wished to have their application processed pursuant to s. 43(1). They are entitled to have it processed under that section.

The vote which has already been ordered has taken place. I understand that there were no objections with respect to the eligibility of individuals to vote. Accordingly, the vote should now be counted.

Wigmar Construction (B.C.) Ltd.
and
Int'l Ass'n of Bridge, Structural and Ornamental Ironworkers, Local No. 97

Labour Relations Board of British Columbia, July 13, 1984.
Peter R. Sheen, Vice-Chairman. No. 278/84.

Practice and procedure — Evidence — Board admitting uncorroborated hearsay evidence — Board declining to make findings based on hearsay evidence alone.

Practice and procedure — Evidence — Witnesses having direct knowledge of matters in dispute not called — No explanation given for failure to call — Adverse inference drawn.

Legal principles — Natural justice — Rules require that Board not make findings of fact on disputed issues based on hearsay evidence only — Necessity to ensure parties afforded full opportunity to cross examine and defend position.

This was an application for reconsideration of a decision granting certification to the union for a craft unit. The original panel conducted a full evidentiary hearing at which both parties were represented by counsel. The evidence at that hearing pertained entirely to the employer's employees performing work on an addition to a hospital in Victoria, British Columbia. The evidence did not indicate that the employer had other employees performing work within the union's jurisdiction, nor did the report of the Board's officer disclose the presence of such employees. The employer sought reconsideration on the basis that on the date of the application for certification there were three additional employees performing work on a ranch in Invermere, British Columbia, owned and operated by the father of the principal of the employer ("H"). The employer argued that addition of these employees into the bargaining unit necessitated a representation vote. At the reconsideration hearing the employer called only one witness, H. H was able to give only hearsay evidence with respect to whether the three employees performed work traditionally within the union's jurisdiction. Neither H's father nor any of the employees was called to give direct evidence regarding the work performed at the relevant times.

Held: the application for reconsideration was dismissed.

The employer had failed to discharge the onus on it to establish on a balance of probabilities that the three individuals were employees on the date of application for certification and that they were performing work within the union's traditional jurisdiction. There was some evidence regarding their status as employees in H's testimony that he hired them. However, there was no direct evidence on the issue of whether the employees were performing work falling within the traditional jurisdiction of the union. The only evidence from H was uncorroborated hearsay. The Board considered its discretionary power to admit hearsay evidence but held that power could not be considered in isolation. The Board is also required to give the parties a full opportunity to present their respective cases. The rules of natural justice require that the Board not make findings of fact based upon hearsay evidence alone, as without direct evidence on a point, opposing parties have no opportunity to cross examine as to the truth of the evidence. In this case, the union was unable to cross examine to determine if any work was done and, if so, what the nature of that work was. These were two of the key issues in dispute and matters not within the power of the union to refute by direct evidence. In addition, there were at least two available witnesses knowledgeable about what work was being performed at the ranch and although neither of these invidivuals was called to testify, no explanation was given for their absence. The Board held that an adverse inference must be drawn from the failure to call these individuals. The Board noted that its decision should not be viewed as a stricter approach to the presentation of evidence. The provisions of the legislation would continue to allow flexibility regarding admission of evidence in an effort to expedite procedures and make hearings less formal. However, the admission of such evidence could not be allowed at the price of denying the opposite party a full opportunity to defend its position.

Cases considered

Folld

Re Girvin and Consumers' Gas Co. (1974), 40 D.L.R. (3rd) 509; *Board of School Trustees of School District No. 68 (Nanaimo) v. CUPE, Local 606*, BCLRB No. 68/76

Statutes considered

Labour Code, R.S.B.C. 1979, c. 212, ss. 19(1), 21(1), 36
Labour Relations Act, R.S.O. 1970, c. 232, s. 37(7)(c)

R. A. Francis, for employer.
J. K. Irving, for union.

DECISION OF THE BOARD:—

I

This is an application pursuant to s. 36 of the *Labour Code*, R.S.B.C. 1979, c. 212, by the employer seeking reconsideration of a

decision of the Board granting certification to Local 97 for a craft unit described as:

> structural, ornamental and reinforcing ironworkers in the field in British Columbia.

