Case Name:
Nanaimo Golf & Country Club (Re)

**Nanaimo Golf & Country Club (the "Employer"), and
Unite Here, Local 40 (the "Union")**

[2015] B.C.L.R.B.D. No. 245

270 C.L.R.B.R. (2d) 199

BCLRB No. B245/2015

Case No.: 68916

British Columbia Labour Relations Board

Panel: James Carwana, Vice-Chair

Heard: November 24, December 2 and 3, 2015.
Decision: December 21, 2015.

(43 paras.)

Appearances:

Israel Chafetz, Q.C., for the Employer.

G. James Baugh, for the Union.

DECISION OF THE BOARD

I. NATURE OF APPLICATION

1 This is an application (the "Application") by the Union pursuant to Sections 6(3)(e), 14 and 68 of the *Labour Relations Code* (the "Code"). There has been a lockout at the Employer's premises since April 24, 2015. The allegations in the Application relate to cleaning work which the Union says has been performed at the Employer's Clubhouse, during the lockout, contrary to an earlier settlement agreement between the parties and contrary to the Code.

2 After the filing of the Application, there were submissions by the parties regarding the allegations in the Application. Interlocutory proceedings were taken and there was disclosure of various items. In particular, the Employer produced various janitorial invoices for the time period at issue, and arrangements were made for the Union to obtain copies of video surveillance from cameras at the Employer's premises.

3 The hearing commenced in Vancouver on November 24, 2015. Openings were made by counsel for the parties and evidence was heard from one witness, Dave Mrus, who was called by the Union. Mrus is a janitor in the bargaining unit who has been on the Union's picket line at the Employer's premises.

4 The Union had served a summons on Tony Perez. The cleaning work at issue is contracted to Master Care Facility Services ("Master Care"), and Perez is the individual actually performing the work under an arrangement with Master Care. Perez did not attend on November 24, 2015, although an email from Perez in respect of the matter and his non-attendance was produced. Discussions were held regarding Perez during the day between me and counsel for the parties, as well as discussions between an officer of the Board, Mark Clark, and Perez, about obtaining Perez's testimony. In the end, it was agreed by the parties to adjourn the matter to December 2 and 3, 2015, with the resumption of the hearing to be held in Nanaimo, BC, and Perez would attend at that time.

5 On December 2, 2015, the hearing resumed in Nanaimo. Perez was present and called to give evidence by the Union. In connection with Perez's testimony, the Union sought to have him declared an adverse witness and subject to cross-examination. After hearing submissions from counsel for the parties, I ruled that Perez was an adverse witness and permitted cross-examination by the Union. Counsel for the Employer requested reasons for that determination be included in my decision, and they are set out later in the analysis and decision section below. In addition to Mrus and Perez, the Union called Shelly Ervin, the Secretary-Treasurer for the Union. The Employer called Ash Chadha, the General Manager of the Employer.

II. BACKGROUND

6 The Union's Application refers to previous proceedings between the parties. In particular, there is reference to an earlier complaint dated May 19, 2015. That complaint was made pursuant to Sections 6(3)(e), 14 and 68 of the Code and dealt with allegations Master Care was performing cleaning work as an impermissible replacement worker in April and May 2015. A settlement agreement dated June 4, 2015 (the "Settlement Agreement") relating to the complaint was entered into by the parties. The Settlement Agreement provides as follows:

SETTLEMENT AGREEMENT

> WHEREAS the Union has filed a Complaint dated May 19, 2015 pursuant to Sections 6(3)(e), 14 and 68 of the *Labour Relations Code* (the "Code");
>
> AND WHEREAS the parties have agreed to settle all matters relating to the Complaint.
>
> IT IS AGREED:

1. The Employer acknowledges the use of Master Care Facility Services ("Master Care") during the period from April 25, 2015 to May 22, 2015 for approximately 3-4 hours of cleaning work each day Monday to Friday in the Club House, and this was contrary to Section 6 and Section 68 of the Code.

2. The Employer agrees to the Board issuing a declaration to the effect set out in paragraph 1 above.

3. The Employer agrees that it will not use Master Care or another cleaning contractor Monday to Friday for cleaning work in the Club House.

4. The Employer says the Board has no jurisdiction to award damages in the circumstances of this case. However, as a gesture of goodwill the Employer will pay the Union the sum of $650 on a without prejudice and without precedent basis to be used in such a manner as the Union deems appropriate.

