idea that there is a great production team located here. If a militant union were to come in, Fisher said, he was worried that the U.S. parent would simply close up the operation and all the jobs would go south of the border. He felt a union such as CLAC would not pose the same threat as CAW might. Thus, there was a greater chance the U.S. parent would leave Teleflex alone.

36 Fisher said he did not know much about CLAC but learned that it was far more conciliatory and less likely to engage in strikes and thus his concerns were far less significant with CLAC. He also testified that he worked for Kockums Cancar Inc. when it shut down and moved to Oregon. His sense of what he had heard at the time at the workplace was that the company was not profitable due to the presence of the union and he read in the papers various opinions of people who blamed CAW (CAIMAW) for the loss of those jobs. While he conceded that the move was not the union's fault, he nevertheless had fears that the kind of demands CAW may make at the bargaining table might convince Teleflex's parent to make the decision to move.

37 Chris Riebe testified that he did not know anything about CLAC prior to the Saturday when he came to the work place to meet Fisher. Riebe was away the week when CAW certification application notice was posted and was advised by a message on his answering machine of what had happened when he returned. He spoke to Fisher who explained why he wanted CLAC and Riebe thought that the win/win philosophy was more in tune with his world view. He participated in attempting to persuade others to that view.

38 Riebe also said he spoke to Christine Walton on September 23 while Walton was working. He said he spoke to her about a work-related matter first, and then the topic of unions came up. Fisher came in on the conversation later and the foreman Shri Sugwekar was also present for a time.

39 Walton said that Riebe and Fisher came to talk to her specifically about CLAC. She said the conversation went on for 45 minutes and that Fisher and Riebe said that the plant was going to close at least 15 times during that conversation. She conceded that neither Fisher nor Riebe made any direct threats although she felt threatened by the thought that the plant may close. She also conceded that in her view neither Fisher

nor Riebe knew what they were talking about. Further, when Fisher said CAW would threaten employees if they tried to decertify, Sugwekar interjected and said that as he understood matters, it is the employees' right to decertify a union if it is not working for them.

40 Walton also said that Fetchko came by and made some remark about the plant making its products in Bellingham in the future and wasn't it too bad that she didn't have a green card.

41 Riebe also testified as to his concerns regarding how the U.S. parent might react to CAW. They mirrored those of Fisher. He explained his views to Walton. He said it was all very obvious to him. He spoke to Walton again the next day. He realized he may have gotten upset at their conversation and he did not want the matter left on a bad footing. He had said to Walton that he had heard she was a leader in the pro-CAW camp. She was upset as a result and he wanted to assure her that she was entitled to her view. This was substantially confirmed by Walton.

42 Riebe also talked to Bob Elston. He explained his views of the U.S. parent company's likely reaction because it had historically wanted Teleflex to move to the U.S. This certification situation might be the excuse that the parent company required. This conversation was observed by Gilmore who did not actually hear the contents of the conversation.

43 Other employees also testified. Ping Ma had told fellow employees that if Fisher was concerned about CAW, or more particularly, whether CAW had forged signatures, that the Labour Relations Board should investigate. Ma also said that after he saw the first bulletin produced by Bernard and Fisher, he called CAW to check the facts that were asserted in that bulletin. He then went to Fisher and Bernard and told them the bulletin was in error. As a result of that the bulletin was removed and corrected. A shorter version was produced and put up on the boards. A number of copies were placed on the table in the lunch room where Brenda McKave, the Personnel Administrator, came by and saw them. She collected them and returned them to Riebe. She told Riebe not to distribute those bulletins in the work place.

44 Tino Yau said that Hon told him Teleflex had got a better union; a conversation which Hon denied. Yau also said he was asked to join CLAC but given no card to sign.

45 Bo Yang Chen testified he was approached by Johnny Lai and asked to support CLAC. He was given no card to sign.

46 Ramesh Prasad testified Bernard gave him a CLAC card to sign while he was sitting outside on a break.

47 All employees said the pitch for CLAC was basically the same: CAW was too strong; the company cannot afford strikes; CLAC was better for the company; CLAC is more conciliatory; jobs will be lost if CAW comes in, but they will likely remain for three to five years if CLAC comes in. Some employee witnesses acknowledged seeing the

first bulletin posted by Bernard and Fisher, and others saw the revised version. Estimates over how long each was posted ranged from a day or two to five days. Given that Ma took issue with the content soon after the first bulletin was posted, it seems that two or three days was the more likely figure for that first bulletin.

48 Finally, John Deutsch, the Comptroller, testified for Teleflex. He described the management structure and said that while these events were unfolding there was very little management presence in the workplace. There had been a major trade show at which a number of management people were present during the week when the notice of the CAW certification application was posted and when the initial flurry or pro-CLAC activity took place. It was only the following Tuesday that management met and discussed the certification application. That would have been around September 23. Evidence revealed that the weekend prior CLAC had done a good portion of its signing up virtually all of it off the company's premises. Deutsch also testified that he removed and disposed of the bulletins comparing the unions from the bulletin boards once he saw them.

49 Deutsch confirmed that the company's management style is open and that employees do work flex times and have access to company premises and equipment on their own time. He also said that neither Lai nor Sugwekar are part of the management team or exercise any management functions other than bare bones work supervision. Management did not know of either meeting held by Bernard. (Bernard had held an earlier meeting which had been announced over the P.A. at which time he had attempted to persuade employees to unionize. This meeting had taken place prior to any thought of CLAC involvement arising.)

VI. ARGUMENT

A. CAW

50 CAW said that the CLAC campaign was not furtive or secretive. Therefore, Teleflex must have known, approved and condoned this activity. CLAC supporters came into the workplace when not scheduled to work, distributed their material, used company equipment and bulletin boards. Supervisors such as Lai and Sugwekar participated in this activity. Only two conclusion are possible: CLAC's campaign had Teleflex support; and threats of closure therefore carried persuasion and coercive weight.