The original panel conducted a full evidentiary hearing at which both parties were represented by counsel.

The evidence at that hearing pertained entirely to the employer's employees performing work on an addition to the Royal Jubilee Hospital in Victoria. The evidence at the hearing did not indicate that the employer had other employees working elsewhere in British Columbia performing work within the jurisdiction of Local 97, nor did the report of the Industrial Relations Officer disclose the presence of such employees. The employer's arguments before the original panel were summarized in its decision as follows:

> However, the Employer argues that several exceptional circumstances surrounding this group of employees, taken cumulatively, demonstrate that the unit is not appropriate in this case: (1) the employees are part-time; (2) the entire project is non-union and granting the application would convert it to a "mixed bag" of union and non-union workers; (3) this is the first time the Employer has placed rodmen on its payroll and it is unlikely to recur; and (4) the work of the rodmen is virtually finished.

The original panel considered these arguments and dismissed them. It certified Local 97 without a representation vote, as that Local had, as at the date of the application, in excess of 55% of the employees in the proposed unit as members in good standing.

The employer now seeks reconsideration of the original decision on the basis that, on the date of the application for certification, there were three additional employees performing ironwork on a ranch in Invermere, B.C. That ranch is owned and operated by Hans Hartwig, the father of the principal of the employer. The employer submits that the addition of these three employees into the bargaining unit requires the Board to order a representation vote, since the support in the unit was thereby reduced to not less than 45% and not more than 55%.

At the hearing on the application for reconsideration, the sole witness called by the employer was Gerald Hartwig, the principal of the employer. He testified that he hired the three individuals in question to perform certain work at his father's ranch in Invermere. The three individuals were Marius Hartwig, Gerald Hartwig's brother (and a former employee of the employer), Kelly Bennett, a

ranch hand at the ranch, and Rob Miller, a former employee of the employer who was appointed foreman for this job.

The employer tendered as exhibits payroll records, records of employment and statements of remuneration paid. However, Gerald Hartwig had no personal knowledge of those documents. He explained that the employer's accountant, under whose direction they were prepared had been killed in an auto accident in late January, 1984 shortly after the hearing before the original panel. He further testified that these records were prepared either by the accountant or by one of four employees in the employer's Victoria office.

On the payroll records tendered, the names of the three employees hired by Hartwig and the figures opposite them are entered at the bottom of a list of employees in what appears to be handwriting different from that in which all the other entries are made. There are no payroll cheque number entries opposite the three names although such entries appear for all the other employees. Hartwig testified that he wrote out cheques to "cash", cashed the cheques, then gave the cash to his stepmother in Victoria who telephoned his father at the ranch. She asked him to pay the three employees the amount of money she had received from her stepson. These cheques were not for the exact amount shown as "wages" to these employees on the payroll records or the T4 slips because certain "expenses" were apparently included in these amounts. This procedure was followed according to Hartwig because the ranch was isolated, and the employees who had no bank accounts, required cash for food and expenses. No cancelled cheques were produced in evidence. None of the office employees were called to testify with regard to the entries in the payroll records, the records of employment or the statements of remuneration paid.

The only evidence Hartwig was able to give with respect to whether the three employees performed work traditionally within Local 97's jurisdiction, was hearsay evidence. He produced a purchase order from the ranch to the employer which reads:

> As discussed earlier, proceed with the construction and placement of new cattle guards, steel bins for storage of grain and installation of corragated (sic) metal roofs for the hay sheds. Diversified Holdings to provide accommodation and job to be done at cost plus 10%.

