

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

EMCON SERVICES INC.

(the "Employer")

-and-

B.C. GOVERNMENT AND SERVICE  
EMPLOYEES' UNION

(the "Union")

PANEL:	G.J. Mullaly, Vice-Chair
APPEARANCES:	Craig T. Munroe, for the Employer Brandon Quinn, for the Union
CASE NO.:	56633
DATES OF HEARING:	July 19 and 24, 2007
DATE OF DECISION:	July 25, 2007

**DECISION OF THE BOARD**

I. **INTRODUCTION**

1           The Employer applies pursuant to Sections 65, 67, 133, 135, 136 and 139 of the  
*Labour Relations Code* (the "Code") complaining that the Union and its members,  
officers and agents are engaging in illegal picketing at or near the operations of one of  
the Employer's subcontractors, Summit Gradall Service Ltd. ("Summit"). Because the  
parties seek a quick decision my reasons will be brief. Although I will not set out all the  
evidence led and the arguments made, I have considered them in reaching the decision  
I have made.

II. **BACKGROUND**

2           The Employer provides highway maintenance services in Service Area 9 under a  
contract with the Ministry of Transportation and Highways (the "Contract"). Some 3000  
kilometres of road are covered by the Contract.

3           The Union represents the employees of the Employer who perform the highway  
maintenance work. The Union is engaged in a legal strike against the Employer.

4           Ditching is one of the highway maintenance services the Employer performs for  
the Ministry of Transportation and Highways. It involves excavating materials from the  
ditches on the sides of roads and hauling of the excavated material to dump sites. A  
gradall (a truck mounted boom with a bucket) is used to perform the excavation and a  
dump truck is used to haul the excavated material.

5           The Employer engages sub-contractors to perform Contract work when it is cost  
efficient to do so. The Employer has an 'all found' contract with Summit to supply ditch  
excavation, flagging, trucking and dumping. However, if the Employer has trucks  
available, Summit sub-contracts back the trucking and dumping portion of its ditching  
work to the Employer. In 2006, of the approximately \$130,000 the Employer paid to  
Summit for ditching, \$19,000 worth of hauling and dumping was sub-contracted back to  
the Employer. According to Frank Rizzardo, the Employer's President and General  
Manager, it's employees were only involved in between 22% and 25% of the ditching  
performed by Summit for the Employer.

6           Rizzardo also testified that Summit has had such an 'all found' contract since  
1990 and the amount of ditching work performed by the Employer's employees has  
been consistent over time. In this respect the evidence led by the Union differed. Frank  
Planidin, an equipment operator employed by the Employer testified that before 2006,  
employees of the Employer performed 100% of the trucking and dumping associated  
with ditching.

7 Planidin also testified, without contradiction, that other than the Employer's two mechanics, bargaining unit members spend only 4% or 5% of each working day at the Employer's yards; the rest of the day is spent doing highway maintenance on the roads covered by the Contract.

8 Another witness for the Union, Mike Schrader, confirmed Planidin's estimate of the amount of time spent by bargaining unit employees in the Employer's yards and he added that in the week before the strike started he had been approached by his supervisor and asked if he wanted to switch from his job (patching) to do ditching work the following week. When Schrader replied that he'd prefer to stay on patching the supervisor said that he would probably call in an auxiliary to do the ditching work. (Auxiliaries are members of the bargaining unit.)

9 The incident that precipitated the Employer's complaint occurred on July 17, 2007. Summit was performing ditching work on the Old Salmo Road, a rural road covered by the Contract. At about 9:30 a.m. in the morning, approximately six individuals appeared at the work site and began picketing wearing signs that read "BCGEU – On Strike". As a result, Summit ceased performing the ditching work.