5. The Employer agrees that Master Care will not be permitted to work more hours on Saturday and Sunday than Master Care had worked prior to the lockout.

DATED this 4th day of June, 2015

"*ASH CHADHA*"

for the Employer

"*SHELLY ERVIN*"

for the Union

7 The Board subsequently issued a declaration as set out in paragraph 2 of the Settlement Agreement.

8 The Pro Shop at the Employer's premises is separate from the Clubhouse. Cleaning work in the Pro Shop is not work of the bargaining unit. Such cleaning work has been performed by a contractor both before the lockout and during the lockout. The right of the Employer to have a contractor perform cleaning work at the Pro Shop is not at issue and the Union's allegations of impermissible work relate to cleaning work in the Clubhouse.

9 At the hearing regarding the Application, there was a significant amount of evidence and argument about the extent to which cleaning work has been performed for the Employer since the date of the Settlement Agreement, and whether the Employer had violated the Settlement Agreement and the Code. In an effort to provide the parties with a relatively expeditious decision, I will not recite the evidence or arguments of the parties in detail but will refer to such matters to the extent I have found necessary in the determination of the issues before me.

III. POSITIONS OF THE PARTIES

10 In its Application, the Union alleges that, after signing the Settlement Agreement, the Employer has violated the Settlement Agreement and further breached the Code by "continuing to use Master Care to provide janitorial services at the clubhouse during the week". The Union says that the Employer has acknowledged this janitorial work was performed in the early hours of Monday, September 14, 2015, and says that such work was in violation of the Settlement Agreement and the Code.

11 The Union alleges that impermissible janitorial work has also taken place on other days. The Union relies on invoices which refer to extra work in June 2015 as showing there was work done after the June 4, 2015 Settlement Agreement, and argues I should not accept the Employer's evidence that such references to extra work were in error. In addition to not accepting such evidence from the Employer, the Union says inferences should be drawn from testimony which was not called at the hearing by the Employer regarding the invoices. Further, although the evidence did not indicate specific dates other than September 14, 2015 during which Perez was seen by bargaining unit members at the Employer's premises, there was evidence Perez had been there during the week on other occasions after the end of May 2015. The Union says inferences should be drawn that Perez was there cleaning the Clubhouse not the Pro Shop.

12 The Union seeks various remedies including: a declaration; a cease and desist order prohibiting the Employer from using Master Care or any other third party to perform janitorial work for the duration of the bargaining dispute; an award of damages; an order that a Labour Relations Officer conduct periodic inspections to ensure the Employer's compliance; and a make-whole order pursuant to Section 133 of the Code.

13 In its claim for damages, the Union relies on authorities including *Fletcher Challenge Canada Limited*, BCLRB No. B255/97, [1997] B.C.L.R.B.D. No. 255 ("*Fletcher Challenge*"); *Cove Tops Limited*, BCLRB No. B62/2011, 194 C.L.R.B.R. (2d) 242; *Southern Railway of British Columbia Limited*, BCLRB No. B39/2015, 258 C.L.R.B.R. (2d) 160; and *Southern Railway of British Columbia Limited*, BCLRB No. B109/2015, [2015] B.C.L.R.B.D. No. 243 (Leave for Reconsideration of BCLRB No. B39/2015 dismissed). The Union's claim for a make-whole order is based on its argument that the Employer "has converted what was an economic lock-out into an unfair labour practice lock-out by its continued use of replacement workers contrary to the Code and the June 4, 2015 Settlement Agreement". In this respect, the Union relies on various cases including *Fotomat Canada Limited*, [1981] 1 Can. L.R.B.R. 381 (OLRB) ("*Fotomat*") where the work stoppage was prolonged by the unfair labour practices committed by the employer.

14 The Employer says that what has occurred here is at most a "technical" breach of the Settlement Agreement. The hours worked in the early morning of Monday September 14, 2015 were from around 3:30 a.m. to around 6:25 a.m. Perez had not worked earlier on Sunday and the approximately 3 hours worked after midnight were the "Sunday" hours which the Employer was permitted to have the contractor work. In other words, Perez did not work more than the number of allowable hours during Sunday, September 13 and Monday, September 14, 2015. The Employer argues Chadha did not direct Perez to work on the Monday, the relationship with Perez is such that the Employer does not direct him when to work the permissible hours, and the Employer did not intend to breach the Settlement Agreement.

