



**ALRB Cite:** IWA-Canada, Local 1-207 v. Zeidler Forest Industries Ltd.  
[1989] Alta.L.R.B.R. 397

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**IWA-CANADA, LOCAL 1-207, Applicant and ZEIDLER FOREST INDUSTRIES LTD., Respondent. Board File: GE-00180. October 13, 1989.**

*A.C.L. Sims, Chair, F. Kuzemski and K. Kreklewetz, Members*

For the Applicant: Duncan S. Stewart Q.C., Susan Edge (Counsel)

For the Respondent: Michael Welsh (Counsel)

**Reconsideration - s. 11(4) - Whether Board ignored previous evidence concerning apologies tendered by dismissed employees.**

**Reconsideration - s. 11(4) - Striking employees terminated for picket-line misconduct - Original finding of employer unfair labour practices - Terminations subsequently upheld at hearing on remedies - Whether the dismissals should have automatically been reversed or mitigated.**

**Reconsideration - s. 11(4) - Applicant wishing to call further evidence - Not appropriate to allow re-opening of case at reconsideration hearing.**

*The Union applied to the Board for reconsideration of its decision upholding the terminations of striking employees for picket-line misconduct (see [1989] Alta.L.R.B.R. 341). Amongst other grounds, the Union argued that (1) the Board ignored evidence concerning the tendering of apologies by the dismissed employees; (2) because a breach of the Act had previously been found, the terminations should have been automatically reversed or mitigated; and (3) the Board had ruled upon a case authority without first providing the Union the opportunity to address its applicability.*

*The reconsideration request was denied. At the previous hearing, the Union had elected not to introduce any apologies before the Board. Nor had any of the employees testified that they had apologized. The limited evidence introduced concerning apologies did not justify attaching significant weight to it.*

*An order of reinstatement did not flow automatically from the Board's original finding that a breach of the Act had occurred. At the hearing pertaining to remedies, the Union had elected to call only minimal evidence on the question of what discipline, if any, should have been imposed on the employees in the absence of anti-union considerations. The Board accordingly upheld the terminations. It was not appropriate to now allow the Union the opportunity to call further evidence on that issue.*

*Although the Union had not been afforded an opportunity to address a recent Canada Labour Relations Board decision, the Board had not relied upon that decision in reaching its earlier conclusion. Reconsideration on that ground was therefore not warranted.*

## **REASONS FOR DECISION**

**Andrew C.L. Sims, Chair:** The Union applies to the Board for a reconsideration of its August 1st decision. It advances four arguments in support of this application which it supplemented with written argument and oral submissions. The Employer presented a written reply, as well as oral submissions, during a hearing on October 10th, 1989.

The Board's authority to reconsider its decisions comes from section 11(4). Information Bulletin 6 outlines the Board's approach to these applications. Similar powers and information existed under the Labour Relations Act.

In summary form, the Union's grounds, as set out in their letter of application, are:

1. That the Board made errors of fact:
  - a) by getting evidence wrong about the tendering of certain apologies;
  - b) by wrongly finding that the Employer required apologies from Bellrose and Antipowich;
2. That the Board's decision conflicts with earlier decisions which the Union gave the Board, but to which the Board made no reference;
3. That the Board denied the Union a fair hearing by relying on a recent decision without giving the Union an opportunity to address that decision;
4. That the Board made an error of law by ignoring its earlier finding of an unfair labour practice and ignoring the effect of that finding on section 143 of the Act.

The Union asks the Board to either reverse its decision or else open up the case to let it call further evidence.

The Union presented its arguments in somewhat different form in oral and written argument before the Board. Those arguments were, in summary:

5. That the Union, and in particular its Counsel, had been under what was, with the benefit of hindsight, a mistaken view of the test the Board would use in assessing the case for each of the individual employees. As a result of this, Counsel, while able to do so, chose not to

call the employees to the stand. The individuals should not, as a result, lose the chance to give their evidence.

