

**Neil O. Glinz, Applicant and Christian Labour Association of
Canada, Local No. 63, Respondent and Ledcor Industries Limited,
Intervenor**

[1992] Alta. L.R.B.R. 557

Board File: GE-00920

Alberta Labour Relations Board

**Mark L. Asbell, Vice-Chair,
Doug Mitchell and Larry Schell, Members**

August 31, 1992

For the Applicant: Robert Blakely
For the Respondent: Co Vanderlaan
For the Intervenor: No Representation

Duty of Fair Representation - Labour Relations Code, S.A. 1988, c. L-1.2, s. 151 - Employer asserting employee's refusal to cross illegal picket line was breach of collective agreement and just cause for termination - Union dropping grievance without thorough consideration of grievance - Union's representation neither fair or genuine - Union failing in duty of fair representation

A former employee alleged that the Union had failed, contrary to s. 151 of the Labour Relations Code, to fairly represent him in his termination grievance. The Employer had claimed just cause for termination; citing reasons of work attitude and ability. At stage 2 of the grievance procedure, the Employer added that the employee's refusal to cross an illegal picket line was a breach of the collective agreement, also giving just cause. The employee, a member of a building trade union, had refused to cross a line set up by individuals protesting the Union's wall- to-wall collective agreement excluding building trade unions from the site. The employee thought his refusal to cross was a breach of the collective agreement, and when asked, admitted that to the Union. The Union dropped the grievance. Before the Board, the Union relied upon a collective agreement clause prohibiting any strike, slowdown or work stoppage by Union members.

The Board found the Union had failed in its duty. Although a union's analysis may be in error, the duty under the Code must be met. The Union's representation was neither fair nor genuine, and the decision not to proceed was arbitrary. There was no evidence that the Union had thoroughly studied the grievance before deciding not to proceed. Instead, the Union seized the convenient excuse of a breach, rather than review the provisions of the agreement or the Code. Neither "strike" or "stoppage of work" was defined in the collective agreement. The employee's conduct did not satisfy the definition of "strike" in the Code, as there was no evidence that two or more employees acted in combination, in concert, or in accordance with a common understanding. Nor was a "refusal to work" within the meaning of s. 83 established. There was no evidence of the motive required under that section. As the Union, not the Employer had committed the error, and arbitration would be ineffective so long after the fact, the Board awarded financial compensation to be paid by the Union. The Board reduced the amount of lost wages by a factor reflecting chance of success in arbitration.

REASONS FOR DECISION

Mark L. Asbell, Vice-Chair: This matter consists of a duty of fair representation complaint brought by Neil O. Glinz affecting the Christian Labour Association of Canada, Local No. 63, Edmonton, Alberta, ("CLAC").

Mr. Glinz alleges that CLAC did not represent him fairly when Ledcor Industries Limited ("Ledcor") terminated his employment. Mr. Glinz alleges that CLAC breached section 151 of the Code. Section 151 states:

- 151(1) No trade union or person acting on behalf of a trade union shall deny an employee or former employee who is or was in the bargaining unit the right to be fairly represented by the trade union with respect to his rights under the collective agreement.
- (2) Subsection (1) does not render a trade union liable to an employee for financial loss to the employee if
 - (a) the trade union acted in good faith in representing the employee, or
 - (b) the loss was as the result of the employee's own conduct.
- (3) When a complaint is made in respect of an alleged denial of fair representation by a trade union under subsection (1), the Board may extend the time for the taking of any step in the grievance procedure under a collective agreement, notwithstanding the expiration of that time, subject to any conditions that the Board may prescribe, if the Board is satisfied that
 - (a) the denial of fair representation has resulted in loss of employment or substantial amounts of work by the employee or former employee,
 - (b) there are reasonable grounds for the extension, and
 - (c) the employer will not be substantially prejudiced by the extension, either as a result of an order that the trade union compensate the employer for any financial loss or otherwise.

Background

The facts are not in dispute. Neither party called any evidence at the hearing. Both Mr. Glinz and CLAC adopted the facts as stated in the Board Officer's Report.

Mr. Glinz is a journeyman pipefitter. He is also a plumber, gasfitter, steamfitter and understands pressure testing. He started working with Ledcor on March 7th, 1991, initially doing pipefitting work on pumps. On March 10, 1991, Mr. Glinz sent a letter to CLAC asking them to redirect his union dues to a charity. He advised CLAC that he was a member of

another union which prohibits him from belonging to another union claiming the same jurisdiction. He also stated that he had not been advised before he started working that CLAC had a collective agreement with Ledcor. According to Mr. Glinz, it was a term of the collective agreement that he should have been told before being hired that CLAC was the bargaining agent for the project.