51 There were nine incidents where that threat of closure was used:

- 1) The Bernard/Gilmore conversation
- 2) The Fetchko/Gilmore conversation
- 3) The Riebe/Walton conversation
- 4) The Fetchko/Walton conversation

- 5) Hon/Yau conversation
- 6) Lai/Chen conversation
- 7) Bernard's meeting
- 8) Riebe/Elston conversation
- 9) Riebe's comments to Ma

52 The employees who testified were prepared to stand up to those threats, but CAW said many others were not. CAW argued that CLAC's whole campaign was based on threats. The bulletins posted disclosed falsehoods about CAW. Simply because these comments are made by people who are not management does not make them any less coercive or intimidating. CAW said that CLAC supporters are really anti-union, but support CLAC only as a means to spare Teleflex the necessity of having to deal with CAW.

53 CAW argued that Teleflex's complicity can be inferred from the fact that foremen, such as Sugwekar, stood by and watched while pro-CLAC employees harangued perceived CAW supporters during working hours. There is no doubt that Teleflex brought in CLAC. The evidence of Yau's testimony should be accepted and preferred over Hon on this point. CAW submitted that one of the tragedies of the Board's *VGH* decision (*Vancouver General Hospital*, BCLRB No. B81/93 (Reconsideration of IRC No. C179/91), (1993), 18 CLRBR (2d) 161) is that employers argue that people like Lai and Sugwekar are not management so that they can convey an employer's message with impunity.

54 Riebe should not be believed regarding his concern over what might happen given that CAW is such a strong union. Riebe was just doing Teleflex's bidding.

55 CAW said it is important that CLAC never explained when the meeting occurred in the office. CAW said it was on September 18 and Fisher said it was September 20th. CAW asked if it was the 18th and they didn't meet with CLAC representatives until the 20th, who recommended CLAC to these employees? CAW asked me to infer that it must have been Teleflex. CAW said it is clear on the evidence that Brenda McKave knew who the CLAC organizers were.

56 CAW argued Teleflex was aware of CLAC's activity but remained silent because events were to its benefit. Therefore Teleflex violated Sections 6(1) and 7(1) of the Code. Further, bulletins were a breach of Section 8 because they are not limited to issues of business. Finally, Teleflex must have known of threats of closure and condoned these threats. Therefore they violated Section 9 of the Code.

57 CLAC violated Section 6(3)(d) of the Code by acting on behalf of Teleflex. It organized on company premises and time contrary to Section 7(1) of the Code. Its supporters signed because they thought Teleflex would close. Therefore CLAC violated Section 9 by using coercive and intimidating threats. The only reason the

CLAC drive existed is because of coercive conduct by CLAC supporters and therefore the CLAC application should be dismissed.

B. CLAC

58 CLAC argued there was no evidence of any Teleflex involvement in CLAC's organizing efforts. No evidence supports any of CAW's claims. The employees took the initiative in response to CAW's application for certification. Both Fisher and Riebe explained why they thought the plant might close. They are entitled, as employees, to hold and express their views. Nothing in the Code prohibits their expression as employees. No policy under the Code goes so far as to deny employees discussing their views. No evidence was led to suggest that these views had their genesis with Teleflex.

59 Further, Bernard's first meeting called on the PA occurred before CLAC was involved and therefore it is irrelevant. CLAC cannot be held responsible for that meeting. Similarly, the meeting held in the common area of the office organized by Bernard also occurred before CLAC was involved. Whether it was on the 20th or the 18th of September is therefore irrelevant. No evidence was led that Teleflex had anything to do with either meeting. CLAC cannot be prejudiced by any conduct of employees at those meetings.

60 The bulletins, prepared by Bernard and Fisher, are the direct expression of their opinion. Ma saw the bulletin and contacted CAW after having some difficulties with the content of the bulletin. Ma phoned CAW to find out more information and then came back to Fisher and Bernard to have the bulletins corrected. Other employees could have done the same, but did not. They chose not to do so. As a result of Ma's contact with CAW, the bulletin was revised. CLAC asked how can there be any intimidation or coercion in that kind of conduct? That conduct appears to reflect the best of employee discussion and discourse.

61 Gilmore was not intimidated by Bernard and Walton was not intimidated by Fisher or Riebe. Neither set of conversations had anything to do with management. In fact, Walton concluded Riebe did not know what he was talking about. The only evidence was that these conversations had no effect.

C. Teleflex

62 Teleflex argued that CAW failed to establish that it (Teleflex) knew or must have known of CLAC's efforts to organize in the workplace and therefore condoned or supported those efforts. There was no evidence of this led by CAW. No evidence was led from which it could be inferred that Teleflex brought CLAC in to organize employees. Most importantly, there was no evidence that Teleflex gave any indication that it preferred CLAC over CAW.

63 On the contrary, managers took down bulletins and returned them as being inappropriate. Managers did not know what had happened during the working hours

when the meetings took place. The work place at Teleflex is laid back and flexible. Nothing unusual happened while the managers were present and for the bulk of the first week most managers were away.

64 Both Sugwekar's and Lai's participation is limited and neither are managers. Neither of these fit into the profile of the foreman as described in the *Protec* decision (*Protec Installations Limited*, BCLRB No. B159/96). Both Lai and Sugwekar are part of the bargaining unit. In fact, Sugwekar indicated a very neutral posture in the Fisher-Riebe-Walton conversation.

