

Case Name:
Vancouver Island University (Re)

**Vancouver Island University (the "Employer" or the
"University"), and
Vancouver Island University Faculty Association (the
"Association")**

[2011] B.C.L.R.B.D. No. 72

194 C.L.R.B.R. (2d) 130

BCLRB No. B72/2011

Case No.: 61871

British Columbia Labour Relations Board

Panel: Bruce R. Wilkins, Vice-Chair

Heard: March 28-29, 2011.

Decision: May 4, 2011.

(42 paras.)

Appearances:

Paul Fairweather and Magdalena A. Wojda, for the Employer.

G. James Baugh, for the Association.

DECISION OF THE BOARD

1 NATURE OF THE APPLICATION

1 The Employer applies under Part 5 of the *Labour Relations Code* (the "Code") seeking relief from picketing activities at or near buildings 105, 110, 115, 130, 150, 155, 164, 165, 178, 185 and 205 (the "Buildings") at the Nanaimo campus (the "Campus") of the University.

1 BACKGROUND FACTS

2 The Association went on strike on March 10, 2011. It picketed the perimeter roads of the Campus, at the entrances to the Campus on Fifth Street, Wakesiah Avenue and Fourth Street, with the exception of entrance 5F.

3 Generally speaking, the Association's members teach academic courses which are predominantly, but not exclusively, taught in the northern part of the Campus. Vocational courses are held predominantly, but not exclusively, in the southern part of the Campus. The vocational courses are taught by B.C. Government and Service Employees' Union ("BCGEU") members, who have refused to cross the picket line pursuant to a provision in their collective agreement. A road across the Campus which begins at entrance 4C off of Fourth Street constitutes a rough dividing line between the vocational part of the Campus to the south and the academic portion of the Campus to the north. Several of the Buildings exist north of this road, however, including buildings 185 and 205. The Employer concedes Association members work in building 100, which is at the southern extreme of the Campus, and have a right to picket there.

4 Among the Association's members are 12 technical support staff, including two audio visual technicians, six desktop technicians and four network support technicians (the "Technicians"). There is no dispute the Technicians attend upon the Buildings to service and repair audio visual equipment, computers, printers and computer networks. The one exception is building 105 which is equipment storage. The Technicians respond to ticket requests which are requests for services in buildings on the Campus, including in the Buildings. They may also perform follow-up of ticket requests already completed to ensure problems have been solved. They may also receive requests for service on a spontaneous basis when they are spotted and recognized as Technicians in the course of their duties. The Technicians also perform scheduled maintenance of equipment over and above ticket requests.

5 Exhibit 2 in the proceedings is a list of ticket requests for the Buildings in the Employer's applications between May 1, 2010 and March 28, 2011. Exhibit 2 demonstrated the Technicians visited building 110 nine times; building 115 four times; building 130 nine times; building 150 thirteen times; building 155 two times; building 164 fourteen times; building 165 three times; building 178 three times; building 185 seven times; and building 205 fifty-five times. Total visits from ticket requests in the Buildings during the period identified was 119.

6 Paul Webb, one of the Technicians, gave testimony at the hearing. His testimony established he is responsible for all printers on Campus, and is responsible for providing backup for another Technician. He provides assistance with anything to do with personal computers and audio visual equipment when audio visual technicians are unavailable.

7 In the course of their work the Technicians maintain the e-mail system and other networks, data file shares, backup of information, some telephone systems, data switches, core routers and fibre optic systems. They repair and maintain audio visual equipment, desktop computers and printers.

8 Only a small number of staff on Campus are not connected to the University's network of computers. Every instructor, whether a member of the Association or BCGEU, has access to a computer and to one of over 200 printers on Campus.

9 Eric Smiley, an instructor in the Green Building Program testified it is essential for him to have a functioning computer in order to do his job because course materials are on-line, students submit digital documents, and projects are graded and returned digitally. He also conducts "webinars" by way of his computer. Smiley also uses a digital content management system for course materials. He said it is very important to have access to available networks because most teaching materials are available through them. Smiley testified in cross-examination that if the computers and networks were taken away from him, he could teach courses using paper.

