Multiple Fax Transmittal

Date: NOV 2, 2012

Time: 11:15 AM

Pages: 10
(including this one)

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Ken Saunders, Vice-Chair and Registrar

LABOUR RELATIONS BOARD
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RE: Certain Employees -and- Rhodes Enterprises Ltd. (now known as Clifton Enterprises doing business as Inn of the West) -and- UNITE HERE, Local 40
(Section 142 (Partial Decertification) - Case No. 64492/12T)

To:. Clifton Enterprises doing business as Inn of the West Fax No: (250) 638-8999
Attention: Amin Sunderji / Karim Basaria

To: Roper Greyell LLP Fax No: (604) 806-0933
Attention: Drew Demerse

To:. UNITE HERE, Local 40 Fax No: (604) 291-2676
Attention: Margaret Prieston

To: McGrady & Company Fax No: (604) 734-7009
Attention: Sonya Sabet-Rasekh

To:. Akma Holdings (Best Western Terrace Inn) Fax No: (250) 635-0092
Attention: Manager

To: North Star Inn Ltd. Fax No: (250) 632-5118
Attention: Manager

To: Kitimat Hotel Via Mail (no fax)
Attention: Manager

To: Rep of Certain Employees VIA COURIER
To: Employment Standards Branch, Terrace VIA DIRECT DIAL FAX
Attention: John Dafoe, IRO

REMARKS:

BOARD DECISION BCLRB No. B238/2012 ATTACHED

****NOTE: FACSIMILE OPERATOR, PLEASE CONTACT THE ABOVE INTENDED RECEIVER AS SOON AS POSSIBLE. THANK-YOU.**

BRITISH COLUMBIA

LABOUR RELATIONS BOARD

"VIA FAX & MAIL" November 2, 2012

To Interested Parties
Dear Sirs/Mesdames:

Re: Certain Employees -and- Rhodes Enterprises Ltd. (now known as Clifton Enterprises doing business as Inn of the West) -and- UNITE HERE, Local 40 (Section 142 (Partial Decertification) - Case No. 64492/12T)

Enclosed is a copy of the Board's decision (BCLRB No. B238/2012) rendered in connection with the above-noted matter.

For your information, Section 141 of the *Labour Relations Code* allows you to apply to the Board for leave to apply for reconsideration of this decision. Should you decide to apply for leave, then such application must be made within 15 calendar days and in accordance with the *Brinco Coal Mining Corporation* decision, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), (1994), 20 CLRBR (2d) 44, 93 CLLC ¶16,043. The key elements of the *Brinco* decision are summarized in the Board's Information Bulletin No. 21 on reconsideration, which is enclosed along with copies of Labour Relations Board Rules 2(2), 2(3) and 29 for the assistance of unrepresented parties.

When an application for leave is made within the 15 calendar day time limit, the applicant must deliver to the Registrar and all interested parties copies of the entire application. Requests for an extension of time, usually up to a maximum of three working days, may be granted orally by the Registrar if requested before the expiration of the 15 calendar day time limit. If granted, the applicant must confirm this extension in writing to the Board, with a copy to the respondents.

If an extension of more than three days is required, the applicant must first seek agreement from all interested parties and then request that extension in writing to the Registrar, confirming the consent of the parties, before the expiration of the 15 calendar day time limit. Again, all parties must be copied. If any of the respondents does not agree to the extension requested, a written application to the Board before the expiration of the 15 calendar day time limit is required, with a copy to all parties. If you require further information on Board procedures, please call the Board's Information Officer.

Please note that an application for leave for reconsideration shall be subject to a fee of $200.00. Payment may be made by a credit card, cheque, debit card or by charging the amount to a pre-approved account.

Yours truly,

LABOUR RELATIONS BOARD

Jayne Ottens, Senior Executive Assistant to
Ken Saunders, Vice-Chair and Registrar

.../2

Interested Parties:

Clifton Enterprises doing business as Inn of the West
4620 Lakelse Avenue
Terrace BC V8G 1R1
ATTENTION: Manager

Roper Greyell LLP
800 Park Place - 666 Burrard Street
Vancouver BC V6C 3P3
ATTENTION: Drew Demerse (Counsel for Inn of the West)

Akma Holdings Inc. (Best Western Terrace Inn)
4551 Greig Street
Terrace BC V8G 1M7

North Star Inn Ltd.
650 Kuldo Avenue
Kitimat BC V8C 1V9

415749 B.C. Ltd. (Kitimat Hotel)
142 - 1020 Mainland Street
Vancouver BC V6B 2T4

UNITE HERE, Local 40
100 - 4853 Hastings Street
Burnaby BC V5C 2L1
ATTENTION: Margaret Prieston