65 This case is different from the *Executive Inn* case (*Pan-Afric Holdings Ltd. Carrying On Business As The Executive Inn, Burnaby and Tivolis Too*, BCLRB No. B1128/96), where CLAC booked a meeting room from the catering department to talk to employees. No evidence that anyone thought Teleflex supported CLAC in this case was led. The only conclusion possible is that Teleflex committed no unfair labour practices and did not participate in the employees' choice of unions.

VII. THE ISSUE

66 The issue which I must determine is whether the alleged unfair labour practices, if committed by either CLAC or Teleflex as against CAW, should result in the dismissal of the CLAC certification applications.

VIII. ANALYSIS AND DECISION

67 I must analyze Teleflex's conduct in this matter from the perspective of the issue which I must decide. I begin by looking at the two bulletins issued by Teleflex. The law guiding my analysis is set out in *Cardinal Transportation B.C. Incorporated and Ed Klassen Pontiac Buick GMC (1994) Ltd., et al.*, BCLRB No. B344/96 (Reconsideration of BCLRB Nos. B463/94 and B232/95) ("*Cardinal/Klassen*"), at pp. 48 and 49, paragraphs 200, 201 and 203.

68 In that case the Board said as follows:

The second and related issue arises as to whether an employer is limited to speaking only about its business as defined by Section 8. In our view, Section 8 is not to be interpreted as a bar to all other communications except statements about the business. An employer regularly communicates with its employees on many matters other than the employer's business in a manner that does not constitute an unfair labour practice. Simply because a statement falls outside the protection of Section 8 does not automatically mean it constitutes an unfair labour practice. Any communications which fall outside Section 8 are subject, however, to scrutiny under the unfair labour practice provisions of the Code.

Third, the term "business" is to be given a common sense definition. It obviously includes the legal regime under which

employees work; it includes the statutory scheme (*Labour Relations Code*) which covers collective bargaining in this province. We again note the Labour Law Reform Sub-committee's recognition that "employers have a legitimate interest in whether their employees organized for the purpose of collective bargaining".

* * *

... the interpretation of "business" does *not* include statements directly concerned with union membership. Nor will general statements about unions (e.g. they create divisiveness in the workplace) fall within this interpretation. However, such statements are permissible if they do not fall within the prohibitions set out in Sections 6 and 9. When it comes to issues of union membership, the employer's position must be circumspect. A permissible communication might be statements regarding membership requirements contained in the Code for certification. The line is clearly crossed when an employer seeks to illicit (sic) from employees (either individually or collectively) an indication as to whether they have signed membership cards or otherwise support the union.

69 I have assessed Teleflex's memo to employees of July 24, 1996 in light of the Board's interpretation of Section 8 of the Code and the issue which I must decide. That memo attaches two proposed pages of an employee handbook. It also thanks employees for remaining union free.

70 The two pages set out a synopsis of support requirements under the Code to achieve automatic certification. There is nothing improper in that. It falls within the scope of what *Cardinal/Klassen* suggests are "statements regarding membership requirements contained in the Code for certification".

71 The two pages also suggest questions what might be put to Union representatives that may help employees decide whether to unionize or not. In general these statements are fairly circumspect. They do not fall within the category of examples set out at page 49 of *Cardinal/Klassen* regarding general statements regarding influence of unions or divisiveness caused by unions and other such negative comments.

72 However, one aspect of the July 24 communication did concern me and that was the fact that in both the two pages and again in the covering letter Teleflex expressed its desire to remain non-union. I am always mindful of the caution in *Forano Limited*, BCLRB No. 2/74, [1974] 1 Can LRBR 13, where the Board in that case stated:

... we must always be conscious of the fact of employee dependence on the employer, especially for job security, and the opportunity this gives the employer for undue influence on that [unionization] choice (p. 18)

73 I conclude that the placing of these questions in the context of the two expressions by Teleflex of not wanting a union, delivers a subtle but effective message. In my view it is designed to influence employee choice.

74 The fact that Teleflex may not want a union is probably stating the obvious. The fact that Teleflex has said so twice and then purported to arm employees with questions to use against a union in my view takes it over the line of being circumspect. Given the caution expressed in *Forano*, I could easily conclude that these statements violate the Code.

75 However, it is unnecessary for me to make that decision. Even if these statements amount to a violation of the Code, they are of no assistance in this case in relation to the issue which I must decide. They are neutral. The anti-union sentiments expressed in that memo are entirely neutral as between CLAC and CAW. The issue which I must determine is whether CLAC's application should be dismissed and CAW's permitted to go forward because of Teleflex's alleged unfair labour practices against one union and not the other and its *active preference* of one over the other to the point of affecting employee choice. The bulletin of July 24, if it is to be construed as a violation of the Code, is generally anti-union without making a distinction between CLAC and CAW. Therefore, whether it is or is not an unfair labour practice is largely irrelevant to the issue which I must decide.

76 I now turn to the memo of September 23 which did address the contest between the CAW and CLAC campaigns. In contrast to the July 24, memo it dealt directly with the two unions. However, this memo is entirely circumspect within the context of *Cardinal/Klassen*. It does nothing more than acknowledge the competing campaigns, acknowledge the requirement that the Employer stay out of the campaigns, and set out some statements regarding membership requirements under the Code in the context of competing campaigns. It is accurate.

77 It may have influenced employees. I note that the memo indicates that if the employees want a run-off vote between the two unions, then CLAC must achieve a 45% level of membership support by a certain date. That date of course reflects the Board's ten-day rule for treating applications as competing. The fact that the recitation of the rule under the Code may have influenced employees does not make the memo an unfair labour practice *per se*. At page 48, paragraph 198 of *Cardinal/Klassen*, the Board said as follows:

... Simply because a statement has an effect on employee wishes does not make that statement wrongful; that would strip Section 8 and employer speech of any force. There will be statements of fact or opinions reasonably held with respect to the employer's business that are influential or persuasive to an employee's choice about collective bargaining. If no element of coercion is found, such statements are permissible.