### 10 III. ANALYSIS AND DECISION

Section 65(3) of the Code provides that:

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

11 In *Lafarge Canada Inc.*, IRC No. C156/88 ("*Lafarge*"), the Industrial Relations Council identified the four criteria that must be satisfied for a union to be entitled to picket under what is now Section 65(3) of the Code (and was then Section 85(3) of the *Industrial Relations Act*):

Under Section 85(3), a member of a trade union may picket a location providing that four criteria have been satisfied: first, the member performs work at the location; second, the work is under the control and direction of the employer; third, the work is an integral and substantial part of the employer's operation; and fourth, the site or place is a site or place of a lawful strike or lockout. Before dealing with each of these criteria I will make the following observations. (p. 8)

12 The Employer concedes that the Union is lawfully on strike but it disputes that the other criteria of Section 65(3) have been met. In other words the Employer submits that:

- the Union is not picketing at or near a site or place where a member of the Union performs work;
- the ditching work done by the Employer's employees is not done under the control or direction of the Employer;
- the work being picketed is not an integral and substantial part of the Employer's operation; and
- the location of the picketing is not a site or place of the strike.

13 In *Lafarge* the Council held that the first Section 65(3) criterion is satisfied provided that before the strike or lockout picketing employees performed "any work at the location, regardless of its significance". I find that if, as in this case, employees are employed to do highway maintenance work on roads and highways in a particular area, the first criterion is met if the picketing is occurring at any location on those roads and highways that could be the site of highway maintenance work.

14 With respect to the second criterion, the Council in *Lafarge* stated:

The second criteria is whether the work performed at this location is "under the control or direction of the struck employer". The focus here is on the control or direction of the work being performed, not the site or place. I do not accept the argument that "control or direction" must mean something more than the employee is employed by the struck division. So long as the employees attend at the location under the direction and supervision of the struck employer, and their work performance and methods are determined by the struck employer, this criteria is met... (p. 10)

15 Neither party led evidence about how employees of the Employer performed the hauling and dumping portion of ditching work before the strike began. The Employer does not concede that it was done under its control or direction. However, generally, the party that asserts must prove (*Health Employers' Association of British Columbia*, BCLRB No. B8/2003 at para. 30) and in this case it is the Employer that is complaining that the Union's picketing of Summit on July 17, 2006 did not meet all the four Section 65(3) criteria. Accordingly, it had the onus of proving that one or more of them were not satisfied. Given the lack of evidence about how employees of the Employer performed the hauling and dumping portion of ditching work before the strike began I am unable to find that work was not done under the Employer's "control or direction" within the meaning of Section 65(3) of the Code.

16 The Board's most recent extended analysis of the third and fourth Section 65(3) criteria is found in *Coca-Cola Bottling Ltd.*, BCLRB No. B285/2001 (Leave for Reconsideration of BCLRB No. B210/1999), 72 C.L.R.B.R. (2d) 17 ("*Coca-Cola*"). In that case the Board held that the assessment of whether work is "an integral and substantial part of the employer's operation" must be done from the perspective of the

significance of the work to the employer's undertaking as a whole, and not simply the location where the challenged picketing is taking place.

17

In *Coca-Cola* the employer manufactured product and delivered it to approximately 2,500 customers at about 3000 sites using 75 trucks. During a legal lockout the employer began to use management staff to deliver its product to its customers. The locked out union picketed at one of the employer's largest customers while management staff were delivering product there. The original panel held that the third Section 65(3) criterion had not been met because the delivery to one customer location out of the total complement of 2,500 customers was not substantial within the context of Coca-Cola's operations as a whole. The reconsideration panel concluded that the original panel had erred in this regard:

We consider the original panel used too narrow an approach when defining the nature of Coca-Cola's operation. It first identified the employer's operation as the "business of bottling and transporting Coke to its customers" (at para. 30). However, it proceeded later in its analysis to minimize the significance of the unloading function in the delivery process even though the driver was present throughout. It excluded the unloading of the product by the customers' staff from the transportation aspect of the employer's business.

The test of "integral and substantial" should not be assessed by looking at a single delivery to one customer location or even one customer alone or by looking at the particular task in isolation. As the panel observed in *Ocean Fisheries Ltd.*, IRC No. C167/89, the inquiry should not be into whether the work is an integral and substantial part of an individual employee's duties. The Board in that case questioned the utility of drawing lines of demarcation between various duties performed at different locations, and instead characterized the delivery in that case as the culmination of the "employment process" (at p. 11). We find that analysis to be persuasive. Applying that approach in this case, we consider that unloading is the culmination of the delivery process. On the facts of this case, the delivery process as a whole is an integral part of Coca-Cola's transportation of its product.

