

-2-

Dears Sirs:

In the matter of the *Canada Labour Code (Part I - Industrial Relations)* and a complaint of unfair labour practice filed pursuant to section 97(1) thereof by Mr. Udhham Adam Dhami, complainant, alleging violation of section 37 of the *Code* by Teamsters Local Union No. 31 and Western Canada Council of Teamsters, respondents; British Pacific Transport Ltd. and Mountain Pacific Transport Ltd., doing business as Shadow Lines, employer.

The Board consisting of Mr. Gordon D. Hamilton, Vice-Chairperson (former), sitting alone pursuant to section 14(3)c) of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) heard evidence from the parties at hearings conducted in Vancouver, British Columbia. The employer, British Pacific Transport Ltd. and Mountain Pacific Transport Ltd., doing business as Shadow Lines (the employer or Shadow Lines), chose to merely observe the proceedings without actively participating. Teamsters Local Union No. 31 and Western Canada Council of Teamsters (the respondents) and Udhham "Adam" Dhami (one of approximately 43 former employees of the employer who are concerned by these proceedings) (the complainants) were all represented by counsel.

I - Scope of the Decision

In *Udhham "Adam" Dhami*, January 10, 2003 (CIRB LD 798), the Board determined all but one of the factual issues in dispute and the implications arising therefrom. The initial written submissions were completely contradictory concerning the conduct of a union representative, Mr. Kory Lenning. In *Udhham "Adam" Dhami, supra*, the Board described the contradiction as follows:

...The complainants alleged that Mr. Kory Lenning, a union representative, advised them to quit *en masse* in order to avoid the Board's return-to-work order. The union denied this. ...

(page 12)

-3-

Accordingly, the Board scheduled a hearing in order to resolve this contradiction and to finally dispose of the complaint.

Counsel for the union argued that the Board was *functus officio* as a result of its earlier decision, *Udham "Adam" Dhami, supra*. This objection was raised without notice to the Board or the opposing counsel, on the first hearing day. However, the words of the Board's initial decision clearly indicated a retention of jurisdiction to deal with the allegations concerning Mr. Kory Lenning's advice. As such, there was sufficient jurisdiction to proceed with the hearing and make a final determination of the issues in dispute.

There was also a request for interim relief from the complainants. Given the nature of the evidence received and the narrow range of issues remaining to be determined, interim relief was not appropriate or warranted. There was also the request for an interpreter, which was arranged. Either the questions were very clearly put to the witnesses, or the witnesses demonstrated a higher level of proficiency in English than counsel anticipated, but in only one instance did language prove to be an obstacle for a witness, and that involved written English. That witness was very comfortable with answering the questions put to him verbally. Throughout the hearing, the complainants' witnesses demonstrated a consistent verbal proficiency in English, both in their listening comprehension skills and their verbal articulation in English. This fact is only worth noting because counsel for the complainants repeatedly argued that the complainants had trouble comprehending what Kory Lenning was telling them during the series of events that ultimately fell under the scrutiny of the Board. Having conducted the hearing, the Board is comfortable in concluding that there was no significant language barrier involving verbal communication when English was used between Kory Lenning and the witnesses who testified at the hearing. Of course, the Board can only speculate as to whether this group of individuals is representative of the language abilities of the drivers as a whole. However, there is no doubt in the Board's mind that these witnesses were capable of clarifying any confusion that other complainants might have raised as a result of a lesser proficiency in their comprehension of spoken English.

-4-

During the course of the hearing, there was a request by the complainants' counsel to present affidavit evidence from a witness named Sarai, who could not be physically present to give evidence. The nature of the proposed evidence would have been central to the question being considered. As such, the necessity of the ability to properly cross-examine the witness on statements contained in his affidavit would have been essential. The Board concluded that cross-examination by telephone would be inappropriate, particularly since there had been previous testimony that suggested this witness' command of English was particularly weak so as to require an interpreter. The Board felt it could not obtain reliable evidence through a prepared affidavit, with a cross-examination conducted by telephone and possibly through an interpreter. The Board was also advised that much of the proposed testimony was merely a reiteration of earlier testimony obtained from several of the complainants' witnesses. Accordingly, the request to file the affidavit evidence was denied.