78 And as I have already indicated, the Board in *Cardinal/Klassen* has said that statements regarding membership requirements for certification contained in the Code

are circumspect and come well within the permissible statements protected by Section 8. If those statements reciting the Board's timeliness requirements influenced employees to sign CLAC membership cards so that its application became a competing application to CAW, that does not constitute an unfair labour practice either in violation of Section 6, 8, or 9 of the Code.

79 Next, I turn to assess the conduct of Teleflex in regards to other matters alleged; for example, permitting the posting of CLAC bulletins and permitting CLAC to organize on its premises. These matters are governed by principles set out by the Board in *347143 B.C. Ltd. doing business as Westside Foods*, BCLRB No. B402/96 ("*Westside Foods*"); and *Pan-Afric Holdings Ltd., supra*. In *Westside Foods* the Board said as follows:

In *Kinetic Construction Ltd., supra* [IRC No. C45/92], the Council held that the employer violated the Code when, after learning of the Carpenters' organizing drive, it held a meeting with key employees to discuss company problems. At that meeting, the employer told the employees that it could not remain competitive with the Carpenters' Standard Agreement, suggested a relationship with CISIWU, CLAC or GWU, and stated that a relationship with CISIWU would give the employer the kind of flexibility and competitive edge it desired. The employees were not told they had to support a particular union, but it was strongly suggested that support for CISIWU would be appreciated by the employer. The panel held that this meeting was utilized by the employer to convey the message that employees' jobs were in jeopardy if the Carpenters were to obtain employee support. The panel reached the same conclusions with respect to worksite meetings where an employer representative advised that the Carpenters' Standard Agreement was not competitive, the employer could not afford it, that unions were outdated, and that other companies had become construction management firms in order to operate without a direct labour supply. The panel held that CISIWU's organizing meeting at a local hotel was not improper as there was no evidence that the employer directed employees to attend this meeting. While in the normal course, there would be nothing untoward in permitting employees to leave work early to attend CISIWU's meeting, in this case, the employer's willingness to accommodate the employees fit into the pattern of conduct designed to enhance CISIWU's organizing abilities.

In *Speed-Erect Foundations, supra* [IRC No. C132/92 (reconsideration BCLRB No. B1/93)], the panel concluded that the employer committed an unfair labour practice when it attempted to pre-empt the presence of building trade unions by encouraging employees to join CISIWU. The Employer openly advised employees that it wanted to avoid the building trade unions and threatened to shut down if it was certified to those unions. The employer also promised to extend medical and dental benefits to employees, and that wages would remain the same or increase

with CISIWU. The employer assisted CISIWU's organizing drive by providing a list of names and telephone numbers of employees to CISIWU, and advised employees that CISIWU would contact them for a meeting. There were management representatives at the CISIWU meeting who supplied money to pay for some employees' initiation fees. The panel concluded that without the encouragement and support of management, CISIWU would not have organized the employees.

In *J.S. McMillan Fisheries Ltd. supra* [BCLRB No. B473/94 (reconsideration on other grounds dismissed, BCLRB No. B510/94)], an employer posted a notice that took a position that corresponded with one union but was diametrically opposed to the competing union's position on the central issue between two unions. This was found to violate Section 6(1). (pp. 14-15)

80 In *Westside Foods* the Board reviewed these previous decisions of the Board in regard to permissible employer conduct. In *Kinetic Construction Ltd.* the Council held that the employer violated the Code when after learning of the Carpenters' organizing drive it held a meeting with key employees to discuss company problems. At that meeting the employer told the employees that it could not remain competitive with the Carpenters' Standard Agreement.

81 In *Speed-Erect Foundations* the employer attempted to pre-empt the presence of Building Trades Unions by encouraging employees to join CISIWU; the employer openly advised employees that it wanted to avoid the Building Trades Unions and threatened to shut down if it was certified to those unions. The employer also promised to extend medical and dental benefits to employees and that wages would remain the same or increase with CISIWU. The employer assisted CISIWU's organizing drive by providing a list of names and telephone numbers of employees of CISIWU and advised employees that CISIWU would contact them for a meeting. There were management representatives at that meeting who supplied money to pay for some of the employees' initiation fees. The Panel concluded that without the encouragement and support of management CISIWU would not have organized the employees.

82 In *J.S. McMillan Fisheries Ltd.* the employer posted a notice that took the position that correspondence with one union that was diametrically opposes to the competing union's position on the central issue between the two unions. This was found to violate Section 6(1) of the Code.

83 In *Westside Foods* itself the vendor employer had invited CLAC to organize at the behest of the purchaser so that the purchaser employer, once it took over the business, could avoid potential obligation to its own existing union UFCW.

84 In this case there was no evidence that Teleflex invited, encouraged or directed employees to support CLAC. It is not a case that fits in the fact patterns outlined by the Board in its previous jurisprudence.

85 In reaching this conclusion, I am mindful that the employees used Teleflex equipment to produce bulletins and to hold meetings on the premises. But I must assess those events in the context of the kind of work place Teleflex provides. I am satisfied that Teleflex runs a laid back operation. It permits employees to use equipment for personal reasons. This includes computers, photocopiers, bulletin boards and some production facilities. In this context there could be nothing unusual for employees to come in to work in off hours in pursuit of some personal business. In cases where employees have used employer facilities and equipment in conducting an organizing campaign and the employer is found to have interfered in union organizing, are cases where the conduct is out of the ordinary thus demonstrating facts from which an inference can be drawn that the employer condoned and supported these employee activities. (See for example *355677 Alberta Ltd. Operating As Time Management Constructors and Klein Construction Ltd.*, IRC No. C172/90) Here the activity from Teleflex's perspective (unless it specifically looked into the matter and there was no apparent reason why it should) would appear quite ordinary.