6. There was no evidence about some of the employees except the certificates of conviction. This evidence did not meet the onus of proof on the Employer.

We will deal with each of these arguments in turn.

The Union takes issue with the Board's review, at page 359, about the tendering of apologies. They say it ignores Mr. Pisak's evidence that the Deputy Minister of Labour led him to believe that Mrs. Zeidler was the appropriate person to whom they should direct apologies. They also say the Board should know her role in the Company. The Board can take notice of commonly known facts. Before a specialist Board like this, the judicial notice rule may go further than before non-specialized Courts. However it does not go that far.

What is significant, from the Board's perspective, is that the Union chose not to introduce any apologies before the Board. None of the employees testified that they had in fact apologized. Mr. Pisak's evidence was so limited, in comparison with what the Union might easily have tendered, that the Board attached no significant weight to it. All we really had was evidence that, during last minute mediation attempts, employees drafted undisclosed letters which they gave to the Deputy Minister. He was to deliver them to someone he thought might be able to facilitate settlement.

There is nothing in this ground that causes the Board to reconsider its decision.

The second alleged error of fact concerns the evidence of Dwayne Bellrose. This ground raises no basis for reconsideration. The evidence was that Bellrose and Antipowich had approached the Employer expressing regret for what had happened. Perhaps they did not say "I hereby tender an apology". Probably the Employer did not say "to go back to work you must make a formal apology". However, there was clear and uncontradicted evidence that they both expressed remorse. A sceptical management questioned both men about this before they were accepted back on the payroll. We find no contradiction in this evidence.

The Union complains that the Board, in essence, ignored three earlier decisions cited by the Union. These are:

*General Teamsters, Local 362 v. Ms. Pat Degraff* (1985) Alta.L.R.B. 85-025.

*General Teamsters, Local 362 v. Steinbock Development Corporation Ltd.* (1986) Alta.L.R.B.R. 489.

*Canadian Union of Public Employees Local 38 v. Brenda Ames*, [1989] Alta.L.R.B.R. 47.

The Union referred to these cases in argument. The Board did not mention them specifically in its decision.

However, failure to recite every case tendered in argument should not be seen as a sign that the Board has failed to consider such cases. Frequently, as in this case, the Board, after reviewing a cited authority, will find that a specific reference adds nothing to the decision.

The Union cited these cases for the general proposition that a termination, motivated, in whole or in part, by anti-union animus, cannot be a termination for just cause within the meaning of section 143. This involves what Union Counsel now says was his misapprehension of what the Board was looking for from the employees. Union's Counsel appeared to think that reinstatement should follow automatically once the Board found anti-union animus. It may be that once the Board finds a breach of the Act it must then consider an appropriate remedy. However this is by no means the same. If the former proposition were true the Board could, and probably should have, reinstated the employees after the initial finding of a breach. The Board did not do so, and specifically refused to do so, based on the reasons set out in its original decision. See [1987] Alta.L.R.B.R. 31 at 58. The Board later elaborated upon this in the May 20th, 1987 clarification decision. See [1987] Alta.L.R.B.R. 300 at 302.

A breach of the Act was found. The Board fashioned a remedy. Initially the Board encouraged the parties to submit the issue to a tri-partite panel. The Union withdrew its agreement to this approach. The Board made it clear to the parties that it would be proceeding with its remedy using the same approach set out for the tri-partite Board.

The Board made it clear that unconditional reinstatement, without further review, was not appropriate in this case even if it might have been in others. The remedy ordered was expressly limited. It involved a substitution of an independent third-party review for the Employer's decision, to make sure that the ultimate decision was free of anti-union sentiment. Such Employer sentiments might have prejudiced the employees or, alternately, they might have given undue favour to Antipowich and Bellrose. A third party review would do neither.