The intended and sole issue for the Board to determine concerned allegations that Kory Lenning had directed, or otherwise advised the complainants, to resign from employment in order to defeat the Board's predicted back-to-work order in response to a potentially unlawful strike involving the complainants.

Throughout the hearing, there was an attempt to expand the scope of the hearing into areas which had previously been decided by the Board. For example, the internal political struggles of the union were raised by the complainants' counsel on several occasions. The manoeuvres to modify the normal dispatch procedures by the employer were identified as a frustrating factor. The lack of participation by the complainants in the decision-making of the union's executive board was highlighted. Several comparable issues which, in the end, had no relevance to the central question before the Board, were repeatedly and persistently presented throughout the testimonies. However, none of this peripheral evidence was appropriate to consider, nor did it affect the Board's determination of the central question, namely what was the specific advice that Kory Lenning gave to the complainants.

-5-

II - Selected Background Facts

The background facts have been completely enumerated in *Udham "Adam" Dhami, supra*, however, there is some practicality to reciting some of the most basic facts once again.

On May 22, 2001, virtually all employees of Shadow Line, including most if not all of the complainants, had refused to work for the employer. This refusal was compounded and partially precipitated by the employer's modifications to certain dispatch procedures. The extent to which these changes affected the concerted action of the complainants is unclear, but they certainly were a concern to several witnesses. There were a number of ongoing complaints or grievances (although they were in process and not official grievances yet), which were being pursued by the union but which were still unresolved at the time. These disputes had been described as extremely irritating to the majority of the complainants. If the evidence presented to the Board accurately conveyed all of the facts, of which the Board is uncertain given the employer's limited role in the hearing, it was readily predictable that there would be some aggressive response by the union or the employees. However, the key issue for the Board to determine in the hearing was whether the complainants were acting in response to advice from Kory Lenning, as the union representative for employees of Shadow Lines, that contained a direction for them to resign as a group.

Regardless of the identification of the instigator of the incident under review, the refusal to work was the third comparable refusal involving some or all of the complainants. Previously, there had been a work refusal when a particular employee was fired. The second work refusal was when employees wanted a particular manager to be fired. The employees' joint efforts in the first two incidents were regarded as completely successful in that they eventually achieved their clearly defined objectives.

One of the more unique elements to this complaint is that the Board was a concurrent participant and observer in the unfolding of the events. This is not a common role for the Board, or one which the Board finds comfortable. In this sense, the Board must also evaluate the evidence presented to it, and test it against the events in which it was a participant or which it observed. Any

-6-

other panel of the Board might find itself disadvantaged or advantaged, depending upon its perspective, without having this first-hand knowledge against which to test the evidence of the witnesses placed before it.

On May 30, 2002, the Board had heard the representations of Ms. Rebecca Murdoch and Mr. Victor Leginsky, counsel for the union and the employer respectively at the time, in respect of an illegal strike application filed pursuant to section 88.1 of the *Code*. Rebecca Murdoch appeared as a witness in this matter to give evidence of her knowledge of the conduct of Kory Lenning.

The panel of the Board that heard the illegal strike application was concerned with both counsel's lack of knowledge about what was really taking place, and its perception that some kind of gamesmanship was underway. Both counsel, Mr. Leginsky and Ms. Murdoch, presented the Board with a draft consent order in which the Board was requested to order "any remaining employees to return to work." The Board questioned them at length as to what was meant by "remaining employees," and it was in their answers that the Board realized that something was very unusual. The Board was advised that both counsel had been informed of the possibility that all of the employees had resigned. It was also advised that employees were refusing to put the resignations in writing. Both counsel readily understood, when questioned by the Board, that the Board would likely not order employees who had legitimately resigned to return to work. If their initial information was accurate concerning the group resignation, then there was no purpose in the Board issuing any back-to-work order. Accordingly, the Board directed both counsel to update the Board with additional facts once they became available, and that the illegal strike application would be held in abeyance until some concrete information concerning the possible resignations were confirmed to counsel. Neither counsel ever provided the Board with an update, and it was not until this complaint was filed that the Board finally discovered the extent of the gamesmanship that had occurred.

