BRITISH COLUMBIA LABOUR RELATIONS BOARD

TOM CHAVEZ AND TEAMSTERS LOCAL
UNION NO. 155

("Chavez" and "Local 155", respectively)

-and-

BRITISH COLUMBIA AND YUKON COUNCIL
OF FILM UNIONS

(the "Council")

-and-

WARNER BROS. PICTURES (B.C.) INC. AND VEIDT
ENTERPRISES INC.

("Warner Bros." and the "Employer", respectively)

PANEL: Philip Topalian, Vice-Chair

APPEARANCES: Leo McGrady, Q.C., for Local 155 and Chavez
Bruce Laughton, Q.C., for the Council
Barry Dong, for Warner Bros. and the Employer

CASE NO.: 59271

DATE OF DECISION: August 27, 2009
DECISION OF THE BOARD

I. NATURE OF APPLICATION

Local 155 and Chavez complain pursuant to Section 12 of the Labour Relations Code (the "Code"), alleging that the Council acted in a manner that was arbitrary, discriminatory and in bad faith when it reversed an earlier decision to pursue a grievance regarding Chavez' termination of employment from the film "Watchmen".

II. BACKGROUND

The Employer is a production company which produced the feature film Watchmen between June 2007 and March 2008.

Chavez is a member of Local 155 and was hired as security personnel on the Watchmen production.

Local 155 is a constituent member of the Council. The other members are Motion Picture Studio Production Technicians, Local 891 of the International Alliance of Theatrical and Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada ("IATSE 891") and International Photographers, Local 669 of the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States and Canada.

The Council is the exclusive bargaining agent for employees who are members of the constituent unions employed on productions within the exclusive jurisdiction of the Council under the terms of the Master Agreement, or who are members employed on other productions which an employer has elected to produce under the terms of the Master Agreement.

The Master Agreement requires that the Council must give its approval before a grievance brought by a member can proceed to arbitration. A majority vote of Council members is required for approval.

The subject of Chavez' grievance was his termination from his position on the Watchmen production on August 23, 2007. He complained to Local 155 which conducted an investigation.

Representatives of the Employer gave various reasons and justifications to Local 155 for Chavez' termination, but ultimately relied on the fact that Chavez was a daily hire which, under the terms of the Master Agreement, meant it was under no obligation to offer him work after completion of his day. He was subject to replacement at the pleasure of the Employer for any reason, or for no reason at all.
Local 155 concluded that the Employer had violated the Master Agreement in the manner in which it terminated Chavez and sought approval to pursue a grievance over the termination to arbitration.

Initially, on June 4, 2008, following a presentation by Local 155 to the Council, the Council approved proceeding to arbitration with a grievance regarding Chavez' termination. However, on June 10, 2008, Ken Anderson, the President of IATSE 891 ("Anderson") stated in an e-mail that he had obtained some information not presented by Local 155 before the decision to proceed was discussed. He said that it appeared Chavez had been given verbal warnings, was verbally abusive to his immediate supervisor, and the job he was assigned to was completed.

Anderson said that, given this new information, he was not comfortable proceeding to arbitration and would make a motion to reconsider the earlier decision.

Anderson discussed the information with the Transportation Coordinator, Mark Angus ("Angus") on June 11, 2008, and Angus confirmed the substance of the allegations regarding Chavez' conduct.

Following Anderson's investigations, the Council reversed its earlier decision to proceed to arbitration with Chavez' grievance.

III. POSITIONS OF THE PARTIES

A. PRELIMINARY ISSUES

The Council submits that Local 155 has no standing to bring a complaint against it pursuant to Section 12 of the Code.

The Employer agrees that Local 155 is not a proper complainant and submits this should be dealt with as a preliminary issue. In addition, the Employer says that while Warner Bros. Pictures (B.C.) Inc. is set out in Sideletter No. 1 of the Master Agreement, as a recognized signatory for bonding purposes and Veidt Enterprises Inc. ("Veidt") is affiliated with Warner Bros. Pictures (B.C.) Inc., the distributor of Watchmen, Veidt, is the Employer for the purposes of the Code. Warner Bros. Pictures (B.C.) Inc. should not be included in the complaint.

In reply, Chavez submits that Local 155 should be included as a complainant in this matter, relying on Section 41(5) of the Code, which provides:

41. (5) The board may make orders and issue directions it considers necessary or advisable respecting the formation of councils of trade unions and the fair representation of the trade unions comprising the council of trade unions.
Chavez submits that it is necessary or advisable that Local 155 be included as a complainant, in order to ensure the fair representation of the trade unions comprising the Council. No reasons are provided in support of this proposition.

Chavez makes no reply to the submission of the Employer that Warner Bros. is not the Employer and, accordingly should not be included as a respondent to the complaint.