86 Further, I accept the evidence that management personnel were largely absent during the relevant periods and when they did come across union organizing activities, such as the bulletins being posted or distributed, these were either taken down or collected and returned. Employees did not seek permission from Teleflex to use the equipment nor was it their expectation that such permission should be sought. I therefore conclude that Teleflex did not permit the use of equipment and bulletin boards and therefore did not interfere or condone one campaign as opposed to the other. There was no conduct on the part of Teleflex that would raise the same issues as reviewed in *Westside Foods* and the cases cited therein.

87 Further, I am unable to conclude that either Lai or Sugwekar were part of management notwithstanding CAW's comments on *VGH*. The *VGH* principles have recently been further refined by the Board's reconsideration decision in *Cowichan Home Support Society et al.*, BCLRB No. B28/97 (Leave for Reconsideration of BCLRB Nos. B100/95, B179/95 and B217/95. Their involvement in the employee activities is permissible. They are not of the same ilk as was the foreman in *Protec* (I urge the parties to review *Protec* as well as the comments in *Cowichan* regarding *Protec*). There is a good paragraph in *Cowichan* which I am not going to quote orally that describes foremen, who might be found to be part of the management, as being perceived to exhibit the same mind set as a vice-president of a company.² Neither of the two individuals in this case falls into that category.

88 Finally in relation to Section 7(1) of the Code, I make the following comments. This Section was addressed by me in *Pan-Afric Holdings Ltd.*, *supra*:

² ... Loyalty in the labour relations context means putting the company's interests first. From the union perspective, it means putting the members' interests first. By keeping managers out of any bargaining unit, their loyalty will not be divided between functions of their jobs (the company's interests) and the interests of members of the bargaining unit. Loyalty also involves a strong degree of selflessness, and applies to all aspects of a person's beliefs and actions; *this often involves envisioning the foreman as sharing the same qualities as the vice-president*: competitive, individualistic and entrepreneurial. ... (p. 25, para. 105; emphasis added)

The panel in that case [*Granville Island Hotel & Marina Ltd.*, BCLRB No. B95/95] observed that not a single case was presented in which the Board has rejected membership cards on the basis that they were signed at the employer's place of employment during working hours. Further, the Board considered the policy objective underlying this Section. The policy objective is to enable the employer to manage his business and control its workforce without disruption from the employee exercise of organizing rights: see *Jim Pattison Industries Ltd.*, BCLRB No. 39/79, [1979] 2 Can LRBR 517, at page 520 and *Erikson Gold Mining Corporation, supra*, [IRC No. C56/89 upheld IRC No. C183/89] at pages 3-4. The Board specifically rejected the second policy objective as argued by the employer that employees should not consider an important step as joining a union while they are busy at work without time to contemplate their decision. Further, the Board confirmed that employees do not contravene the Section if they attempt to persuade others to join a trade union during the lunch hour or other work breaks: *Jim Pattison Industries Ltd., supra*; *Cominco Ltd.*, BCLRB No. 72/81, [1981] 3 Can LRBR 499, at page 507. The panel concluded that the policy objective underlying Section 7(1) has not been undermined.

There was no evidence at all of any disruption to the employer's business as a result of the sign-up of the employees during working hours. The evidence indicated that discussions with employees were relatively brief. Further, the panel weighed on balance the fact that a meeting had been held on February 19, 1995 where employees signed a petition opposing the certification application and at least some employees were in attendance during working hours. The panel could not seriously accept the argument that brief discussions which occurred in regard to sign-ups during working hours disrupted the employer's business.

I agree with those sentiments and find that even if there had been a technical breach of Section 7, based on the evidence which I heard, I could not conclude the policy objectives underlying that Section had been breached. Like the panel in BCLRB No. B95/95, I am simply not prepared to exercise my discretion not to count the membership cards and the most I would do is declare that there has been a breach of Section 7(1). That remedy would not affect the threshold of CAW's entitlement to a run-off vote.
(p. 12)

89 In *Pan-Afric I* referred to an earlier case of the Board in *Granville Island Hotel and Marina Ltd.*, BCLRB No. B95/95. The panel in the *Granville Island Hotel* case observed that not a single case was presented in which the Board had rejected membership evidence on the basis that cards were signed at the employer's place of employment during working hours.

90 The policy objective underlying that Section is to enable the employer to manage his business and control his workforce without disruption from the employees' exercise of organizing rights. The Board specifically rejected the second policy objective as argued by the employer that the employees should not consider an important step as joining a union while they are busy at work without time to contemplate their decision. Further, the Board confirmed that employees do not contravene Section 7(1) if they attempt to persuade others to join a trade union during the lunch hour or other work breaks.

91 I agree that here too, given that flex hours and laid back atmosphere exists, there was no significant disruption in the work processes. Further, the meetings held by Bernard were at or around the break times of office employees although I do note that certain shop employees attended. Teleflex has not complained with regard to any breach of Section 7(1).

92 The issue then becomes whether the activity that took place (which on its face may be a breach of Section 7(1) unfairly prejudiced CAW by giving *employer driven preferential treatment* to CLAC. In view of my conclusions that Teleflex did not knowingly or with the blinders on condone or encourage CLAC's organizing efforts, I cannot conclude that there was a meaningful breach of Section 7(1) to the prejudice of CAW. The activity carried on by CLAC supporters therefore falls within the caveat which I already quoted from the *Pan-Afric* case: that the Board has never rejected membership evidence or cards on the basis that they were signed during working hours at the work place.