III - Analysis of the Facts and the Law

The Board could choose to recite in detail the evidence contained in the transcripts of its proceedings. However, there is no purpose in attempting to concisely outline those facts presented

-7-

in oral testimony, which have already been committed to written transcripts. In reaching its conclusions, the Board relied upon its notes, its recollection of the evidence, its own observations of the witnesses who appeared before it and the submissions of the parties.

The overall evidence of the many witnesses for the complainants was unremarkable. There were certainly some significant inconsistencies and it was the inconsistencies which provided the greatest challenge to counsel and the Board in an attempt at creating an accurate reconciliation of the true account of the key events.

In order for the complainants to succeed in this complaint, the allegations against Kory Lenning would have to be proven on a balance of probabilities. There would have to be sufficient evidence that Mr. Lenning's behaviour was inappropriate as alleged, such that the Board would be led to conclude that the union's conduct was discriminatory, arbitrary or in bad faith in relation to the complainants and their rights under the *Code* and the collective agreement.

In *Udham "Adam" Dhami, supra*, the Board ordered a hearing to determine whether the complainant's allegations, that Kory Lenning had indeed advised the complainants to quit as a group in order to avoid the Board's remedial powers in response to a section 88.1 application, were accurate. Such advice, particularly if acted upon, would be so egregious that the Board would have readily concluded that it constituted a breach of the duty to fairly represent its union members.

In his written submission, counsel for the union relied upon the difference in specific wording used by various witnesses, namely "to avoid being sued." The Board's experience recognizes that the concept of "being sued" often has a broader definition among lay people than is normally understood by lawyers, who make a clear distinction between the proceedings of administrative tribunals and civil litigation lawsuits. Lay people frequently consider "being sued" as meaning any legal proceeding where one could be negatively affected. However, it is also equally possible in this instance that the various witnesses who employed this terminology were accurately speaking of civil litigation, given that there was a real possibility that their employer might sue them personally in a civil proceeding for its loss of business and profit directly flowing from their severance of the employment contract without reasonable notice. The evidence was inconclusive in identifying

-8-

precisely what the witnesses actually meant. However, under either interpretation, the impact on the outcome to the question before the Board in this hearing was minimal at best.

IV - The Union's Evidence

Kory Lenning was vigorously examined about his conduct by both counsel. His testimony was consistent with the union's assertions throughout this file. He did not waver in his conviction as to what had transpired, either in direct examination or under cross-examination. He emphatically and clearly rejected any suggestions to the contrary.

His evidence was that the complainants had quit *en masse* on their own initiative and contrary to his after-the-fact pleadings to them. The only involvement he had with their decision arose when he replied to a question from Mr. Rapinder Chohan (known as Young Rapinder). Mr. Lenning had been asked, in relation to the employer's illegal strike application that had been filed with but not determined by the Board, what would happen if everyone quit. Kory Lenning conditionally advised them, since he clarified that he was not a lawyer, that he believed their liability might cease if they quit. His testimony suggested that, after that point, he lost control of the discussions, as Young Rapinder and others spoke in Punjabi thereafter. Kory Lenning testified that a vote took place in the union hall, in which everyone voted to quit. At the time, he questioned some of the complainants in English in order to confirm this.

