Pacific Press Limited
and
Vancouver-New Westminster Guild, Local 115, The Newspaper Guild

British Columbia Labour Relations Board, May 25, 1983.
S. Kelleher, Chairman. No. 109/83.

Arbitration — Authority of arbitration board and Labour Relations Board to order pre-hearing production of documents — Discretionary power.

Practice and procedure — No general right to discovery at arbitration hearings or before Labour Relations Board hearings.

These were applications by the employer for reconsideration of two decisions of the Board. The decisions originated in two sets of proceedings arising out of a layoff by the employer of a number of employees. The union claimed a violation of the collective agreement and proceeded to arbitration on the layoffs but also filed a complaint before the Labour Relations Board that the layoffs constituted an illegal lockout. The arbitration board issued an interim award holding that it had jurisdiction to order pre-hearing production of documents and ordering production of certain documents. The Board dismissed an application for review of those interim awards (see BCLRB No. 1/83). The employer sought reconsideration of that decision. The employer conceded that an arbitration board could compel pre-hearing production of documents on which a party would be relying but argued that any order of an arbitration board for pre-hearing production of all documents relevant to the issues would involve a denial of a fair hearing as an arbitration board, lacking the benefit of pleadings, cannot determine relevance in the absence of evidence and argument at hearing.

In the second set of proceedings the Labour Relations Board rejected an argument that the employer should proceed first and made an order compelling it to produce relevant documents. The employer also sought reconsideration of that ruling, arguing that the Labour Relations Board did not have power to order production of documents prior to a hearing or, if it did, it had the power only with the approval of the Minister.

Held: Both of the applications for reconsideration were dismissed.

With regard to the authority of an arbitrator to order pre-hearing production of documents the legislation in British Columbia confers a broad mandate on arbitration boards. Within the confines of its obligation not to deny a fair hearing, an arbitration board must have power to determine its own procedure based on the needs of the dispute before it. The legislation does not require any distinction between an arbitration board's jurisdiction before a hearing and after it commences. The grievance and correspondence leading to arbitration should enable the board to make a determination of relevance. If relevance cannot be established the arbitrator will not order production. While there is no general right to discovery of documents at arbitration hearings, the power to order pre-hearing production of documents is a discretionary matter for the arbitration board.

With regard to the power of the Labour Relations Board to order pre-hearing production of documents, subject to its obligation to ensure a fair hearing, the Board has power to determine its own practice and procedure. This power encompasses the ordering of documents prior to a hearing. Public policy reasons, related

the authorities from outside British Columbia are of limited assistance because they arise under a different statutory framework. In British Columbia, the focus of our attention must be the following provisions of the *Labour Code*:

> 92(2) It is the intent and purpose of this Part to constitute method and procedure for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
>
> 92(3) An arbitration board, to further the intent and purpose expressed in subsection (2), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement, and shall apply principles consistent with the industrial relations policy of this Act, and is not bound by a strict legal interpretation of the issue in dispute.
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> 98. For the purposes set out in section 92, *an arbitration board has the authority necessary to provide a final and conclusive settlement of a dispute arising under a collective agreement*, and without limiting the generality of the foregoing, has authority to. . . .

(Emphasis added.)

As well, s. 27(2) of the *Interpretation Act*, R.S.C. 1970, c. I-23, is relevant:

> 27(2) Where in an enactment power is given to a person to do or enforce the doing of an act or thing, all the powers shall be deemed to be also given that are necessary to enable the person to do or enforce the doing of the act or thing.

These provisions confer a broad mandate on boards of arbitration to conduct proceedings in the manner which will promote the often quoted virtues of speed, economy and informality which make arbitration the legislative choice as the vehicle for determination of disputes under collective agreements. See *Simon Fraser University*, [1976] 2 Canadian LRBR 54 at 57-58. In conducting those proceedings, the arbitration board must not deny any party a fair hearing (see s. 108(1)(*a*)) but as long as the fair hearing requirement is met, the board of arbitration must have the power to determine its own procedure based on the needs of the dispute before it.

This statutory framework is far removed from that in other jurisdictions. For example, the prevailing view of arbitrators acting under the *Ontario Labour Relations Act* is that in that jurisdiction: (*Re Fabricated Steel Products (Windsor) Ltd. and United Automotive Workers, Local 195* (1977), 16 L.A.C. (2d) 148 at 159 (O'Shea).):

> Once an arbitrator is appointed by the parties, his only authority prior to the hearing is to make the necessary arrangements for the time and place of hearing, with the agreement of the parties if possible. . . . [T]he arbitrator has no authority to issue any direction to one of the parties prior to the hearing, at the request of the other.

Counsel for the Employer argues that to order such production is to deny a fair hearing to the person who is so ordered. That is because it is not possible, in his submission, for a board of arbitration to determine what is relevant in the absence of evidence and argument at a hearing. Counsel concedes that in civil proceedings in the superior courts in this Province, the production of such documents is commonplace. There, the relevance of documents, if that is in issue, is determined by a Supreme Court judge in chambers. However, counsel for the Employer points out that a judge in chambers has the benefit of pleadings and on that basis is in a position to make a ruling on relevance.

It is true that in labour relations matters there are no formal pleadings. Indeed, that is an element of the informality. But there is virtually always a grievance which sets out with more or less particularity the nature of the claim. The grievance and correspondence leading to arbitration should enable an arbitration board to make the determination of relevance. The safeguard is there: if a party cannot establish relevance, the arbitrator will not order that the document be produced.