Hartwig never visited the site, nor observed the men working. Rather he stated that he received periodic requests from Rob Miller, the foreman, to send money to pay the employees. Either

Hans Hartwig or Kelly Bennett could have testified regarding the work performed by these men at the relevant times as both had observed the nature of the work being done. Although both men were available to be called, neither was. The Panel therefore has no direct evidence regarding the nature of the work performed by these three employees.

II

On this application, the onus is on the employer to establish on the balance of probabilities that the three individuals in question were employees on the date of the application for certification *and* that they were performing work within Local 97's traditional jurisdiction.

Certainly there is some evidence regarding their status as employees: that is the testimony of Gerald Hartwig that he hired the three. However, the more difficult question is whether these employees were performing work that falls within the traditional jurisdiction of Local 97. There is no direct evidence on the point. Gerald Hartwig did not attend at the ranch at any time to see if work was being performed. Nor did the Panel hear evidence from either Hans Hartwig, who was present at the ranch at the relevant times, or from Kelly Bennett, who was hired to perform the work. Therefore, Gerald Hartwig's testimony that he assumed that the work was being performed because he received periodic requests for money from Miller, and Miller's occasional assurances that the work was being performed, is uncorroborated hearsay.

Section 19(1) of the *Labour Code* permits the admission of hearsay evidence:

> 19. (1) The board may receive and accept such evidence and information on oath, affidavit or otherwise as in its discretion it considers proper, whether or not the evidence is admissible in a court of law.

However, s. 19 cannot be considered in isolation. Section 21 of the Code requires the Board to give the parties a full opportunity to present their respective cases. In our view, the two sections must be considered together. The result of such an approach requires that the Board not make findings of fact based upon heresay evidence alone. The rational for this lies in the rules of natural justice and the need for fairness. Without direct evidence on a point, opposing parties have no opportunity to cross-examine as to the truth of the evidence. Thus, in this case the union is unable to cross-examine to determine if any work was done and, if so, what the nature of that

work was. These were two of the key issues in dispute and were matters which were not within the power of the union to refute by direct evidence.

We are supported in this conclusion by a recent judgment in the Ontario High Court. In *Re Girvin and Consumers' Gas Co.* (1974), 40 D.L.R. (3rd) 509, the Ontario High Court, Divisional Court considered s. 37(7)(c) of the Ontario *Labour Relations Act*, R.S.O. 1970, chapter 232 which permits an arbitrator to:

> accept such oral or written evidence as the arbitrator or arbitration board, as the case may be, in its discretion considers proper whether admissible in a court of law or not.

The judgment of the Court in that case was delivered by Holland J., who stated [at 512]:

> This subsection was considered by the Court of Appeal for Ontario in *R. v. Barber et al., Ex p. Warehousemen & Miscellaneous Drivers' Union Local 419*, [1968] 2 O.R. 245, 68 D.L.R. (2d) 682. Mr. Justice Jessup, for the Court, at p. 252 O.R., p. 689 D.L.R., after quoting the subsection above referred to, said:
>
> > "By that clause the Legislature recognized that arbitrations will frequently be presented before arbitration boards by lay persons. Accordingly, it relaxed the strict rules as to the admissibility of evidence and in particular allowed hearsay evidence to be adduced without objection. However, that provision does not relieve a board from acting only on evidence having cogency in law."

His Lordship went on to discuss the use of hearsay evidence [at 512]:

> It is to be observed that the board in this case made a finding of fact excluding, in effect, the evidence of the grievor and relied exclusively on hearsay evidence, some of which evidence was in conflict. Such evidence may well be admissible by reason of the subsection of the *Labour Relations Act* above referred to, but it must be borne in mind that the employer acted properly in the discharge of the employee and in order to satisfy that burden in this case the employer, in effect, relied exclusively on hearsay evidence. Even though that evidence may well have been admissible we are all of the view that the employee did not receive a fair hearing in the circumstances. His counsel had no real opportunity to cross-examine on the evidence that was presented.