The Board is unwilling to accept that the level of English comprehension was so minimal that every driver present may not have fully understood Kory Lenning's questions or follow-up discussions. Based upon the fluency of the complainants' witnesses, comprehension of spoken English appeared not to be much of a problem. Given this fact and the fact that these witnesses were present at the meeting in the union hall, if they had disagreed with Kory Lenning's understanding of the transpired events, they could have clearly and verbally indicated it to him in an effective manner.

Counsel for the complainants raised concerns with the union's late disclosure of Exhibit 8. This exhibit was a series of notes prepared by Kory Lenning in response to the complaint. They were

-9-

not contemporaneous notes nor were they notes which would normally be exchanged as part of the Board's mandated document exchange and production. The exhibit was disclosed to the complainants' counsel prior to Kory Lenning's examination. The Board finds nothing inappropriate about the union's failure to disclose this document earlier, especially given its very limited evidentiary value.

The evidence of Rebecca Murdoch clearly indicated that she had been told by one of the drivers that a vote had just been taken to quit as a group. She had pressured every driver in the meeting to put their resignations in writing, but none did. She testified that she had been told the drivers had retained their own lawyer who was now advising them. This testimony is consistent with her representations to the Board later that same day. She had advised the Board that it appeared as if everyone had resigned, but she could not say for certain whether there were some employees who still had not yet resigned. She had also advised the Board that the drivers were so far unwilling to put their resignations in writing. It was for this reason that she had agreed with counsel for the employer as to the appropriate wording to include in the proposed back-to-work Board order.

The importance of Rebecca Murdoch's testimony cannot be underestimated. She was the only person in a position to confirm what the drivers had told the union, including Kory Lenning. She too had direct interaction with some of the drivers, which was confirmed by some of the complainants' witnesses. She would have readily uncovered any miscommunications over the issue of resignations, given that she had to make representations to the Board that evening. Having made numerous representations before the Board previously, the Board is quite familiar with her direct style of questioning. The Board simply does not accept that she would have misunderstood what she was being told by the drivers at the meeting she attended, or that she could not make herself understood. In this regard, the Board has not doubts as to the veracity and reliability of her evidence.

In his testimony, Kory Lenning suggested that he lost control of the meeting with the drivers. This group of employees had previously taken part in wildcat strikes or similar action to achieve their objectives. Kory Lenning has a very strong personality and appears unwilling to accept an outcome or conclusion that he disagrees with. Such was evident from his response to questions put

-10-

to him when he was under cross-examination. It is difficult for the Board to conclude that Kory Lenning would not clarify or argue with the complainants if he truly believed that they were quitting. This argumentative approach would help to confirm or clarify his understanding as to what had transpired. He testified that he had concluded that they had resigned *en masse*, by taking a vote on the question. He also testified that he tried to persuade them to change their mind. Such an approach is consistent with what the Board would expect Kory Lenning to follow if he truly believed the drivers had quit. To that extent, his testimony was consistent with what his personality would suggest.

The complainants have suggested that Kory Lenning had advised the employees to quit. Their counsel argued that the decision to quit was merely an intention to quit at some point in the future, not an actual decision to resign at the time. For that reason, the complainants' counsel argued that Kory Lenning was duty bound not to advise the employer (or the Board) of these future intentions. The complainants' counsel also suggested that the group decision was the result of Kory Lenning's advice, which urged them to quit. Kory Lenning emphatically denied that allegation. The evidence of the complainants' witnesses suggested a different scenario, which is summarized below. However, he denied that he had ever concocted a strategy that would have the complainants quit in order to avoid legal sanctions, whether from the Board or the courts.

V - The Complainant's Evidence

The evidence of the complainants' witnesses contained many inconsistencies, but were consistent concerning the matter of quitting. Virtually every witness said that they did not quit or resign from their employment.

Mr. Gurmit Pall Singh Sandhu stated that Kory Lenning urged the drivers to quit. However, he said that the drivers refused to quit and refused to follow his advice. He indicated that the vote had to deal with acceptance or rejection of the employer's offer. The offer was turned down.