10 The University's Registrar Fred Jacklin testified and described the University's computer system and networks as "vital" and "critical" to the Registry's functioning. He said as long as the computer systems were functioning, the vast majority of the Registry's tasks could be performed

11 Manager Ed Poli testified the gallery on campus (the "Campus Gallery") is a satellite location of the Nanaimo Art Gallery (the "Gallery"). The Campus Gallery has been closed down due to the strike, and is behind picket lines. The Campus Gallery has a part time curator who is a member of the Association. Association members also bring their classes into the Campus Gallery for instructional purposes. The Campus Gallery gets 6,000 visits a year; the Gallery gets 12,000 visits a year. There is a significant student and faculty presence in the ordinary state of affairs. During summer months, the Campus Gallery experiences a decline in attendance.

12 Gail Haug is a supervisor of the Malaspina Child Care Centre (the "Day Care"), which is behind picket lines at entrance 5D off of Fifth Street. The Day Care continues to operate but the numbers of children who are attending are down. The Day Care is open for use by students, faculty, and the Nanaimo community, and is continuing to function during the strike. There are 44 children who attend the Day Care, some full time and some part time. Since the strike the attendance has dropped to the point where some days there have been as low a nine children and some days 24, with an average of 20. The picketers are letting the Day Care users through the picket line, though some picketers will make people wait for a while by walking in front of cars before they are let in. Haug knows of five children whose parents refused to cross the picket line, two of whom she spoke with directly.

13 The Association has issued picket passes to employees in the Student Union Building so it can continue to operate. The Student Union Building is run by a separate employer than the University.

14 The evidence demonstrated, through the testimony of Smiley and documents entered as exhibits, the Association's members involved in instruction also have a presence in some of the Buildings, either through having offices such as Faculty Members Richard Aisaican and Suki Dhillon in building 205, or through teaching courses in some of the Buildings, including buildings 150, 155, and 185. For example, Smiley taught part

of a course in the Green Building Program in building 115.

1 ARGUMENT

2 The Employer

15 The Employer says the entire site of the Campus is not a primary site of picketing, and the Association's members teach primarily in the northern part of the Campus. Simply because the Employer occupies space at any particular location does not give the Association the right to picket there.

16 The Employer argues a reconsideration panel of the Board has suggested perimeter picketing of a university campus is an incorrect approach under the Code: *University of British Columbia*, BCLRB No. B328/2004 (Leave for Reconsideration of [2003] B.C.L.R.B.D. No. 409, BCLRB No. B409/2003), 109 C.L.R.B.R. (2d) 67 ("*UBC*"). While the Campus is much smaller than the UBC campus, it is qualitatively the same in that the public ordinarily has access to the Campus, and utilizes the Campus for a number of services including automotive shop, hairdressers, public lectures, a bakery, the Day Care, the Campus Gallery, coffee shop, Subway restaurant and others. The Employer relies on the following passage from *UBC*:

Under Sections 2(f) and (g) of the Code, the Board has a duty to minimize the effect of a labour dispute on third parties and ensure that the public interest is protected during the labour dispute. The issue(s) before us in the present matter will likely arise again between the parties if there are further labour disputes between them and picketing.

In future labour disputes, the unique nature of the Employer must be recognized. The Employer's property includes a large campus, with all of its functions and amenities, and a large community of residents. These are obviously locations and services to which the public by and large has access and uses extensively. This nature of the Employer and that public access are critical factors in determining the Unions' lawful picketing rights.

The Employer sought to restrict picketing to the campus perimeter, as opposed to the various locations on campus where Union members worked. If granted, such an order would have had a significant impact on the public.

We are not pre-judging the matter. However, under the provisions in Part 5 of the Code and the duties in Section 2 of the Code, future determinations regarding picketing locations in labour disputes between these parties must include consideration of where the employees actually work, the public nature of the Employer, and the need for public access to the campus, including its residences and

amenities. What will be needed are practical determinations in relation to these matters and the picketing rights in the Code. The parties will need to address these matters. (paras. 13-16)

17 The Employer says in order for there to be lawful picketing, there must be a reasonably current presence. The right to picket at a location does not arise unless the union members' presence at that site is more than fleeting and fortuitous: *The Board of School Trustees of School District No. 47 (Powell River)*, [1994] B.C.L.R.B.D. No. 48, BCLRB No. B49/94 (Reconsideration of [1993] B.C.L.R.B.D. No. 127, BCLRB No. B105/93).