McGrady & Company
PO Box 12101
1105 - 808 Nelson Street
Vancouver BC V6Z 2H2
ATTENTION: Sonya Sabet-Rasekh (Counsel for the Union)

* A Representative of Certain Employees
(enclosures attached for applicant only)

cc: Ministry of Jobs, Tourism and Skills Training and Labour
108 - 3220 Eby Street
Terrace BC
V8G 5K8
ATTENTION: John Dafoe, IRO

* In accordance with Board policy, name and address of the Representative of Certain Employees has been deleted on copies sent to the other parties.

BCLRB No. B238/2012

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CERTAIN EMPLOYEES OF RHODES ENTERPRISES LTD.
(now known as CLIFTON ENTERPRISES INC.) (dba INN OF THE WEST)

("Certain Employees")

-and-

RHODES ENTERPRISES LTD. (now known as CLIFTON ENTERPRISES INC. ("INN OF THE WEST");
AKMA HOLDINGS INC. (BEST WESTERN TERRACE INN);
415749 B.C. LTD. (KITIMAT HOTEL); and
NORTH STAR INN LTD.

(together, the "Employer")

-and-

UNITE HERE, LOCAL 40

(the "Union")

PANEL:	Ken Saunders, Vice-Chair and Registrar
APPEARANCES:	Drew Demerse, for Inn of the West Sonya Sabet-Rasekh, for the Union
CASE NO.:	64492
DATE OF DECISION:	November 2, 2012

DECISION OF THE BOARD

I. INTRODUCTION

1 Certain Employees apply under Section 142 of the *Labour Relations Code* (the "Code") to delete from the existing bargaining unit a group described as "employees at the Inn of the West". This type of application is known as a partial decertification.

2 The Board's policy concerning partial decertification is set out in *Certain Employees of White Spot Limited*, BCLRB No. B16/2001 (Leave for Reconsideration of BCLRB No. B440/99), 65 C.L.R.B.R. (2d) 161 *("White Spot")*. First, the Board must be satisfied that a rational line can be drawn around the group leaving the bargaining unit and that the group remaining in the bargaining unit is appropriate for collective bargaining. Once that threshold is met, the Board weighs the wishes of employees seeking the variance against the impact of granting the application, both on employees remaining in the unit and on the collective bargaining relationship as a whole. Additional factors include the timing and context of the application, along with whether it would be a practical impossibility to decertify the entire unit.

3 The Union opposes the application on a number of grounds. I find the application can be decided on the basis of the Union's objection to the timing of the application.

4 I further conclude the issue of timing can be decided on the basis of the parties' submissions and without an oral hearing. To the extent the parties dispute certain facts, I find the disputed facts are either not material to my decision or, where they are material, I have assumed the Inn of the West's factual assertions to be true, as indicated below.

5 I have referred to the parties' positions in the following analysis and decision. Certain Employees did not file a submission in response to the Union's objections.

II. ANALYSIS AND DECISION

6 In *White Spot* the Board explained that its discretion to grant partial decertification involves balancing considerations favouring collective bargaining and industrial stability, against the value of giving effect to employee wishes:

> The Board has struggled in the past, and likely will continue to struggle, with the question of when partial decertification should be permitted. As indicated above, the Board must strike a balance between collective bargaining and industrial stability considerations and "employee wishes". In our view, neither of these values can prevail absolutely over the other. The *Westar* decision attempted to balance these two values by stating that employee wishes, while a factor to be considered in applications for partial decertification, would not be determinative. We agree with this statement of principle. However, as already discussed, we find that the *Westar*

> test does not strike a balance in practice. Partial decertification has been virtually eliminated under *Westar*, so that the value of employee wishes as against collective bargaining stability receives little if any weight. (para. 88)

7 The Board also held that an application meeting threshold requirements may not be processed when its timing interferes with a union's ability to discharge its collective bargaining obligations: *White Spot*, para. 108. In short, the instability associated with potential partial decertification applications may outweigh employee wishes for a time, particularly during the sensitive period a union and employer are in the midst of bargaining. In *White Spot*, the Board accepted that the potential for partial decertification has an inherently destabilizing effect on a union's ability to bargain:

> In our view, partial decertification should not become a routine solution to difficulties and dissension within a bargaining unit. *We accept the point made by the union-side parties that the potential threat of partial decertification has an intrinsically destabilizing effect on bargaining unit cohesiveness, and therefore on a union's ability to bargain collectively on behalf of that unit with the employer. The more remote the possibility of partial decertification, the less destabilizing the effect. A union that does not have to concern itself seriously about losing part of the bargaining unit is less likely to flinch from making the difficult choices among conflicting employee interests often required in collective bargaining. Conversely, the more readily available the option of partial decertification becomes, the greater the destabilizing effect on both the bargaining unit's relationship with the union and the balance of power between the union and the employer.* (para. 83, emphasis added)

8 In *7-Eleven Canada, Inc.* BCLRB No. B354/2002 (Leave for Reconsideration of BCLRB No. B130/2002) *("7-Eleven")* the Board held that the policy rationale for considering timing is engaged from the outset of the bargaining process:

> The fact that an application is made at the outset of the collective bargaining process engages the same policy concerns about industrial instability *as there is an immediate effect on the positions the union takes or the demands it advances at the bargaining table.* Collective bargaining has been recognized as a pressure point where it is time for majority interests to be of paramount importance. Refusing an application when collective bargaining is underway allows the parties to focus on negotiations rather than diverting attention away from bargaining by the union being forced to defend against rearguard actions. (para. 38, emphasis added)

9 In *7-Eleven* the Board also held that the giving of the notice to bargain is "...the appropriate point to draw a "bright line" for purposes of applying the policy on the timeliness of partial decertification applications": para. 55. The Board summarized the approach in *7-Eleven* in *Certain Employees of C. & O. Holdings (Ol'Keg Neighbourhood Pub)*, BCLRB No. B96/2008 (Leave for Reconsideration of BCLRB No. B66/2008) *("C & O Holdings")* as a general rule, subject to exceptions:

> In *7-Eleven Canada Ltd.*, BCLRB No. B354/2002 (Leave for Reconsideration of BCLRB No. B130/2002) ("*7-Eleven*") and *JHS*, the Board created a policy or "bright line" test with respect to partial decertification applications filed during the collective bargaining process. As a general rule, partial decertification applications are not permitted after the notice to bargain has been filed (*7-Eleven*) and until the date of ratification (*JHS*). The reason for this policy is to create stability within the collective bargaining structure during the collective bargaining process.
>
> However, in *7-Eleven* the Board also left open the possibility that in some circumstances it might depart from the policy of not granting partial decertification applications brought after notice to bargain had been given:
>
> > We add that our finding that these applications should not be granted once the collective bargaining process has been entered into is not to say that in some other circumstances, after a sufficient elapse of time, that applications may not be entertained. There may be cases where there is a prolonged dispute where the strike has effectively ended where the Board's intervention may not raise the policy concerns we have canvassed. Needless to say, the example cited may not be exhaustive of any exception. However, to decide this case, we need not explore the outside limits of that exception and we leave that issue for a future panel. (para. 57) (paras. 7-8)

10 I now turn to the present case in view of the above noted considerations.

11 The narrative arises against the backdrop of bargaining between Hospitality Industrial Relations ("H.I.R.") on behalf of its member employers, and the Union. On December 20, 2011, H.I.R. told the Union that the Inn of the West had resigned from membership and would bargain its own collective agreement.

12 On May 8, 2012 Inn of the West told the Union it was seeking concessions. Inn of the West asked the Union to meet in ten days to bargain a new agreement. The Union responded May 22, 2012 by appointing a representative to negotiate a renewal collective agreement. According to Inn of the West's submission, the Union informed it shortly after May 22, 2012, of its availability to meet in October. Inn of the West told the Union this was "unacceptable" but did not take steps to force the matter, apart from asking for the appointment of a mediator some three months later.

13 On August 22, 2012 Inn of the West applied for the appointment of a mediator. It submits and I accept as fact for present purposes, that the Union advised the mediator it was unavailable to meet until October 2012.

14 Certain Employees filed their application on September 14, 2012. The parties have not met to bargain as of the date submissions were received.