15 With respect to the Union's allegations about cleaning work on other days, the Employer says the evidence indicates that no other work was performed at the Clubhouse outside of the weekend after the Settlement Agreement. In terms of the invoices with the June 2015 description of extra work, the Employer says they are in error and have been corrected. The Employer argues that, in addition to the oral testimony of Perez and Chadha indicating that such work did not occur, the General Ledger documents and an analysis of the charges in the invoices connected to all the work done do not support the claim that such extra work was performed in June 2015.

16 In terms of remedy, the Employer argues that the only potential remedy to consider, regarding the "technical" nature of any breach which occurred here, is a declaration and nothing else. The evidence did not indicate the breach was continuing and no more hours than those permitted under the Settlement Agreement were in fact worked. There is no basis for awarding damages pursuant to *Fletcher Challenge*, and no proof that the work stoppage has been prolonged as a result of the breach here. With respect to the claim regarding the lockout being converted from an economic lockout to an unfair labour practice lockout, the Employer says that is not the case and further points to items which remain outstanding from bargaining.

V. ANALYSIS AND DECISION

17 The allegations here relate to breaches of the Settlement Agreement as well as breaches of the Code. In terms of the Code, the Board has explained that the test under Section 68 is "whether the work performed by replacement workers would have actually been performed by an employee in the unit but for the labour dispute": *Nanaimo Times Ltd.,* BCLRB No. B232/94, 23 C.L.R.B.R. (2d) 97 at p. 108.

18 In examining the issues involved with this case, I will deal with the following:

i) the events of the September 12-14, 2015 time period;

ii) the allegations of breaches during other time periods following the Settlement Agreement;

iii) the adverse witness finding in respect of Perez; and

iv) what, if any, remedy there ought to be in the circumstances.

i) THE EVENTS OF SEPTEMBER 12-14, 2015

19 It was usual for Perez to clean the Clubhouse early in the morning on Saturdays and Sundays, before other people arrived. I find that on Saturday, September 12, 2015, Perez cleaned the Clubhouse in the morning as was usual for him. On Saturday afternoon, Chadha called Perez. That Saturday was a slow day and the Sunday was going to be busy. Chadha asked Perez to come in later the next day instead of early on Sunday morning, and Perez agreed to do so.

20 On Sunday, September 13, 2015, there were three shotgun starts for golfers, with the first one at 7 a.m. In addition, there was a food and beverage event which took place in the Lower Lounge on Sunday afternoon, and a dinner event in the same room later that evening.

21 According to Perez, he arrived on Sunday sometime between 8 p.m. and 9 p.m. to clean. According to Chadha, it was approximately 9 p.m. When Perez arrived, the evening event was still going on in the Lower Lounge, which was one of the areas he was to clean. Chadha told Perez that the time was not right and Perez should come back later. Perez agreed to do so and left. Chadha did not stipulate a time for Perez to come back to clean.

22 I find what occurred here is that Chadha did not turn his mind to the Settlement Agreement. In his evidence, he said he had no expectations about when Perez would return. Chadha had been involved with a number of events that day and was busy with the event which was going on that evening when Perez arrived at approximately 9 p.m. I accept it was not Chadha's intention to violate the Settlement Agreement; rather, he failed to consider how Perez would get his work done on Sunday if he was to come back later.

23 Chadha had previously taken the step of requesting Perez not to come in as usual on Sunday morning, but to come in later. Having taken this step, it was Chadha's responsibility to ensure this did not result in Perez performing janitorial work outside of the Settlement Agreement. The fact the Employer has given Perez some flexibility in setting his work hours did not permit Perez to work contrary to the Settlement Agreement - and it was up to the Employer to make sure that didn't happen as a party to the Settlement Agreement. Chadha had signed the Settlement Agreement and ought to have turned his mind to it when Perez arrived at approximately 9 p.m. on Sunday and Chadha told him to come back later.

24 Perez returned at approximately 3:30 a.m. on Monday. Mrus gave evidence that when he arrived to picket at approximately 4 a.m. that morning, Perez's car was already there and parked in the parking lot closer to the Clubhouse. The surveillance photos indicate that Perez continued working at the Clubhouse until approximately 6:25 a.m. and left shortly thereafter.