In *Board of School Trustees of School District No. 68 (Nanaimo) v. CUPE, Local 606*, BCLRB No. 68/76, the Board considered an arbitrator's use of hearsay evidence, remarking [at 10-11]:

> Because strict adherence to the hearsay rule militates against the informal and expedited nature of arbitration hearings, arbitration boards have traditionally attempted to reconcile the competing inter-

ests by permitting hearsay evidence to be adduced but developing two restrictive rules on its use. Those rules can be stated as follows:

(a) Uncorroborated hearsay evidence should not be preferred to direct sworn testimony.

(b) Hearsay evidence alone should not be admitted to establish a crucial and central question.

. . .

These restrictive rules on the use of hearsay need not signal a more formal, legal character to arbitration board proceedings. Arbitration boards may properly and sensibly admit hearsay evidence to establish many of the facts necessary to a determination of the issue. However, an arbitration board cannot accept hearsay evidence over sworn direct testimony unless it has been corroborated by other evidence. *As well, when an arbitration board allows hearsay evidence on a crucial issue, that evidence should be given no weight unless it is corroborated by other direct sworn testimony . . .*

Emphasis added

Consequently in failing to present cogent evidence regarding what work was performed by these individuals, the employer has failed to discharge the onus resting upon it in this application.

There is an additional reason why this application must be dismissed. There were at least two available witnesses who are knowledgeable about what work was being performed at the ranch: Hans Hartwig, the principal's father, and Kelly Bennett. Although neither of these individuals were called to testify, no explanation was given for their absence. In our view, an adverse inference must be drawn from the employer's failure to call these individuals. The basis for this is stated as follows in *Wigmore on Evidence* (Third Edition) [at 162]:

> . . . The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavourable to the party . . .

This principle is the natural consequence of the so-called "best evidence rule" which originally required the best available evidence to the *exclusion* of so-called "substitutional evidence". As observed in *Cross On Evidence* (Third Edition) [at 12]:

> . . . It is said that the rule is merely a council of prudence for the absence of best evidence may always be the subject of adverse comments by the Judge.

We infer from the failure to call these two available witnesses

that their testimony, if called, would have revealed that either no work was being performed on this ranch or, at the very least, no work which was within the Ironworkers traditional jurisdiction was performed.

This decision should not be viewed as a stricter approach to the presentation of evidence before the Board. The provisions of s. 19 of the Code will continue to give the Board considerable flexibility in the evidence that it accepts in an effort to expedite procedures and make hearings less formal. However, the admission of such evidence cannot be allowed at the price of denying the opposite party a full opportunity to defend its position. Here the facts with regard to what work, if any, was being performed by the three employees was solely within the knowledge of the employer. Witnesses who could have testified to this were available. They were not called. The union was not in a position to call evidence or refute the indirect evidence given by Gerald Hartwig. Nor was it given the opportunity, due to the nature of the evidence called by the employer, to cross-examine as to what work was done on the ranch at the relevant times.

For these reasons, this application is dismissed.

District of Sparwood
and
Canadian Union of Public Employees, Local 2698

Labour Relations Board of British Columbia, July 20, 1984.
Shona A. Moore, Vice-Chairman, No. 282/84.
J.A. Moore and Herbert L. Fritz, Members.

Declaration — Picketing — Board declining to make declaration in advance of picketing.

Picketing — Where permitted — Meaning of site or place where member of trade union is lawfully on strike.

Practice and procedure — Evidence — Recourse to legislative debates not helpful as primary guide for interpreting statutes.

This was an application by the employer seeking relief from certain picketing during the course of a lawful strike. At the time of the commencement of the strike, the employer was engaged in a number of road improvement projects which it had contracted to independent contracting firms. None of the work performed by the independent contracting firms was work which had ever been performed by members of the bargaining unit. The location of these job sites were public roads and sidewalks in the district. The union