On March 13th, the foreman told Mr. Glinz that his work was unsatisfactory. Pumps he had been working on were incomplete or installed improperly. The next day the foreman stated that Mr. Glinz and his partner were to work on some transformers. Mr. Glinz stated he did not have the qualifications to work on these transformers. The foreman said it did not matter. Mr. Glinz gathered his equipment to work on the transformer. An illegal picket line set up by individuals protesting the jobsite being non-union, blocked his access to the transformer. Mr. Glinz did not cross the picket line but, instead, stood and talked with the picketers for about an hour. Mr. Glinz was the only employee of Ledcor who did not cross the picket line.

On Friday, March 15th, 1991, Ledcor fired Mr. Glinz. According to Ledcor, the termination was due to his poor attitude and work ability. Mr. Glinz informed CLAC he wished to file a grievance. CLAC filed a grievance on Mr. Glinz's behalf on March 18, 1991. The employer responded to CLAC stating the above reasons for his firing. Mr. Glinz responded to the allegations from the employer.

CLAC proceeded to step 2 of the grievance procedure. The employer responded to CLAC's second step stating that, in addition to the previous reasons, Mr. Glinz walked the picket line contrary to the collective agreement.

As a result of the employer's response, the shop stewards on site met with the Business Representative of CLAC. At that meeting they decided not to proceed with the grievance for Mr. Glinz.

CLAC's representative, Mr. Co Vanderlaan, then contacted Mr. Glinz. Mr. Vanderlaan asked Mr. Glinz if he knew that his failure to cross the picket line was contrary to the collective agreement. Mr. Glinz said he knew it was contrary to the terms. He also asked Mr. Glinz if he knew what he was doing, to which Mr. Glinz responded "yes". Mr. Vanderlaan then explained to him that as he violated the terms of the collective agreement and no other employee working on the site walked the picket line, he had no choice but not to proceed with his grievance any further. Mr. Glinz asked him to send a letter confirming their conversation, which Mr. Vanderlaan did. The letter reads:

April 1, 1991

TO WHOM IT MAY CONCERN

RE: NEIL GLINZ

The above named person was employed by Ledcor Industries Limited at its Bruderheim site. The employee was terminated and the termination was pursued by this Union via the grievance procedure.

It has since become known that the employee participated in an illegal picket line against his own employer and against the Union representing him on this site. As a result, the employee was terminated for just cause and the Union will not be pursuing it

any further on his behalf.

Steps 1, 2 and 3 of the grievance procedure from the collective agreement state:

STEP 1 Subject to the conditions of Article 6.05, if a grievance is to be filed it shall, within the five (5) work days referred to in Article 22.04 above, be reduced to writing and shall be presented to the designated Employer representative by a Steward or a CLAC representative. The designated employer representative shall notify the union representative of his decision in writing not later than five (5) work days following the day upon which the grievance was submitted.

The grievance referred to above shall identify;

- a) the facts giving rise to the grievance;
- b) the section or sections of the Agreement claimed violated;
- c) the relief requested;

and shall be signed by the employee or employees involved.

STEP 2 If the grievance is not settled in Step 1, a CLAC representative shall within five (5) work days of the decision under Step 1, or within (5) work days of the day this decision should have been made, submit a written grievance to the designated Employer Representative. A meeting will be held between the Steward or CLAC representative together with the griever involved and the designated Employer representative and other representatives of the Employer. This meeting will be held within five (5) working days of the presentation of the written grievance to the designated Employer representative. The Employer shall notify the Steward or CLAC Representative of his decision in writing within five (5) work days of such meeting.

STEP 3 In the event that the grievance is not settled at Step 2 the party having the grievance may serve the other party with written notice of desire to arbitrate within five (5) work days of the delivery of the decision in Step 2 to the Steward or CLAC Representative but not thereafter.

Issues

Counsel for Mr. Glinz argues that CLAC has discriminated against Mr. Glinz. This is not a traditional form of discrimination, however. Rather, the union did not handle itself in a manner and standard of conduct necessary in the circumstances. Counsel for Mr. Glinz alleges CLAC dropped the grievance, not for reasons based on merit, but rather, because Mr. Glinz, in the eyes of CLAC, had committed an act of "treason". He refused to cross a picket line which called into question the legitimacy of CLAC. The union, Counsel alleges, looked at the wrong question in determining whether to proceed with the matter to the next level.