25 I find Perez's work on Monday, September 14, 2015 was in breach of the Settlement Agreement. It was work during Monday to Friday cleaning the Clubhouse contrary to paragraph 3 of the Settlement Agreement. Such work was also contrary to Section 68 of the Code. Mrus testified that his normal work hours would begin at 4 a.m. on Mondays during that time of the year. The hours worked by Perez that Monday morning overlapped with the hours Mrus would have worked, and the type of janitorial work performed by Perez that morning was the same type of work Mrus would have performed. I find that but for the lockout Mrus would have been there at that time doing the work, not Perez. The work occurred through requests made by Chadha for Perez to work at a later time which ended up with Perez actually working Monday morning, instead of on Sunday, and Perez performing work which would have been performed by a bargaining unit member but for the lockout in violation of Section 68 as well as in violation of the Settlement Agreement.

ii) THE ALLEGATION THAT BREACHES OCCURRED ON OTHER DAYS FOLLOWING THE SETTLEMENT AGREEMENT

26 In examining this matter, I find that the only date on which a breach occurred following the Settlement Agreement was September 14, 2015. In my view, this is in accordance with the evidence and the preponderance of probabilities. I have come to this conclusion for a number of reasons.

27 First, the evidence demonstrated that this was the only occasion on which Chadha had asked Perez to change from his normal routine of cleaning on Sunday morning. I accept Chadha's evidence that there was no other occasion on which this occurred. It was out of the ordinary for Chadha

to ask Perez to change his hours and I find it is something Chadha would have remembered if it had occurred at another time as well.

28 Second, I accept Perez's testimony that this was the only occasion where he had performed his cleaning at the Clubhouse outside of his usual weekend hours after the date of the Settlement Agreement. He testified that he recalled this occasion because it was an extraordinary event and I find he would have recalled other such occasions had they occurred as well.

29 Third, Chadha and Perez were subjected to rigorous cross-examination by counsel for the Union. I found their evidence to be reliable and in accordance with the preponderance of probabilities as well as the bulk of the other evidence.

30 Fourth, I find the extraordinary nature of Perez's attendance on September 14, 2015 is supported by the evidence of Mrus. He testified that September 14, 2015 was the only occasion when Perez's vehicle was there before he arrived and it was parked closer to the Clubhouse than on the other weekday occasions. Mrus specifically remembered the September 14, 2015 date and having spoken to the Union about it, but did not remember any other specific days. In this respect, I find the morning of September 14, 2015 stood out for Mrus as well as Chadha and Perez in terms of being unusual.

31 Fifth, I find Perez's attendances on weekdays after the June 4, 2015 Settlement Agreement were for work in the Pro Shop. This is in accord with the evidence of Chadha and Perez. I find this is also consistent with evidence given by Mrus about observing Perez on such occasions. For example, Perez testified that he would park closer to the area where he was working to avoid carrying his equipment a longer distance, and Mrus gave evidence about seeing Perez on these occasions drive to the far end of the parking lot where the Pro Shop is located, park near the Pro Shop, exit his car, and walk towards the Pro Shop carrying a back-pack vacuum cleaner.

32 Sixth, I accept that the references to extra work in the invoices for May and June 2015 were in error as explained in the evidence. The extra work was in fact performed in April and May 2015 prior to the date of the Settlement Agreement. The evidence did not demonstrate two periods for which there was extra work and payment, which I find would have been the case if extra work had been performed during both the April/May time period (as indicated in the Settlement Agreement) and during the May/June period (as alleged by the Union based on the mistaken invoices). Further, if the invoices were correct about the attendances in June 2015, there would have been some 17 occasions from Monday to Friday in June 2015 where Perez would have attended for such work. I find Mrus would have seen and remembered Perez attending on such occasions, would have reported such attendances to the Union as he did with Perez's September 14, 2015 attendance, and the Union would have acted on the matter. None of this was, however, demonstrated in the evidence.

33 Seventh, the entries in the General Ledger support the findings above regarding the invoices. The entries are consistent with extra work having been performed during the April/May 2015 time frame prior to the Settlement Agreement and not on additional occasions afterwards.