93 In this case the evidence was that a lot of the cards were being distributed and signed on the weekend off premises. There was evidence that some cards were distributed or collected on the premises and there was an admission that at least one card was dated during working hours. Some evidence was led that others were observed passing cards but none of that leads me to conclude that there was a meaningful breach of Section 7(1) which would result in the rejection of CLAC membership evidence. I have concluded that neither Teleflex nor CLAC breached Section 7(1) in a material way which should result in a dismissal of CLAC's applications.

94 I now turn to other conduct of CLAC and its organizers and supporters in the workplace. CAW argued that this conduct should not be assessed on the principles applied by the Board in raid situations. However, in *Westside Foods* where there was no raid, the Board relied precisely on that line of jurisprudence in assessing CLAC's conduct. I quote from *Westside* at page 15:

The scope of permissible union comment has also been developed in the context of two unions competing for employee support. Unions are allowed considerable latitude in their comments about other unions during an organizing campaign. Reference *British Columbia Housing Management Commission*, B3/93; *Westfair Foods*, *supra*; *Procon Miners Inc.*, BCLRB No. B225/94; *North Shore Home Support Services Society*, BCLRB No. B307/95 upheld on reconsideration B366/95 and on judicial review,

UFCW Local 1518 -and- Labour Relations Board of B.C., Vancouver Registry No. A953464/A953031 (BCSC), February 23, 1996, T. Jordan Inc. BCLRB No. B51/96 and Pan-Afric Holdings, BCLRB No. B165/94. However, it is an unfair labour practice for a raiding union to say that the employer would never bargain with the incumbent union and would close its doors first, the employer would welcome the raiding union, and that joining the raiding union was the only way for employees to get back to work. See Perimeter Transportation Ltd., IRC No. C190/90. A raiding trade union may cross the line and engage in an unfair labour practice that the union acts as an agent of the employer and threatens that jobs would be lost unless the incumbent union can be defeated. Where a union or a person harnesses the power of the employer to carry out a threat in a statement may have a coercive or intimidating effect: British Columbia Housing Management Commission, supra, p. 12.

95 It is on that basis that I must assess CLAC's conduct. I begin by repeating my observation that the conduct here was entirely amongst employees. While considerable latitude is allowed unions, no less latitude for discussion, opinion and views, whether rightly or wrongly held, can be accorded employees.

96 I am satisfied that no opinions expressed by Bernard, Fisher, Riebe, Fetchko or Lai were generated from any particular view advanced by Teleflex, but whether rightly or wrongly held, they were generated by those employees on their own. That opinion amounted to the fact that CAW was a militant, violent and too strong union.

97 The explanation offered by Fisher and Riebe is not so extraordinary as to be unbelievable. Trade unions are not private clubs but quasi-public institutions. They are often in the news and develop reputations whether or not those reputations accurately reflect their character. I can take judicial notice of the fact that while this case was pending, members of CAW, employees of Canadian Airlines International, vocally and publicly, on newscast after newscast, debated the virtues of their union's hard-line stance on the Canadian Airlines International bail out plan. Fisher referred to Kockums Cancar situation. The Board's own decisions also reflect CAW's predecessor CAIMAW's tough stance in *Western Canada Steel*, IRC No. C185/91 (Reconsideration of IRC No. C242/90) and *Wolverine Tube (Canada) Inc.*, IRC No. C186/92 (Reconsideration of IRC No. C35/92). Employees do not live in isolation from such events and may therefrom form opinions and vocalize those opinions in response not only to what they hear in the news media, but what they experience themselves. It is therefore not surprising that some may develop opinions of the kind expressed by Fisher, Riebe and others.

98 I emphasize that I reach no conclusion on whether the views held are right or wrong and that is quite irrelevant. Much of the persuasive power lies in perception, not in fact, as this Board has on numerous occasions pointed out by saying that much latitude is given and puffery is permissible in union organizing campaigns.

99 It is only to be expected that a union's reputation would become a factor to be considered. If a reputation, even though not deserved, becomes problematic, a union may have to work hard at cultivating another reputation if it wishes to reach employees who hold a particular view of unionization. CLAC has also developed a reputation, but quite different from CAW. Because unions compete for employee support and are not guaranteed that support, CLAC's reputation as a "soft union" has often been held up by more mainstream unions as a selling point of their own virtues.

100 Further, the bulletins prepared by Bernard and Fisher were nothing more than an attempt to compare, both factually and by reputation or perception, the two unions. I am satisfied that there was no unfair labour practices committed by the distribution and posting of these bulletins and their content. Indeed, when Ma pointed out errors, the first bulletin was withdrawn and a second, truncated version replaced it. The authors of the bulletins were quite receptive to criticism and prepared to correct the inaccuracies. Nothing prevented other employees from making up their own minds or if they were unsure, from contacting either or both unions for further information. Ma did. Walton concluded that Bernard, Fisher and Riebe were selling nonsense and felt no need to contact CAW. This is the essence of discourse among employees. I find no unfair labour practices committed by employee supporters of CLAC or CLAC in respect of, or the opinions about the unions expressed in, the bulletins.

101 The only other bulletin which was issued (and nothing turns on it) is the one in several languages which urged the employees to vote for CLAC but the bulk of which proposed and answered certain questions about voting procedures under the Code. There is nothing improper in that bulletin and, but for the four words which urge employees to vote for CLAC, even if Teleflex had issued it, there would not have been anything improper and it would have met the requirements of *Cardinal/Klassen*.

102 As I have already said, Teleflex removed those bulletins which it saw and returned others to Riebe. It did not participate or permit distribution of these bulletins. It did not adhere, condone or support one view or the other. No evidence established that Teleflex condoned or permitted the distribution of these bulletins or the advancement of these opinions. They are not a factor to be considered and are not of any moment in this case.