18 The Employer says the work done by the Technicians in the Buildings is not an integral and substantial part of the Employer's operation. The Employer argues, in determining what "integral and substantial" means, the nature of the Employer's operation must be taken into account. It says the University does not exist to provide technical support, but to teach its students and make sure they are educated by any means available. The Employer points to Smiley's testimony, that if the computers were taken away from him he could teach courses using paper. The Employer says when the computers and other technology are up and running they are just another tool in the delivering of services to students. The Employer says the occasional visit to the Buildings by the Technicians to repair tools that are not working cannot be seen as integral and substantial to the Employer's operation. The Employer further argues the evidence of the Association's instructing members in the Buildings is fleeting and fortuitous. The Employer submits the Technicians generally speaking are not in the Buildings and their presence in the Buildings-sometimes less than once a month-is sporadic and rare. The Employer does not take issue with the fact the work is under its control and direction.

19 The Employer argues in the alternative, if the Board finds the work of the Technicians to be an integral and substantial part of the Employer's operation, that exceptional circumstances warrant the Board's intervention to limit picketing under Section 65(6) of the Code. The Employer argues I should use my discretion under Section 65(6) of the Code to prohibit picketing at entrance 5D to allow access to the Day Care and the Campus Gallery, and at entrance 5B to allow access to adult special education in building 205.

20 The Employer says it is not trying to prevent the Association from picketing its worksite in the upper part of the Campus or at certain entrances on the perimeter of the Campus. It says the Campus is a site which can be parsed out from the vocational part of the Campus so that BCGEU members can do their work. The Employer says the picketing at entrances 4A, 4B, 4C, 4D, 5A, 5B, 5D, W1 and W2, should not be permitted under the Code. It says it does not take issue with the picketing at entrances 4E, 4H, 5C, 5E and 5G.

21 The Employer argues its position is consistent with Sections 2(e), (f) and (g) of the Code which state the following:

2 The board and other persons who exercise powers and perform duties under this Code must exercise the powers and perform the duties in a

manner that

- 1 promotes conditions favourable to the orderly, constructive and expeditious settlement of disputes,
- 2 minimizes the effects of labour disputes on persons who are not involved in those disputes,
- 3 ensures that the public interest is protected during labour disputes.

1 The Association

22 The Association says the only building in the Employer's application the Technicians do not visit is 105, where no instruction takes place at all. With this one exception, all of the Buildings are within the Technicians' service area. The evidence in the form of directories and class timetables proved Association instructors also have a presence and teach in the Buildings. The Association says the Buildings are not physically separated or isolated from buildings in which teaching members of the Association work; the lower part of the Campus is not a satellite site of the Employer. The Association says the evidence demonstrated its members work on a physically and functionally integrated site, and consequently, the Campus cannot be divided into north and south for picketing purposes.

23 The Association says the Technicians service all of the Buildings where only BCGEU members teach, and in several of the Buildings where both Association members and BCGEU members teach. It says the Campus is a single enterprise with overlapping duties, where courses are taught by both BCGEU and Association members who use the same infrastructure in the form of classrooms and computer technology.

24 The Association says the Board should take an approach based on reality and interpret the Code according to real world concerns. The Employer's suggestion that the University's teaching could be done without computer technology ignores the evidence that universities and their instructors today rely extensively on computer technology and rely on the Technicians to keep technologies running. The Association argues the Employer's own witnesses testified to the importance of the computer networks, and that a functioning network is a vital part of the University's operations. The Association says the evidence demonstrated the University's task of instructing its students requires computers and a functioning network which is used by administration, teaching faculty and students. It says the University is a 21st Century operation in which computer technology and networks are a substantial and integral part of the Employer's operation.

25 The Association says the Board ought to look at the service the Technicians are providing to the University as a whole rather than just focussing on the number of visits to each building. The Association says the evidence proves the service of the Technicians is integral and substantial to the operation of the modern university and to the University in particular. The University employs 12 Technicians to keep computer networks and e-mail working and to ensure computer access to the network is also working. The Association says the Technicians are not casuals, but have a permanent presence on the Campus, and respond to requests for service according to a system which is in place. The Association says the evidence proves its faculty also have a presence in many of the

Buildings.