34 For all the above reasons, I dismiss the Union's allegations that there was cleaning at the Clubhouse in breach of the Settlement Agreement and the Code, on days other than September 14, 2015, after the Settlement Agreement was entered into on June 4, 2015.

iii) THE ADVERSE WITNESS FINDING IN RESPECT OF PEREZ

35 As previously noted, during the course of the hearing I ruled that Perez was an adverse witness. In making this ruling I had regard for Rule 20 of the Labour Relations Board Rules (the "Rules") and found that Perez was adverse in interest to the Union as set out in Rule 20(2). In this respect, I determined that the previous Section 68 proceedings brought by the Union, which had resulted in the Settlement Agreement, had adversely affected the interest of Perez by reducing the number of hours he was working for the Employer. I further determined that Perez was adverse in interest with regard to the current Application since it had the potential of adversely affecting when he could perform his work and whether he would be permitted to continue to perform his work. In this connection, one of the remedies sought by the Union was to prohibit the Employer from using Perez for the duration of the work stoppage.

36 In all the circumstances I ruled Perez was an adverse witness and the Union would be permitted to cross-examine him.

iv) REMEDY

37 I begin with finding it appropriate to issue a declaration that the Employer violated the Settlement Agreement and Section 68 of the Code with respect to the work performed by Perez cleaning the Clubhouse on the morning of September 14, 2015.

38 In terms of other relief, I find that something more than a declaration is also required to ensure that such circumstances do not occur again. There had already been a declaration in June 2015 flowing from the Settlement Agreement in respect of similar cleaning work and this subsequent impermissible event nevertheless occurred. Having said that, the extent of the impermissible event here consisted of approximately 3 hours work performed early on a Monday morning rather than on the Sunday, and I have found the Employer did not intend to violate the Settlement Agreement. In the circumstances, I am confident such impermissible conduct will not happen again by issuing an appropriate cease and desist order. Thus, while I will permit the Employer to continue using the services of Master Care, I order the Employer to cease and desist using the services of Master Care or another cleaning contractor contrary to the terms of the Settlement Agreement or the Code.

39 Turning to the claim for damages, I find that the circumstances do not warrant an award of damages. Applying the principles from *Fletcher Challenge*, I find that the remedies awarded above are adequate and provide a practical avenue for effective and meaningful relief. I further find the approximately 3 hours of cleaning involved here, performed early Monday morning rather than on Sunday during this one occasion, did not have the effect of prolonging the dispute.

40 In the circumstances, I further deny the request for periodic inspections by a Labour Relations Officer. It follows from my finding that the other remedies provided are adequate, that I find such an additional remedy is unnecessary, and I am not prepared to exercise my discretion to make such an order. Further, I find neither the Employer nor Perez have taken steps to hide what is being done and the attendances of Perez continue to be subject to the observations of picketers such as Mrus and a degree of video surveillance.

41 With respect to the Union's claim that the Employer's breaches have turned this dispute into an unfair labour practice lockout rather than an economic lockout, I find that is not the case. I find the conduct here is not of the same sort or to the same effect as in the cases cited by the Union. In particular, I find the Employer's conduct has not prolonged the work stoppage as in *Fotomat.* I also find there are a number of items from bargaining, including wage increases, which remain out-

standing. In this respect, I note that certain outstanding items of disagreement between the parties have already been the subject of Board proceedings in *Nanaimo Golf and Country Club*, BCLRB No. B140/2015, [2015] B.C.L.R.B.D. No. 136 (Leave for Reconsideration Denied, BCLRB No. B165/2015, [2015] B.C.L.R.B.D. No. 161) where the Board found the Employer had not violated the Code in bargaining.

V. CONCLUSION

42 For the reasons given, I find the Employer violated the Settlement Agreement and the Code when Perez performed cleaning work in the Clubhouse from approximately 3:30 a.m. to approximately 6:25 a.m. on Monday, September 14, 2015. I dismiss the allegations made by the Union that there were other occasions where breaches occurred after the Settlement Agreement was entered into on June 4, 2015.

43 In terms of remedy, I declare that the Employer violated the Settlement Agreement and the Code with respect to the work performed by Perez cleaning the Clubhouse on the morning of September 14, 2015. While I will permit the Employer to continue using the services of Master Care, I order the Employer to cease and desist using the services of Master Care or another cleaning contractor contrary to the terms of the Settlement Agreement or the Code. I further find such remedies are adequate and provide a practical avenue for effective and meaningful relief.

LABOUR RELATIONS BOARD

JAMES CARWANA
VICE-CHAIR