1. **Analysis and Decision on the Preliminary Issues**

Regarding the inclusion of Warner Bros., Chavez has offered no facts or argument upon which to base a conclusion that the Employer is other than Veidt. The affiliation between Veidt and Warner Bros. has not been argued to give rise to a conclusion that Warner Bros. is Chavez' employer and I find that it does not do so. Warner Bros. is not a respondent to the complaint.

Regarding the inclusion of Local 155 as a complainant, Chavez has provided no detail as to how any interest of Local 155 could possibly be at issue in his complaint. Nor has he suggested a labour relations purpose for the inclusion of Local 155 as a complainant.

The entire substance of the Section 12 complaint is the refusal of the Council to process a grievance regarding the termination of his employment on the Watchmen production to arbitration. As noted in the submission of the Employer, the *Industrial Inquiry Commission Report Regarding the British Columbia Film Industry* (the "Tysoe Report"), published in 2004, made it clear that the Council should act as the single union for the purposes of screening grievances and resolving jurisdictional disputes. At page 36 the Tysoe Report noted:

> The members of the Council should assess an employee complaint on its merits and the grievance should only go forward if a majority of the Council members are in favour of proceeding with it.

In addition, the Constitution of the Council has the following as one of its purposes:

> To act as the exclusive bargaining agent for the units of employees that it represents.

The Employer and Council do not dispute that the Council owes a duty of fair representation to members of its constituent unions in determining whether to process individual grievances to arbitration.

The Council submits that to permit a Council member to advance a breach of Section 12 against the Council is inconsistent with the Council's status as the trade union. One part of the Council cannot bring a complaint (under Section 12) against the other parts.
Decisions of the Council regarding processing of grievances to arbitration are based on a majority vote of its constituent members. I find that no issue arises on the facts of this case regarding representation of Local 155 by the Council and Section 41(5) has no application.

I find that Local 155 is not a proper party to the complaint.

2. Conclusion Regarding the Preliminary Issues

Local 155 is not a proper party to the complaint in the circumstances of this case.

Warner Bros. is not Chavez' Employer and therefore is not a respondent to his complaint.

B. THE SECTION 12 COMPLAINT

Both the Employer and the Council rely on a decision of Arbitrator Christopher Sullivan, issued January 7, 2009: Earth Canada Productions Ltd. and Teamsters Union Local No. 155, Ministry No. A-020/09, [2009] B.C.C.A.A. No. 21 (the "Sullivan Award"). In that decision, Arbitrator Sullivan dealt with a grievance concerning the replacement of four workers on the catering team by Earth Canada Productions Ltd. ("Earth Canada"). As in the present case, at least one of the four workers received a Record of Employment stating that the reason for termination was "Shortage of Work/End of contract or season" (p. 11).

Earth Canada did not dispute that the four workers were replaced because there was some dissatisfaction with their services but did not assert just cause. Rather, as does the Employer in the present case, Earth Canada relied on the provisions of Article 10 of the Master Agreement: Lay Off and Discharge. Clause 10.05 of that Article provides:

10.05 Written Guarantee: The guaranteed length of employment shall be daily or weekly. A guarantee for a longer term shall be specifically set forth in writing. An employee may be replaced following completion of the guaranteed period of employment.

Arbitrator Sullivan concluded that:

Mr. Carr’s expression to the effect that the caterers were being replaced as a result of dissatisfaction with the food does not necessarily lead to the conclusion that the Employer sought to remove them for cause, or that the discharge for cause provision of the Master Agreement otherwise becomes invoked. As there is no contractual right to a guaranteed run of the show, it was within the Employer's right to replace the employees in accordance with Article 10.05. (Sullivan Award, p. 16)
Had the foregoing been all that was before me, I would likely find no basis for Chavez’ complaint. The Council is entitled to reach conclusions regarding interpretation of provisions of the Master Agreement, particularly when those conclusions are consistent with arbitration awards concerning those provisions.

However, I find the Council is not able to rely on the outcome of the Earth Canada arbitration in support of its position regarding Chavez’ grievance for the reason that the Council reversed its initial decision to allow Chavez’ grievance to proceed to arbitration during a conference call on June 11, 2008, more than six months before the Sullivan Award was published. Nor can it be said that the reversal of the Council’s initial decision was simply because both Chavez’ termination and that of the Earth Canada workers was under consideration at the same time and, as both arose under the same provision of the Master Agreement, it made sense to proceed on one only.