In response, CLAC states that they took all the necessary steps. They reviewed the case thoroughly and decided not to proceed. Additionally, Mr. Glinz admitted he did not cross the picket line. He knew he

was in breach of the collective agreement. The union was under no obligation to proceed further.

The Authorities

Section 151 of the Code sets out the union's duty of fair representation. To determine whether a union has breached section 151 the Board will check the union's conduct or decision. The Board uses a three step analysis in assessing whether the union has acted reasonably and in good faith. First, the Board will assess the nature of the grievance filed to determine the degree of seriousness of the subject matter of the complaint. Second, the Board will consider the characteristics of the bargaining agent. The Board cannot expect the bargaining agent to produce for bargaining unit members what is beyond the agent's financial, physical, administrative or other means. Third, the Board will investigate in detail the steps taken by the bargaining agent in processing a grievance filed by a member of its bargaining unit.

See Andre Cloutier [1981] 2 Can. L.R.B.R. 335. Also, Pokonzie v. C.U.P.E. Local 37, at al. [1982] Alta.L.R.B.R. 82-039 at p. 11.

The union need not be correct in its decision so long as it meets its duty under the Code.

See, Chow v. Overwaitea Foods [1981] Can. L.R.B.R. 43 at 51.

Canadian Merchant Service Guild v. Gagnon et al., [1984] C.L.L.C. 12,181 at 12,188 (S.C.C.) set out five principle features of the duty of fair representation.

The following principles, concerning a union's duty of representation in respect of a grievance, emerge from the case law and academic opinion consulted.

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee on the one hand and the legitimate interests of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

Decision

In this case, CLAC processed the initial grievance. When Ledcor responded by saying Mr. Glinz breached the collective agreement by not crossing an illegal picket line, CLAC refused to take any

further steps. Was this decision taken in good faith, without evidence of dishonesty or hostility, and to the best of its ability?

Using the analysis set out in *Andre Cloutier*, supra, there can be no dispute that the nature of the grievance filed alleging a wrongful termination is very serious. There also was no evidence to suggest that CLAC would be unable to process the grievance if required either by reason of lack of finances, administrative support or otherwise. The third step from *Andre Cloutier* then requires the Board to examine in detail the steps taken by the union in processing the grievance.

Both CLAC and the employer stated that Mr. Glinz breached the collective agreement by refusing to cross an illegal picket line. The union took the position at the hearing that by refusing to cross the picket line, Mr. Glinz participated in an illegal strike. The only Article of the collective agreement which refers explicitly or implicitly to illegal picketing or strike activity is Article 5.01. It reads:

ARTICLE NO. 5 - NO STRIKES OR LOCKOUTS

5.01 During the term of this Agreement, or while negotiations for a further agreement are being held the Union will not permit or encourage any strike, slowdown, or any stoppage of work or otherwise restrict or interfere with the Employer's operation through its members.

The agreement does not define "strike, slowdown, or any stoppage of work". The Code, however, describes strike activity as 2 or more employees acting in combination or in concert. Section 1(1)(v) of the Code reads:

- 1(1)(v) "strike" includes
- (i) a cessation of work,
 - (ii) a refusal to work, or
 - (iii) a refusal to continue to work,

by 2 or more employees acting in combination or in concert or in accordance with a common understanding for the purpose of compelling their employer or an employers' organization to agree to terms or conditions of employment or to aid other employees to compel their employer or an employers' organization to accept terms or conditions of employment.

There is no evidence that Mr. Glinz acted in combination, concert, or in accordance with a common understanding with any other employee of Ledcor when he refused to cross the illegal picket line. He was the only employee of Ledcor who refused to cross the picket line. We find, therefore, that Mr. Glinz did not participate in a strike action contrary to Article 5.01. He may, however, have refused to work contrary to section 83(a), which reads:

83 No employee shall

- (a) refuse to perform work for his employer for the reason that other work was or will be performed or was not or will not be performed by any person or class of persons who were not or are not members of a trade union or a particular trade union,

There is no dispute that Mr. Glinz was absent without permission. This element alone, however, does not constitute a breach of Section 83. This section requires some evidence to establish the motive of the employee. The section says that "no employee shall refuse to perform work for his employer for the reason ... " No direct evidence was presented before us as to the reason for this refusal to work. We therefore cannot determine why he refused to cross the picket line.