26 The Association says the suggested approach by the Employer is incorrect. The Board should look at whether the work performed by the Union's members in the Buildings is integral and substantial to the Employer's operation, not the number of times they visit the site in question. It says the latter approach was rejected in *Coca-Cola Bottling Ltd.*, [2001] B.C.L.R.B.D. No. 285, BCLRB No. B285/2001 (Leave for Reconsideration of [1999] B.C.L.R.B.D. No. 210, BCLRB No. B210/1999) ("*Coca-Cola*").

27 The Association says it is entitled to picket the entire Campus because it is the workplace of the Association's members. The evidence was the Technicians service the entire Campus.

28 The Association argues there are no applications for third party relief from the picketing and neither the Gallery nor the Day Care has asked the Board to take the pickets down. The Board should not do so on its own motion in the absence of an application by the parties themselves. The Association says it has given picket passes to the Student Union employees for the Student Union Building which is owned and operated by a different employer and is not a part of the Employer's operation.

29 The Association says the *UBC* reconsideration panel had very different facts before it and that the *UBC* campus and the Campus are very different. In the *UBC* case, some of the services and amenities on the *UBC* campus considered were private residences, an RCMP station, a fire department, a public hospital, hotel accommodation, and numerous third party employers. The Association says the Campus does not have nearly as many such amenities and services, and is different in nature.

1 ANALYSIS AND DECISION

30 The issue before me is whether the picketing undertaken by the Association is lawful under the Code. The Employer says the work performed by the Association's members in the Buildings is not an integral or substantial part of its operations. Consequently it asks the Board to declare the Association's picketing around the perimeter entrances to the southern part of the Campus illegal under the Code.

31 Section 65(3) of the Code says the following:

A trade union, a member or members of which are lawfully on strike or locked out, or a person authorized by the trade union, may picket at or near a site or place where a member of the trade union performs work under the control or direction of the employer if the work is an integral and substantial part of the employer's operation and the site or place is a site or place of the lawful strike or lockout.

32 The four factors which must be present to justify picketing under Section 65(3) of the Code were explained by the Industrial Relations Council in *Lafarge Canada Inc., Western Region*, IRC No. C156/88 at page 8:

Under Section 85(3), a member of a trade union may picket a location providing that four criteria have been satisfied: first, the member performs work at the location; second, the work is under the control and direction of the employer; third, the work is an integral and substantial part of the employer's operation; and fourth, the site or place is a site or place of a lawful strike or lockout. ...

33 The evidence demonstrated the members of the Association work at the Buildings. There is no dispute the work is under the control or direction of the Employer. Exhibit 2 illustrates that, but for the strike, the Association's members, and in particular, the Technicians, would be working in the Buildings, so the fourth factor of Section 65(3) has been met.

34 The parties dispute whether the work performed by the Technicians and instructing members of the Association in the Buildings is an integral and substantial part of the Employer's operation.

35 In *Coca-Cola* a reconsideration panel of the Board examined the meaning of "integral and substantial part of the employer's operation" as follows:

The first interpretive issue we must decide is from which perspective should the assessment of the integral and substantial nature of the work be done? Should the Board look only at the work at the location where picketing is taking place (an approach seemingly adopted by the original panel)? Or, should the Board look more broadly at the significance of that work to the employer's undertaking as a whole (an approach advocated by the Union-side parties)?

To answer that issue, we look to the history of the "integral and substantial" test with its origins in *Slade & Stewart No. 1*, [1984] B.C.L.R.B.D. No. 318. In the following passage, the reconsideration panel in *Slade & Stewart No. 1* rejected an argument that there must be a significant or substantial amount of work performed at a location in order for it to be a "site or place":

Having regard to the words used in Section 85(3) and (4) of the Labour Code, considered in the context of the statute as a whole, we can see no basis for requiring that a significant or substantial amount of work must be performed *at a location* in order for it to be found to a "site or place where a member of the trade union is locked out or lawfully on strike". (at p. 11 - emphasis added)

After *Slade & Stewart No. 1* was decided, the Legislature responded by seemingly adopting part of the test advocated by the original panel in *Slade & Stewart No. 1*, but rejected by the reconsideration panel. The

Legislature imported the substantial and integral elements into the provision. However, rather than making the assessment relative to a particular location, it expressly made it relative to the "employer's operation". To accept the interpretation advanced by the Employer-side parties that the focus should solely be on the work performed at the location would require us to read words into the phrase that are not there. It would require that the "work performed *at the location*" be integral and substantial. That outcome would not be faithful to the language of Section 65(3) which ties the integral and substantial requirement of the work to "the employer's operation". We prefer the alternative interpretation that fixes the assessment relative to the operations as a whole.