The Council approved Chavez’ grievance proceeding to arbitration in a meeting on June 4, 2008. On June 9, 2008, Anderson sent an e-mail to the Council in which he stated:

I found out some information that was not presented to me before the decision to proceed was discussed. Mr. Chavez it appears was given verbal warnings, was verbally abusive to his immediate supervisor, and the job he was assigned at Domtar was completed. He was not moved back to the other sites, and due to the new information I am not comfortable moving forward with this arbitration. I would make a motion to reconsider the grievance going to arbitration.

The following morning, Anderson spoke with Chavez’ supervisor, the Transportation Captain on the production, "to get the facts". The Transportation Captain confirmed that there had been some dissatisfaction with Chavez’ conduct while he was employed on the production.

On June 11, 2008 the Council, in a conference call convened as a result of Anderson’s concerns, rescinded its approval of Chavez’ grievance proceeding to arbitration.

No one from the Council advised Chavez of the concerns that had arisen, nor was he offered an opportunity to respond to those concerns before the motion to reconsider was made.

In James W.D. Judd, BCLRB No. B63/2003, 91 C.L.R.B.R. (2d) 33 ("Judd") the Board has stated:

Arbitrariness essentially encompasses three requirements. The union must: (i) ensure it is aware of the relevant information; (ii) make a reasoned decision; and (iii) not carry out representation with blatant or reckless disregard.
(i) Union must ensure it is aware of the relevant information

The requirement that the union must "make sure it is aware of the circumstances [and] the possible merits of the grievance" is often referred to in shorthand form as "conducting an adequate investigation". It is important to note, however, that not every case will necessarily require an "investigation". There may be some grievances where the relevant information is already in the union's possession.

In the more typical case, however -- for example, when an employee is suspended for alleged misconduct -- gathering the relevant information will require an "investigation". An adequate investigation may include considering the sequence of events, learning the grievor's point of view, obtaining information from potential witnesses, and offering the grievor a chance to respond. There may also be, depending on the circumstances, other ways of testing the employer's assertions. An employee is expected to cooperate and participate with the union in the investigation.

The key is that the union must take reasonable measures to ensure it is aware of the relevant information. What is "reasonable" will depend on the particular circumstances -- including the significance of the issue for the employee. (paras. 61-64)

39 When the Council reconsidered and reversed its approval to take Chavez' grievance to arbitration based on information obtained by Anderson without first giving Chavez an opportunity to respond, it failed in its duty to ensure that it was aware of all relevant information. It acted in an arbitrary manner, contrary to the provisions of Section 12 of the Code.

40 Even if I were to accept that it is likely that a grievance over Chavez' termination could not succeed, given the parties' interpretation of Article 10.05 of the Master Agreement, I cannot accept this as a justification for not putting the specifics of the complaints to Chavez before revisiting the decision to proceed to arbitration with his grievance. In other words, I find the decision was reversed solely due to the information obtained by Anderson in his investigation regarding complaints about Chavez rather than because of a reconsideration of the parties' position in light of the relevant terms of the Master Agreement. That being the case, the Council was under an obligation to seek an explanation from Chavez prior to revisiting the decision to proceed with a grievance.

41 In the circumstances of this case, the Council had at the very least an obligation to seek Chavez' response to the allegations raised against him. Chavez should have been sufficiently informed of the particulars of the allegations that he had a reasonable opportunity to provide his version. Once it had done this, the Council would be fully entitled to weigh Chavez' explanation against other relevant considerations and decide whether pursuing his grievance to arbitration would be the appropriate course of action.
I find the failure of the Council to address the allegations with Chavez before reversing its decision to allow his grievance to proceed to arbitration to be arbitrary conduct within the meaning of Section 12 of the Code.

Regarding the assertion of the Council that the remedy requested by Chavez, an order that his case proceed to arbitration, is academic in light of the Sullivan Award, Chavez submits that there is no guarantee that a different arbitrator would reach the same result because there is a different grievor. Secondly, Chavez asserts the facts of his case are distinguishable because he was given a number of different reasons why the employment relationship ended.

In light of the Sullivan Award, I am not satisfied that ordering Chavez' grievance be referred to arbitration would be consistent with the requirements of Section 2(e) of the Code: promotion of conditions favourable to the orderly, constructive and expeditious settlement of disputes. If the parties believe that the Sullivan Award does not accurately interpret the provisions of the Master Agreement, the appropriate course is to appeal the decision, rather than bringing the issue before another arbitrator in an attempt to obtain a different interpretation. The Sullivan Award has not been appealed.

Accordingly, in light of my finding that the Council breached its obligations under Section 12 of the Code, and declaration to that effect, I will give the parties an opportunity to make submissions regarding what, if any further remedy, is appropriate in the circumstances of this case.

My assistant will contact the parties regarding a schedule for the submissions.

LABOUR RELATIONS BOARD

"PHILIP TOPALIAN"

PHILIP TOPALIAN
VICE-CHAIR