In the termination notice, Ledcor stated that Mr. Glinz was terminated because of his attitude and work ability. This was later amended, at step 2, to include the secondary reason that he walked the picket line contrary to the collective agreement. CLAC reviewed the matter, had meetings with its shop stewards and decided not to proceed. The sole reason for this decision, however was that Mr. Glinz "participated in an illegal picket line against his own employer and against the Union representing him on this site". CLAC makes no reference to the original reason for Mr. Glinz's dismissal, but relies only on the subsequent reason advanced by Ledcor. After reviewing the matter, had the union relied, even partially, on the original reason given for termination as a reason for not proceeding, there would likely have been no application before us. This is not the case, however.

Failing to report to a job site, or being absent without permission, does not mean one employee, acting alone, is participating in a strike. It may or may not be a refusal to work contrary to section 83. There is insufficient evidence before us to be satisfied that there was a contravention of Article 5.01.

The Board in *Chow v. Overwaitea Foods*, supra, found that a union need not be correct in its decision so long as it meets its duty under the Code.

The principles set out in *Gagnon*, supra, state that a union must exercise their discretion in good faith and honestly after a thorough study of the grievance and the case. The union must consider the significance of the grievance and its result on the employee. In this case, the union processed the first two steps of the grievance quickly, as required by the collective agreement. However, there is little evidence to support CLAC's position that they thoroughly studied the grievance before deciding to proceed no further. The shop stewards discussed the matter before deciding not to proceed. The Board, however, heard no evidence about the content of those discussions. A representative of CLAC contacted Mr. Glinz and asked him whether he knew his conduct was contrary to the collective agreement. Despite Mr. Glinz's affirmative answer, it is irrelevant whether Mr. Glinz believed he was in contravention of the collective agreement in this case. Insufficient evidence was presented before the Board to establish what Mr. Glinz thought he had contravened. CLAC did not seek advice from legal or other counsel about whether or not to proceed with the grievance. There is no evidence that CLAC actually even looked at the collective agreement or the Code to check whether Mr. Glinz in fact breached the terms of the collective agreement. They simply relied upon Ledcor's statement.

Considering the above, and especially having regard to the serious nature of the grievance, we are satisfied that CLAC did not undertake a thorough study of the grievance.

Was the union's decision arbitrary or wrongful in some fashion? As *Gagnon* asked, was their representation "fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee?"

We find that CLAC's representation was neither fair nor genuine. CLAC processed the grievance only so far as the collective agreement compelled them to take it. Once they reached that point, we are satisfied they were looking for a convenient excuse to get out of the grievance. Ledcor provided them with the opportunity which CLAC seized. Their representation was insincere, apparent on its face. They made an arbitrary decision, giving only superficial attention to the facts at issue. CLAC made little effort to discover the circumstances surrounding Mr. Glinz's case. They showed total disregard for his interests. Had their intentions indeed been genuine, one would have expected a more thorough analysis. The grievance, while not necessarily a strong one, was nonetheless a defensible one. CLAC did not even assess its merits. Focusing on the union's conduct at the time of the grievance, leaves us with the negative inference that CLAC felt betrayed by Mr. Glinz's support of a rival union and this was an opportune chance to get rid of an opponent. While Chow and Gagnon state that a union can make an error in its analysis, the union must still meet its duty under the Code.

The Board recognizes that it is difficult for a union with limited resources and experience to ask the right questions and to arrive at the correct conclusions. However, the union owes a duty of fair representation to its members. Having regard to all of the circumstances present in the case before us, we are satisfied that this union has failed in this duty. The application is granted.

Remedy

Mr. Glinz was employed by Ledcor in the construction industry. The tenure on any one job and with any one company tends to be somewhat limited in this industry. In light of this fact, and given that the application did not come before this Board until over a year after the dismissal, the applicant neither asked for nor wants access to the arbitration process. Rather, the applicant seeks remuneration for the entire period of time that he was off work. He was unemployed from March 15th, 1991 through and until April 1st, 1991. Mr. Glinz earned the sum of \$680.00 weekly.

CLAC's position on remedy is that Ledcor must be involved as any decision we make must impact them. We disagree. Ledcor committed no error in this matter; CLAC did. Additionally, we agree with Mr. Glinz's position that the arbitration procedure at this stage would be a waste of time and effort and would achieve nothing. We are satisfied that the only proper relief available to Mr. Glinz is financial compensation from CLAC.