103 This brings me to the final critical issue and that is with respect to statements made by CLAC supporters saying that Teleflex would close and move south if CAW were to be certified. I continue to reserve my decision on this point. It will be decided and will appear as a written addendum to the hard copy version of the oral reasons given to this point.

ADDENDUM

104 I have now had an opportunity to thoroughly consider the last remaining issue in this matter: statements made by CLAC supporters to other employees saying that Teleflex would close and move to the United States if CAW was certified. I have

concluded based on the evidence that this information did not have its origin with management and there is no evidence led from which such an inference could be drawn. Further, there was also no evidence upon which an inference could be drawn that this information had its origin with CLAC. Finally, there was no evidence that Teleflex or CLAC at any time made similar statements to anyone.

105 The issue then becomes whether employees may properly express views or fears regarding what an employer might possibly do in reaction to a particular union certification application. *Westside Foods*, which I cited in the context of my oral decision on the issue of opinions expressed regarding the character of a union also offers some guidance on this issue. In that case, the Board said that:

...it is an unfair labour practice for a raiding union to say that the employer would never bargain with the incumbent union and would close its doors first, the employer would welcome the raiding union, and that joining the raiding union was the only way for employees to get back to work. See *Perimeter Transportation Ltd.*, IRC No. C190/90. A raiding trade union may cross the line and engage in an unfair labour practice if the union acts as an agent of the employer *and* threatens that jobs will be lost unless the incumbent union can be defeated. Where a union *or* a person *harnesses the power of the employer to carry out a threat*, a statement may have a coercive or intimidating effect: *British Columbia Housing Management Commission*, *supra*, p. 12. (p. 15; emphasis added)

106 I have reviewed *Westside Foods*, *Perimeter Transportation* and *British Columbia Housing Management Commission*. I have concluded that similar principles governing permissible statements and conduct apply to both raiding unions and to any person in a situation where two unions are competing for support and for certification.

107 In *Perimeter Transportation* both the employer and the in-house union were found to have committed unfair labour practices. The Board held:

... While I find that CBOA believed that it was telling the employees the truth, in essence these statements capitalized on *Perimeter's* unfair labour practices. Such statements fed employee fear that their jobs would be lost forever unless ICTU was destroyed, and in my view move beyond fair persuasion into the realm of coercion under Section 4(3) of the Act. (p. 20)

108 It is clear from *Perimeter Transportation* that the statements being made by a union and its supporters were lent substance by the fact that the employer had committed unfair labour practices. Therefore, employees could reasonably draw the conclusion that the threats being vocalized by the CBOA were not just union talk, but in fact reflected the employer's state of mind and what the employer would in fact do.

109 In *British Columbia Housing Management Commission* the panel also commented on *Perimeter Transportation* as follows:

The members of the raiding union advised employees that the Employer would never bargain with ICTU and would close its doors first. It said that the Employer would welcome a home grown union and that the only way for employees to get back to work was to join the new union. The Employer was found to have engaged in an unfair labour practice *by making similar statements to employees*. The home grown union was held to have violated Section 4(3) of the *Industrial Relations Act*. (p. 12; emphasis added)

110 Further, the panel in *British Columbia Housing Management Commission Association of Commercial and Technical Employees' Union, Local No. 1728 -and- Dr. Patrick McGeer*, BCLRB No. 73/79, [1979] 3 Can LRBR 454. In that case "a cabinet minister, *in effect acting as a spokesperson for an employer*, stated that if employees did not quit the union the College would shut down. McGeer was held to have violated the Code. Where a union or a person harnesses the power of the employer to carry out a threat, *a statement made may have a coercive or intimidating effect.*" (p. 12; emphasis added)

111 In this case Teleflex made no such statements, has not committed any unfair labour practices, and no employee supporter of CLAC that made the statements in issue, did so as an agent or spokesperson of Teleflex or, for that matter, CLAC.

112 The Board in *British Columbia Housing Management Commission* also reviewed *Brinco Coal Mining Corporation*, IRC No. C169/92, in which the Council concluded that statements made by BCGEU did not constitute a threat because the union making the statements had no control over the events it purported to describe. In the circumstances of this case also, the employees making statements had no control over whether or not the company remained or moved south of the border. A key to establishing a limit on such discussions or expression of views is that those engaging in the activity not act, in the words of *Westside Foods*, "as an agent of the employer" *and* in that capacity "threatened that jobs would be lost" or, act as spokesperson for the employer thereby "harnessing the power of the employer" to carry out the threats.

113 In this case I am satisfied that these discussions originated entirely with the employees. Neither Bernard, Riebe, Fisher or Fetchko were acting as agents of the Teleflex. At no time did they act as the spokespersons for the employer and thus "harness the power of the employer to carry out a threat" and no threats were carried out. No evidence was led from which it could be inferred that any of these employees had a particular inside knowledge of what Teleflex might do. I am satisfied that they reached their conclusions based on what they perceived, rightly or wrongly, to be the obvious: the fact that Teleflex is a small operation in Canada and a small part of the parent U.S. company, which serves a market entirely located in the United States, and which historically has been subjected to pressure to move. For these employees the presence of what they perceived to be a hard line union could directly or indirectly cause the U.S. parent at some point to ultimately precipitate a move. The expression of that concern by employees in an effort to maintain what they saw as conditions

favourable to Teleflex remaining in Canada while persuasive, does not cross the bounds into conduct which is intimidating or coercive within the meaning of the Code.

