Between McPherson Playhouse Foundation (the "Employer"), and International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada, Local No. 118 (the "Union")

[1987] B.C.L.R.B.D. No. 293

No. C65/87

(Appeal of BCLRB No. 165/87)

British Columbia Industrial Relations Council

October 15, 1987

Panel: Michael H. Davison, Vice-Chairman

Counsel: Robert A. Higinbotham for the Employer Katharine P. Young for the Union

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I

This matter arises from an application for certification by the Union received by the Labour Relations Board on December 12, 1986. Twenty-five ballots were cast. On February 12, 1987, the Labour Relations Board held a formal hearing with respect to these challenges of the right of certain employees to cast ballots. All challenges were made by the Employer. On February 13, 1987, the Labour Relations Board issued a letter decision with full reasons to follow. In that decision the panel concluded that 22 of 23 challenges succeeded except for the ballot of Mike Zair which would be counted. The decision stated that the ballots of Zair, A. Wilkinson and R. Stebih would be counted. On May 25, 1987, the Labour Relations Board set out full reasons for its conclusions in decision No. 165/87. This is an application by the Union for reconsideration of BCLRB No. 165/87. The Employer also applied for reconsideration of BCLRB No. 165/87. The Employer appealed that part of the panel's decision which ordered the ballot of Mike Zair to be counted.

II

In its letter decision of February 13, 1987, the panel of the Labour Relations Board concluded that the employees whose ballots were ordered destroyed "did not demonstrate a reasonable expectation of employment nor a community of interest with the regular employees".

In BCLRB No. 165/87, the original panel said the following with respect to "reasonable expectation of employment":

> "The evidence presented at the hearing did not suggest that these individuals had a reasonable expectation of recall. Certain performances regularly return to the Victoria area but this did not result in a pattern of regular employment. Individuals went months without working any hours. While

> Eastick attempts to keep a 'call list' of people from which he can draw, depending on the skills required, there was no formal method of recall. Employees who were available when needed, were called in. Their expectation of future employment was minimal, at best. However, regardless of any expectation of future employment, none of the employees in this category had a 'continuing tangible felt relationship.' They worked irregularly and infrequently throughout the year. Many went months without working a shift. The Board has continually rejected arguments from employers to include individuals in a bargaining unit for the purpose of an application for certification who demonstrate a much stronger employment relationship." (at 6-7)

In regard to community of interest the panel concluded as follows:

> "The Panel also found that there was no community of interest between the casual employees and the regular employees. A full time employee shares little in common with an employee who works but a few shifts a year. It made little sense to the Panel to include into a unit individuals who bear such faint relationship to the Employer. The principles expressed in Edco Healey, supra, are applicable in this case. If the employees in the second group were included in the unit, collective bargaining would be dominated by casual employees who work a handful of shifts per year. This is not to say that the collective agreement will not contain provisions for casual employees. It was our conclusion, however, that the proper way to proceed was to establish a bargaining relationship with the full time employees and leave it to the parties to negotiate the use of casual employees." (at 7)

In regard to Mike Zair the original panel concluded as follows:

> "...Although Zair has taken employment elsewhere, he continued to work for the Employer. The Panel did not hear evidence from Zair and on the evidence before us, we were not prepared to exclude him from the bargaining unit. His ballot was included in the vote."
> (at 7)

Counsel for the Union sets out its grounds for review as follows:

> "1. The Board erred fundamentally in its conclusion that the union did not demonstrate that the challenged voters had a reasonable expectation of future employment and a continuing tangible felt relationship with the employer. This conclusion was not supported by any evidence and was in direct conflict with the evidence. The Board's conclusion constitutes a denial of a fair hearing.
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> 2. The Board erred in concluding that the part-time employees did not have a community of interests with the three employees whose votes were counted.
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> 3. The Board's order operated in an unanticipated way.

4. The Board erred in interpreting the policies and principles of the Code and rendered a decision totally inconsistent with the scheme of the legislation."

The Employer set out its grounds for review as follows:

"...the original panel erred in finding that Mr. Zair in his circumstances was capable of having a community of interests with the regular full-time employees of the **McPherson Playhouse** Foundation."

IV

Section 36 of the Industrial Relations Act reads as follows:

"36.(1) The council may, on application by any person, or on its own motion, reconsider a decision or order may by it or by a panel under this Act, and my vary or cancel the decision or order."

The Labour Relations Board developed a policy for the exercise of its power under Section 36 of the Labour Code described in The Corporation of the District of Burnaby, BCLRB No. 25/74, [1974] 1 Can LRBR 128, and Western Cash Register (1955) Ltd., BCLRB No. 84/77 [1978] 2 Can LRBR 532. These decisions describe both procedural and substantial restrictions on the scope of appeal available to parties under Section 36 of the Code. In the present case, we are satisfied the procedural restrictions under Section 36 of the Code as outlined in the regulations of the Industrial Relations Council have been satisfied by the parties. With respect to the matter of the substance of the appeal, the Labour Relations Board stated in Western Cash Register (1955) Ltd., supra, that an application for reconsideration will succeed only in certain limited circumstances described as follows:

"1. if there was no hearing in the first instance and a party subsequently finds that the decision turns on a finding of fact which is in controversy and on which the party wishes to adduce evidence; or

2. if a hearing was held, but certain crucial evidence was not adduced for good and sufficient reason; or

3. if the order was made by the Board in the first instance has operated in an unanticipated effect in its particular application; or

4. if the original decision turned on a conclusion of law or general policy under the Code which law or policy was not properly interpreted by the original panel.

(This fact is generally regarded as the most important in the use of Section 36.")
(at 534)

V

The Labour Relations Board has stated (an opinion which I adopt) that an application for reconsideration cannot attack the conclusions of fact of the original panel which were made after having received the evidence and evaluated its significance. SS Robinson Little & Co. Ltd., BCLRB No. 32/75, [1975] 2 Can LRBR 81. This effectively disposes of ground 1 and 2 of the Union's application for reconsideration and, further, completely disposes of the Employer's cross-application for reconsideration in reference to Mike Zair.

Counsel for the Union submits that the Labour Relations Board's decision operated in an unanticipated way. It might have but in fact did not. From the submissions of the parties I am satisfied that the fear of the Union that the Employer would not negotiate terms and conditions of employment for part-time employees has not materialized.

Finally, I have carefully reviewed the conclusions of the original panel and find that they do not err either in law or in policy under the Act.

In conclusion, I have considered the Union's application for reconsideration and have decided that the circumstances here do not come within any of the circumstances described by Western Cash Register (1955) Ltd., supra, and accordingly both applications are hereby dismissed.

MICHAEL H. DAVISON
VICE-CHAIRMAN