Counsel for the Employer argued that to permit an arbitration board to make such orders is to convert the process into a more formalistic one. That would be an unfortunate by-product. In the vast majority of cases where pre-hearing production of documents is sought, there is no argument as to the relevance of the documents. It should be a simple matter for counsel to exchange such documents in order that the eventual evidentiary hearing proceed efficiently. The grievance procedure under the collective agreement will often serve to make clear to the parties the nature of the issues to be arbitrated and, therefore, the relevance of documents in the parties' possession.

Before leaving this aspect of the matter, I wish to make two comments concerning the reasons expressed in the decision of the original panel. First, the original panel held that it is permissible under the Labour Code for a board of arbitration to order the production of documents which are "*prima facie* admissible". If that phrase describes documents which the applicant persuades the board of arbitration are relevant to the issues and are not privileged or protected from disclosure for some other legitimate reason, I fully agree with the panel. If, however, the phrase is intended to imply that the test for production is something less than that, I respectfully disagree. As counsel for the Employer argued, it would not be fair for a board of arbitration to compel production of documents which do not satisfy the test of relevance.

Secondly, I adopt and repeat the following comments made by the original panel:

> This does not mean that there is general right to "discovery of documents" as

> 21(1) The board shall determine its own practice and procedure, but shall give full opportunity to the parties to a proceeding to present evidence and make submissions.

It will be seen that s. 21(1) has two aspects. First, it clearly establishes that the Board is the master of its own procedure. This is an important legislative statement. It enables the Board to function in a flexible manner and to adopt its procedures to the exigencies of particular cases. The second aspect is a limitation on the first: although the Board may determine its own procedure, that procedure must not deny to a party a fair hearing.

Let me apply this analysis to the issues before me. The Board's power to determine its own procedure is broad enough to encompass the ordering of production of documents before the hearing: see *B. C. Hotels Ass'n*, Decision No. L116/83; however, consideration must be given to whether in doing so, there is a resulting unfairness to the Employer.

The panel did not order the Employer to produce any documents which are irrelevant to the proceedings. Therefore, the Employer would be in the same position if a *summons duces tecum* were issued to the appropriate officer of the Employer in the course of the hearing. Relevance is still the test. True, the Employer is forced to provide material *before* the hearing. There may be tactical reasons for not wishing to do so. However, the public policy reasons for adopting this procedure override these. The development of rules of pre-trial disclosure in the civil courts is described in *B. C. Hotels Ass'n, supra*. The panel in that case went on:

> The need for pre-hearing disclosure in matters coming before this Board is even more crucial for two primary reasons. Labour relations are founded, at least in part, upon concepts of trust and fair dealing: *Corporation of the District of Chilliwack*, BCLRB No. L362/82. A "victory" for one side in a labour relations adjudication (whether it be at arbitration, or before this Board), based upon the concealment of one's "evidential resources" or exploitation of the opposing side's ignorance may, in the long run, prove Pyrrhic indeed. Second, as stated by this Board in another context, in no area of the law is it truer that justice delayed is justice denied: *Corporation of the District of Burnaby*, BCLRB No. 25/74, [1974] 1 Can LRBR 128. While the Board was intended to provide a forum where experienced labour relations adjudicators could use their skills in resolving complex and often urgent labour disputes in a speedy and simplified process, it is true that the failure or refusal of the parties to disclose their cases has proven the source of countless unnecessary adjournments and delays of hearings. This Board must be responsive to such problems and do all it can to facilitate expediency and require fair dealings.

(at p. 4)

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Counsel for the Employer made one other argument which must be addressed. It was his position that if s. 21(1) empowers the

obtained from the Union, and the Union is unwilling to provide such undertakings, such a question can be determined by the panel.

In the result, both applications for reconsideration are dismissed.

Surrey Co-operative Association, in receivership and Retail Wholesale Union, Local 470

Labour Relations Board of British Columbia. June 21, 1983.
S. Kelleher, Chairman. No. 156/83.

Declaration — Successorship — Facts too uncertain for Board to make declaration.

Successorship — Declaration — Facts too uncertain for Board to make declaration.

The employer applied for a declaration that, upon the lease of its former premises to a prospective lessee, the successor provisions of the *Labour Code*, R.S.B.C. 1979, c. 212, would not apply and the lessee would not be bound by the terms of the collective agreement between the employer and the union. The original panel declined to grant the application on the basis that the facts involved too many unknowns for the Board to issue a declaration at that time. The Board felt it could not be sure as to what use the lessee would ultimately make of the premises. The employer applied for reconsideration.

Held: the employer's application was dismissed.

The Board agreed with the judgment of the original panel that the employer's application lacked certainty with respect to the eventual factual circumstances.

P. A. Csiszar, for employer.
D. K. Pidgeon, for union.

DECISION OF THE BOARD:—

I

This is an application pursuant to s. 36 by Surrey Co-op, asking the Board to reconsider its decision BCLRB No. L70/83. In that decision, Surrey Co-op was seeking a Board declaration pursuant to s. 38 of the *Labour Code*, R.S.B.C. 1979, c. 212, that upon the lease of its former premises in Abbotsford to Buckerfields Limited ("Buckerfields"), s. 53 of the *Labour Code* would not apply and Buckerfields would not be bound by the terms of the collective agreement between Surrey Co-op and the Union.

Surrey Co-op had operated a retail hardware store at certain premises in the Abbotsquare Mall in Abbotsford. In 1982, it ceased