114 The Board has on several occasions, as noted above, said that where the maker of the statements has no power to effect them, no unfair labour practice would be found. Unions have been permitted to raise the issue of job loss, safety and other such matters, as long as the issue is not raised within the prohibited parameters referred to in *Westside*. If unions can engage in such discussions, there is no reason why employees amongst themselves cannot do so either. To require the workplace to be entirely free of such employee expression or discourse would be to require laboratory conditions which realistically do not exist.

115 I find support for my view in a decision of the Board in *Executive Inn Ltd.*, BCLRB No. B148/93. In that case the same two unions as in this case were competing for certification of employees at Executive Inn. CAW filed complaints under Sections 6, 7 and 9 of the Code, as much as it did in this case, alleging the following:

1. Two organizing employees for CLAC told employees that CLAC was "management's choice".
2. These two employees made derogatory comments about CAW during their organizing campaign.
3. These two employees had free access to the work place from which it is inferred they organized on the Employer's time. (p. 2)

116 The Board in that case ruled that these allegations do not establish a *prima facie* case. The Board said:

... First, CLAC organizers had free access to the work place because they are employees. CLAC representatives say they have never been in the hotel and there is no suggestion that that is incorrect. Second, it is not a breach of the Code for an organizer of one trade union to make derogatory comments about a rival union and positive comments about itself. As well, if organizers believe that suggesting management supports the organizational drive will be persuasive, it is not a breach of the Code for the union organizers to make those comments. Third, CAW brings no evidence to support its allegations either that management was involved in CLAC's organizing drive or that employees felt pressured to sign membership cards. (pp. 2-3)

117 Similar sentiments can be expressed about the activities in this particular case. Indeed, as I have already indicated orally, the fact that CLAC supporters were able to conduct their efforts in the work place was because they were employees working in a flexible environment where such conduct was not out of the norm. I am further bolstered in my view on that point by the comments of Chair Paul Weiler (as he then was) in *Canex Placer Limited*, BCLRB No. 91/74, [1974] 1 Can LRBR 443 at page 450,

in which CAIMAW, the predecessor to CAW, was the beneficiary of similar efforts. In that case, Chair Weiler said as follows:

... Following the adjournment on May 9th, several employees began the organizing drive for CAIMAW. I accept the evidence that much of this organizing took place during working time, *in technical violation of Article 4(1) of the Code, but that is not a sufficient reason for dismissing the certification application* (for reasons stated in the *Butler Wire Products* decision). *The fact that the supervisors knew of the efforts of Parker and Green and did not clamp down on them does not alter that conclusion.* There was no evidence of any significant disruption in production or other damage to the Company interests and the Company did not enforce more rigid standards on the Steelworkers' pamphleteering and electioneering. (emphasis added)

This is essentially a "no harm, no foul" principle. This principle has been a feature of the law and policy of the Board since 1974 and *Granville Island Hotel & Marina Ltd.* as well as *Pan-Afric Holdings Ltd.*, to which I referred in my oral reasons, did nothing more than continue it. The Board will consider allegations of a violation of Section 7(1) if material consequences are alleged.

118 Further, I agree with Vice-Chair Longpre in *Executive Inn* and have similarly remarked in *T. Jordan Inc.*, BCLRB No. B51/96, that if a union wishes to advance the notion that management supports its drive, that does not in and of itself constitute an unfair labour practice. As well, unions often make derogatory comments about opposing unions in the throes of support competition.

119 Finally, I said in *T. Jordan Inc.* that if employees are not happy with an organizing effort in their workplace, they have an obligation to do some research, exercise their persuasive abilities on fellow employees within the limits permitted by the Code, and participate in the procedures provided by the Code to determine their own destiny. The focus of the Code in the initial stages of organizing is on employee enfranchisement -- that unions be the freely chosen representatives of employees.

120 In this case, there is no evidence from which I could conclude or reasonably draw any inference of employer involvement. The employees here did exactly what I admonished employees in *T. Jordan Inc.* for not doing. They independently obtained information; they used their persuasive abilities within the limits established by the Code; and they used apparently larger all employee support to file not only a competing certification application, but also one which could effectively take the production unit application out of the game entirely. In short, they effectively used the procedures provided by the Code to determine their destiny.

121 CAW may be right in its assessment that these employees are really anti-union and have only done this to spare Teleflex the necessity of dealing with CAW. Even if this is true, it makes no difference; the employees have a lawful right to exercise their franchise as they choose for whatever reasons they choose as long as it is free of

employer interference. CAW may also suspect that Teleflex was behind this effort. However, if there is no evidence before the Board from which appropriate inferences can be drawn within the law and policy of the Code, then suspicion obtains no result.

122 For all these reasons I therefore concluded that neither Teleflex, CLAC nor employee supporters of CLAC engaged in any acts which violated the Code. Statements made by employees in the context of discussions at the work place that the U.S. parent might close Teleflex in reaction to CAW's certification fall within the permissible range of discussions employee to employee within the law and policy of the Code.

123 In view of my conclusions, and in view of the earlier rulings, I have determined that the most expeditious way to proceed on the certification applications is to order that the ballots in the CLAC all employee certification application be counted first. If CLAC is successful, a certification will issue and because the all employee unit encompasses the smaller production unit applications, there will be no need to deal with those other applications. If CLAC fails to achieve certification on the counting of this vote, then the all employee application will be dismissed and the matter will be set down for a half-day hearing on challenged ballots in the production unit application run-off vote. Once those challenged ballots are resolved, the run-off vote will be counted.

124 To ensure that all parties are abiding by the same rules, the 15-day reconsideration period will run from the date the Board notifies the parties that this decision in hard copy is available. It does not run from the date on which the oral part of the reasons were delivered to the parties at the Board.

LABOUR RELATIONS BOARD

V. A. PYLYPCHUK
VICE-CHAIR