This Board rarely hands out monetary awards. The Board's powers in this regard are summarized in Informational Bulletin #18. The Remedies section states as follows:

The Code allows the Board to review the fairness of the union's conduct. It does not offer an appeal of the Union's decision on a grievance. Nor does it give the Board the power to hear or rule on the employee's grievance itself.

The Board does not adjudicate on the merits of a complainant's grievance. Yet, it may review the facts of the grievance. This is because the Board must assess whether the union's investigation reflected the worthiness and seriousness of the employee's case.

If the Board finds a breach of the duty, the nature of the complaint influences any remedy given to the complainant. The remedies the Board can award include extending the time limits of the grievance procedure, giving a declaration or awarding damages.

...

What the grievor has lost may only be the right to have the grievance heard and

determined. It is not necessarily everything claimed in the grievance. This is particular so where the complaint is about a mishandled or abandoned grievance.

When the Board assesses the loss suffered it looks at the chances of the grievance having succeeded. This means the Board may have to consider the merits of the original grievance.

In determining the extent of any loss suffered, the Board considers the employee's effort to minimize the loss as described above under "Employee's Responsibility".

The Board's power to redress a complaint does not include the power to award punitive damages. It cannot award monies for emotional damages or unspecified general loss.

In the decision of *Barry Martin v. Alberta Food and Commercial Workers Union Local 397*, Alta. L.R.B.D. 85-048, the Board dealt with how the Board assesses the value of a grievance. Starting at page 11, the Board states:

Grievances vary in quality. Some are almost certain to succeed, others are speculative at best. It would be a serious error for the Board to assume that any grievance, frustrated by a breach of the duty of fair representation, would have succeeded if it had been arbitrated. What the grievor loses is not his claim for damages but his opportunity to have his claim determined. He loses the chance of success, not success itself. The value of such a chance is not always easy to determine, however, the Board must do its best given the evidence before it to assess both the value of the disputed claim if successful and the chance of that success.

Support for the view of the measure of damages can be drawn from the cases involving solicitors negligence and the chance to pursue a law suit. (sic) a dealing with the loss of such a chance are discussed in *Govieu v. Simonot* [1982] 6 W.W.R. 221 (Sask. Q.B.) and *Hornak v. Paterson et al* (1967) 62 D.L.R. (2d) 289 (B.C.S.C.).

Valuing a grievance going to arbitration is not always easy, particularly one involving the dismissal or demotion of an employee. Under an arbitration system if no cause is found the grievor may be reinstated to full time employment as opposed to being given damages in lieu of notice, and the one may well be of more value than the other. By virtue of the arbitrator's remedial jurisdiction under s. 125(2) of the Act, even where there is cause, any number of variations of penalty are possible. The assessment is thus difficult but perhaps that is why it is confided to the Labour Relations Board which consists entirely of persons experienced in such matters.

Assessing the chance of success is equally fraught with difficulty since the employer, who in discipline cases carries the onus of proof, is absent from the proceedings. However, it is open to a respondent to call the employer if it chooses to show that there was little chance of success. As it is part of the duty of fair representation to assess the facts in issue in a grievance one cannot muster too much sympathy for the respondent that argues "how am I too know what the chances of success were?"

In this case the calculation is made simpler by Mr. Martin's largely undisputed claim that he lost \$3,2000.00. In our view his chances of success on his first grievance were very low, but his chances of success on the second were quite high. Reorganizing (sic) that this is an imprecise estimate, but equally recognizing that arbitration (or litigation) is by no means a precise science either, we believe he had a 80% chance of success. ...

In this matter, Ledcor dismissed Mr. Glinz shortly after he started working for them. Their concerns rested with his workmanship and attitude. We were presented with no evidence to suggest that he would have been successful with his grievance. Alternatively, we were presented with no evidence to suggest that he would not have been successful. However, based on all of the evidence and circumstances before us, we believe that Mr. Glinz had no more than a 50% chance of success. Mr. Glinz was off work for slightly more than two weeks. 50% of this would amount to one week's salary. We therefore direct CLAC to pay to Mr. Glinz the sum of \$680.00 less all appropriate statutory deductions. This payment is to be paid by CLAC to Mr. Glinz's solicitor in trust for Mr. Glinz, together with an accounting of the deductions. The payment is to be mailed no later than four weeks from the date of this decision.

The Board will remain seized with this matter pending payment of monies due.