15 Inn of the West acknowledges that the Board's policy is to place timing constraints on partial decertification applications after notice to bargain has been filed. It submits that constraint is adopted in order to "...create stability within the collective bargaining structure during the collective bargaining process" and is subject to exceptions in appropriate cases: *C & O Holdings*, para. 7. Inn of the West also submits that the policy rationale for imposing a timing constraint is not engaged in the case at hand. That is because the Union has deliberately avoided scheduling bargaining sessions. Counsel for Inn of the West, in its October 16, 2012 letter to the Board, submits in part as follows:

> ... No dates for bargaining have been set and there has been no willingness on the part of the Union to come to the table. The Union has caused an inordinate delay in the commencement of the bargaining process. This is not a situation where an employer has delayed negotiations in an effort to destabilize collective bargaining or interfere with the relationship between the Union and its members. The Union has avoided collective bargaining with the Employer. The Employer believes that the reason it has done so is because it well knows that this will be a difficult round of negotiations because of the problems facing the Hotel. The Employer submits that the Board should not allow the Union to avoid collective bargaining—in breach of its obligations under the Code—and then claim that the fact that a new collective agreement has not yet been negotiated is a bar to Certain Employees' application. (at p. 10)

16 I accept as fact for present purposes, that the Union has avoided meeting with the Inn of the West because it knows they will seek concessions and that this will be difficult round of bargaining.

17 The broad issue is whether the application made by Certain Employees should be dismissed on the ground of timing; more specifically, do the facts of this case call for an exception to the rule established in *7-Eleven?* This calls for a practical labour relations judgement about whether the policy justifications explained in *White Spot* (para. 83) and *7-Eleven* (para. 38) are engaged on the facts at hand.

18 I begin by observing, as a matter of practical labour relations reality, that a union in group bargaining is likely to resist negotiating concessions with a single employer who has left the group, lest it set a precedent at the larger table. In this context, the Board commonly sees employers and unions jockey for bargaining dates. This may be done to avoid setting a pattern or in an attempt to set an industry bargaining pattern, as well as a host of other reasons. In collective bargaining, the timing of negotiations can be a critical consideration.

19 So while Section 47 of the Code contemplates that collective bargaining get underway ten days after the date of notice, the common practice is for parties to seek sessions much later—on dates that suit their particular interests. Sometimes, the Board sees parties force an outcome by filing a complaint under Section 11 of the Code. But that is uncommon. Parties usually negotiate dates they can live with through give-and-take. It follows that the question of whether to push for dates, whether to wait for dates,

and ultimately what dates to agree to, all represent judgments integral to the collective bargaining process.

20 For these reasons, I am not persuaded by Inn of the West's argument that the parties are not in the collective bargaining process because the Union has engaged in delay. Rather it is fair to infer that the Union has chosen to pursue October dates, as that best coincides with the goals it has established for the unit at issue. The Union has been successful in this strategy so far. It must be added that Inn of the West has chosen not to push the issue of scheduling dates by filing a Section 11 application. Rather the record shows Inn of the West was content to object to October dates but ultimately let the matter sit—even after engaging a mediator. It is fair to conclude that the Inn of the West's decision not to force dates is the product of its own cost-benefit calculation.

21 As Inn of the West points out, it is reasonable to infer from their departure from H.I.R. group bargaining, that the Inn of the West's stated desire for concessions and the Union's subsequent refusal to engage, that the Union has chosen to delay a difficult round of bargaining. This is understandable. Experienced bargainers know there is no upside for a union to negotiate itself into a strike position, only to keep existing entitlements. Similarly there is little to be gained for a union to expose its members to the costs of a lockout only to avoid concessions. I hasten to add that this is not intended as an endorsement of the Union's tactics to date. The sole point of these observations is that delaying dates for bargaining in response to a concessionary bargaining agenda is an understandable collective bargaining strategy.

22 On balance I am persuaded that the parties are engaged in the process of collective bargaining. It is fair to infer that the Union has made a judgement that the collective bargaining interests of the employees at issue are best served by pushing sessions to dates in the future. In making this judgment and in the course of pursuing this strategy, the Union should not have to flinch for fear that a minority of employees will seek to leave the unit. Accordingly, I conclude that the considerations favouring stability of the collective bargaining relationship and maintaining the cohesiveness of the unit set out above, outweigh giving effect to the employees' true wishes. This judgment is developed on the basis of circumstances that have unfolded to this point in time. Accordingly, this case does not present exceptional circumstances that justify a departure from the general rule in *7-Eleven*.

23 Finally, I note that Inn of the West relied on the Board's decision in *C & O Holdings*. I find that decision is distinguishable. As argued by the Union, that case involved a situation where bargaining resulted in a collective agreement subject to ratification that was held up—so bargaining was essentially completed for about one and a half years before partial decertification was sought. I do not find the reasoning in that case assists Inn of the West in the circumstances at hand.

III. CONCLUSION

24 I decline to exercise my discretion in favour of the Certain Employees' application for the reasons given above. The application is denied.

LABOUR RELATIONS BOARD

KEN SAUNDERS
VICE-CHAIR AND REGISTRAR