We directed the third party Board, and later ourselves, to look at all the evidence presented to decide what the original decision ought, fairly, to have been. We left the parties to decide what evidence to adduce to influence our decision. The Union called very little evidence, while the Employer bolstered its evidence of cause. We assessed that evidence and decided on terminations. We find nothing in this ground to justify reconsideration.

The Union's next complaint concerns the reference, on page 354 of the decision, to the recent, unreported, case of *Canadian Union of Postal Workers v. Canada Post Corporation*. The complaint is that the Board relied upon that decision without giving the Union any opportunity to comment upon its applicability. Until this reconsideration application, the Board did not afford Counsel an opportunity to comment on the case. However, if one reviews the way the *Canada Post* decision is referred to, it is clear the Board did not rely upon that decision in reaching its conclusion. Therefore, in the Board's view, no necessity to solicit comment ever arose.

At the hearings in 1987, the Union urged the Board to follow a decision of the Canada Labour Relations

Board: *Canadian Airline Flight Attendants' Association et al. v. Pacific Western Airlines Ltd.* [1986] 12 C.L.R.B.R. (N.S.) 315 (C.L.R.B.). The Union cited the case for the proposition that certain conduct, perhaps illegal, which in other circumstances might justify termination, is acceptable if it takes place in the context of normal picket line activity. In our original decision we took a cautious approach to P.W.A. We said, after several pages of analysis of the different approaches available, at p. 54:

We would be reluctant to see the comments set out in the P.W.A. [case] interpreted as a type of licence or special protection for picketing employees who engage in acts of violence involving criminal acts or physical harm to persons or property.

When the matter came back to the Board again in 1989, Counsel for the Union again urged upon the Board the more liberal approach to picket line violence exemplified in *P.W.A.*, along with an alternate approach based upon the *B.C. Tel* arbitration decision. Our decision reminded the Union that we were not reconsidering our earlier decision. We reaffirmed our views on the proper tests, implicitly rejecting, once again, either the *B.C. Tel* or the *P.W.A.* approach. The Board went on to note, by way of an explanatory point, that in any event, the Canada Board had reversed itself on this issue. Our decision in no way turned upon this fact, since we had in any event rejected that approach as far back as 1987.

As part of the reconsideration hearing, we heard what Counsel for the Union had to say on the Canada Post decision. Nothing in those submissions justifies a reconsideration of our decision.

The Union's fourth ground is that the Board erred by ignoring its earlier finding. This is really its second submission revisited. The foundation for the argument is that, having found a breach of the Act, the Employer's discipline cannot have been for just cause, either generally, or under section 143. The penalty must, therefore, as a matter of law, be reversed or at least mitigated. On this we disagree. The finding of a breach requires the Board to address an appropriate remedy. Reinstatement may often be the right remedy. Given the pervasive, violent and criminal nature of the conduct, in this case, however, reinstatement would give the employees more than they could have reasonably expected from an Employer arriving at a decision free of anti-union motive.

We fashioned an approach that substituted a third party review instead of directly substituting reinstatement or a mitigated penalty. As a result of the Union's withdrawal of its agreement, the Board itself carried out that review. This is not a difference in law as to whether a breach has occurred, it is a difference in approach to the appropriate remedy. The circumstances are different in this case than in the earlier decisions cited by the Union. The Board finds no contradiction between these approaches that justify a reconsideration.

At the hearing, Union Counsel recast some of these arguments. He said that, with the benefit of hindsight, he was obviously wrong in his assessment of what the Board expected of the employees and the Union to establish their case.

He says that he was under a misapprehension about the basis upon which the Board would be assessing cause. He thought the Board would assess the conduct of the 25 employees against the standards set by the

Employer through its treatment of Antipowich and Bellrose, not against a normal arbitration standard where there was no Employer-established comparable. He also seems to have been under the misapprehension that the Board, having found a breach of the Act, would be looking at some form of mitigation of penalty. His position is that, right up to the last moment when the Employer closed its case, he was considering putting the 25 employees on the stand to testify. He elected not to do so because, in his judgment, the Employer had not met its onus.