* * *

... The Council in *Lafarge* found that the focus of the third criterion is on the nature of the employer's operation and the significance of the work performed by members of the union to that operation (at p. 10). That analysis points to the need to identify at the outset the nature of the employer's operation. Once the type of business is defined, then the significance of the work performed by the employees to that operation can be assessed. However, the question is asked in relation to the context of the employer's operations, not in relation to the location of the individual customer. (paras. 39-41 and 45)

36 From the evidence before me, I conclude the University has technology in the form of computers, audio visual equipment, and computer networks to assist it to achieve its fundamental goal of instructing its students. The evidence demonstrated instructors rely on this technology to teach their courses by making materials digitally available. Students access course work and submit their work to their professors by way of the University's computer networks. I accept Smiley's testimony that the majority of his courses are digitally based and he and his students rely on such networks as e-mail to teach and learn in his courses.

37 While Smiley agreed under cross-examination that if computers were taken away he could teach his courses using paper, this is not the question before me. The question before me is whether the work the Technicians are required to do by the Employer is integral and substantial to the Employer's operation. In answering this question I accept the University Registrar's testimony that the University's computer system and networks are "vital" and "critical" in the Registry's functioning, and as long as the computer systems were functioning, the vast majority of the Registry's tasks could be performed. The Technicians are required by the Employer to keep the computers and computer networks the Registry and other University staff use running. In considering all of the evidence, it is clear to me the University relies heavily on functioning computers and computer networks among other technology. The University employs 12 Technicians on a full time basis who are responsible for servicing the Employer's technical needs in the Buildings, (with the exception of building 105, which is used for equipment storage) and

indeed for the whole Campus. Ticket requests alone accounted for 119 visits to the Buildings between May 1, 2010 and March 28, 2011. This evidence demonstrated the Technicians can be and are called upon at any time to visit the Buildings to provide assistance and service.

38 Following the approach in *Coca-Cola* above, I find the work performed by the Technicians in the Buildings to ensure that technology works and is accessible so that administration, instructors and students can use it, is integral and substantial to the University's operation. Having heard and considered the evidence and submissions of the parties, I have determined the four requirements for lawful picketing in Section 65(3) of the Code have been met with respect to the Buildings, and the orders sought by the Employer should be dismissed. Given my finding with respect to the Technicians, it is not necessary for me to rule with respect to the work instructing members of the Association perform in the Buildings.

39 With respect to the *UBC* case and the issue of perimeter picketing, there are differences between the amenities and services available on the UBC campus and the Campus in this case. While there are services the public has access to on the Campus, they are not of the same nature as a public hospital, police and fire departments or private residences which were present in the *UBC* case. The need for public access to the Campus is consequentially not as high as it was in the *UBC* case.

40 While the Employer relied on the *UBC* case to suggest perimeter picketing of a university where the public ordinarily has access may not be appropriate, the Employer's suggestion as to where the Association could picket legally included perimeter picketing. The Employer proposed a hybrid approach which would allow the picketing of some specific buildings, such as building 100 at the southern extreme of the Campus, prohibit perimeter picketing in the southern part of Campus, but allow perimeter picketing at certain entrances to the northern part of the Campus. This suggestion was premised on the notion, however, that the Association did not have a right to picket in the southern part of the Campus (with the exception of building 100). I have found they do have that right.

41 I decline to grant relief on my own motion under Section 65(6) with respect to the Campus Gallery, the Day Care, and adult special education classes. I note that no applications were received by the Board for third party relief. I do not find the circumstances compel me to use my discretion in such a manner to interfere with the picketing as it occurred.

1 CONCLUSION

42 The Employer's application is dismissed.

BRUCE R. WILKINS
VICE-CHAIR

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