As well as focussing on the particular task done at the location, the original panel made its assessment of whether the work was "substantial" by referring to the total number of customers served by Coca-Cola. It stated that the "delivery to one customer out of 2,500 customers is not substantial within the context of the Employer's operation as a whole" (at para. 32). We conclude that the original panel erred in focussing on the particular work performed at a site of a single customer. That analysis is not consistent with the language of the provision which expressly directs that the assessment of integral and substantial be done in relation to the employer's operation. The original panel should have

assessed the significance of delivery of the product generally, rather than the significance of delivery to the particular customer, or customer location. (paras. 46-48)

18 Although the Employer argued that ditching at a particular location on the Old Salmo Road was not an integral and substantial part of the Employer's operation it did not establish or even argue that ditching is not an integral and substantial part of highway maintenance. Ditching is one of the services that the Employer sought successfully to have the Board declare an essential service: *Emcon Services Inc.*, BCLRB No. B126/2007, para. 1.

19 The fourth Section 65(3) criterion is that the site or place of the picketing be "a site or place of a lawful strike or lockout". The Board discussed this criterion in *Coca-Cola*:

In our view, the fourth criterion of a "site or place of lawful strike or lockout" is designed to establish a "but for" test; i.e., but for the strike or lockout, employees would be working there. That interpretation is consistent with the approach in *Slade & Stewart No. 1* where the reconsideration panel interpreting equivalent language observed that the employees had "ceased to perform work [at that site] because of a lockout" (at p. 13). The "but for" test was also used in *District of Sparwood*, BCLRB No. B282/84, (1985), 7 CLRBR (NS) 106, where the Board allowed picketing at one location as it was "an area at which, but for the strike, members of the union would work *from time to time*" (at p. 9). (para. 59, emphasis added).

20 In *Slade & Stewart Ltd.*, BCLRB No. 317/84, (1984) 7 CLRBR (NS) 258 ("*Slade & Stewart No. 1*") the Board had also stated that:

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

21 As the Board in *Coca-Cola* noted, after *Slade & Stewart No. 1*, what is now Section 65(3) of the Code was amended and an "integral and substantial" element was introduced. However, as noted above, what must be integral and substantial for picketing at a particular location to fall within Section 65(3) is work assessed relative to the "employer's operation", not relative to that location.

22 Before concluding I want to emphasize what I have *not* decided. I have not decided whether the Union's right to picket should not be restricted under S. 65(7) of the Code. In this regard I adopt the following comments of the Board in *Coca-Cola*:

...we also emphasize that we are considering the issue of entitlement to picket at the Section 65(3) stage without regard to the potential for regulation of that picketing through Section 65(7). Under that provision, the impact on potential third parties can be addressed by offering relief where there is common site picketing.

We preface our analysis of Section 65(3) by making the obvious observation that any right to picket that may exist under that provision may be restricted through common site picketing relief. Although there may be a right to picket at the definition stage of Section 65(3), the exercise of that right may be diluted at the regulation stage if third party interests are affected. Upon application, the Board will regulate the exertion of any secondary pressure on uninvolved third parties at a common site under Section 65(7). At that stage the Board attempts to weigh the competing rights of the striking or locked out employees to picket against the rights of third parties to be protected from the effects of a labour dispute. Under the interpretive and policy framework governing common site applications set out in *Sovereign General Insurance Co.*, BCLRB No. B451/94 (Leave for Reconsideration of BCLRB No. 275/94), (1995), 25 CLRBR (2d) 161), the Board may reconcile the competing interests by imposing geographical, temporal or functional limitations, such as conditions imposed on the location of pickets, the timing when pickets may be present and restrictions on the type of work performed. (paras. 36-7)

23 A determination of whether the Union's right to picket Summit should be restricted under S. 65 (7) must await an application on that Section.

#### IV. CONCLUSION

24 For the reasons given above I find that the Employer has not established that the picketing of Summit on the Old Salmo Road on July 17, 2007 did not meet one or more of the four Section 65(3) criteria. Accordingly, its application is dismissed.

LABOUR RELATIONS BOARD

"G.J. MULLALY"

G.J. MULLALY  
VICE-CHAIR