The argument urged upon us now is that the employees should not suffer as a result of the mistakes of their Counsel and should be given a further opportunity to testify.

Several factors convince the Board this would be inappropriate. Senior, experienced Counsel have represented the Union throughout. The decisions taken during the hearing were not taken casually. They were made in the face of a clearly expressed position, set out by the Employer's Counsel right at the start of the hearing, as to where the onus of proof lay, and what the proper tests might be.

The hearing took place following three written Board decisions which set out the Board's position. It followed two years of examination of these decisions through Queen's Bench and Court of Appeal litigation. It followed a preliminary Board hearing, after the Court of Appeal decision, called to discuss the way the remaining hearings would proceed. It followed the Board once again suggesting the parties resolve the issue themselves by third party adjudication. It also followed a change in position by the Union since, at the preliminary hearing, the Union advised the Board the employees would be called. This position only changed once the full hearing commenced.

The position the Union now finds itself in is very similar to the position advanced by the Employer, and rejected by the Board, following the first hearing in 1987. After the original decision, the Employer sought to reopen its case, to add evidence to rebut the finding of anti-union animus. The Board, at page 261, set out the argument made by the Union:

With respect to the evidence Zeidler now wishes to bring through a company official, Ms. Edge suggests that, as the evidence would almost certainly pre-date the hearing, it is not new evidence. She suggested that Counsel for Zeidler would have had access to both the company officials and the documents at the time the matter was heard and that reconsideration is not available to allow the advantage of "20/20 hindsight" in correcting a case.

The Board went on to hold, at p. 264:

It is the Board's view that the time for officials of Zeidler to have seriously looked at the unfair labour practice charges was prior to or during the hearing. Investigations should have been made at the time, not after the decision was rendered. If Zeidler made a calculated guess as to how the Board would look to the evidence adduced and was wrong in its assessment, they should not be allowed to present evidence that they could have, with

due diligence, presented at the hearing. In the same vein, the Board should not consider cases submitted by Counsel which go to the issues before the Board at the first inquiry, if those cases were available and could have been presented to the Board at that time.

When either side concludes its case, it is only reasonable for the Board to accept that it has been presented with all the relevant evidence on which to base its decision. How simple it would be to present a case if Counsel were able to give part of their evidence, then await the Board's decision and, if the decision was not in their favour, have the Board reconvene the hearing to hear the rest of the evidence.

The Board must now deny the Union's request for the same reasons it denied Zeidler's request then.

The Union's last point concerns whether there was any evidence in respect to certain employees. The Board has detailed its findings on the evidence at pages 350-353. This was done after a thorough review of the documentary, photographic, videographic and oral evidence. Nothing in Counsel's argument has convinced the Board of any errors in these findings or any justification for a reconsideration.

Counsel argues that much of the evidence came in on a global basis rather than in a series of "mini-arbitrations" relating to each of the 25 persons. There is nothing significant in that fact. This frequently happens when a number of persons are involved in events. The Board has weighed the evidence about each person. The fact that the evidence was presented globally makes it no less convincing. Part of the evidence consisted of informations, certificates of conviction and evidence (both written and oral) of guilty pleas. It also consisted of evidence that the R.C.M.P. were on the scene and immediately arrested persons they had actually seen involved in the activity complained of. In each case this evidence went almost entirely un rebutted by Union evidence, either from the individuals convicted, or otherwise.

Counsel for the Union appears to take issue with our reliance on certificates of conviction evidence. As the Union's written argument points out, Section 27 of the *Evidence Act* clearly allows such reliance, subject to our assessment of the appropriate weight to be given. In most cases we have more than convictions as evidence. The decision clearly sets out our findings, and the basis for them, and we see no justification for a reconsideration on this basis.

For these reasons the Board denies the Union's request for a reconsideration.