

BRITISH COLUMBIA LABOUR RELATIONS BOARD

VIATEK COMMUNICATIONS INC.

(the "Employer" or "Viatek")

-and-

LOCAL 213 OF THE INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

(the "Union")

PANEL: Allison Matacheskie, Vice-Chair and
Registrar

APPEARANCES: Gavin Marshall and Michael Kilgallin, for
the Employer
Patrick Dickie and Emily Luther, for the
Union

CASE NO.: 61607

DATE OF HEARING: January 11, 2011

DATE OF DECISION: January 12, 2011

DATE OF REASONS: January 14, 2011

REASONS FOR THE BOARD'S DECISION

I. **NATURE OF APPLICATION**

1 The Employer applies for a declaration that the Union is engaged in an illegal
strike and various orders, including an order that employees return to work and the
Union return to the bargaining table.

2 On January 12, 2011, I issued a bottom line decision dismissing the Employer's
application. These are my reasons.

II. **FACTS**

3 On May 28, 2004, the Employer and the Union signed a letter of understanding
("LOU 2004"). LOU 2004 has the following four terms:

1. Both parties covenant and agree to abide by all of the terms and conditions of the Standard Cablevision Agreement, as attached and any successor agreement designated by the Union.
2. The Employer agrees to recognize the various jurisdictions classified by the Constitution of the I.B.E.W. in the performance of all electrical work performed within the territorial jurisdiction of Local Union 213, I.B.E.W.

The Employer further agrees to employ thereon only members in good standing in Local Union 213, I.B.E.W. who are in possession of a clearance from the Union office to perform such work in strict accordance with specific provisions of the said Constitution governing classification of workmen.
3. This Letter of Understanding shall continue in full force from year to year thereafter until either party gives notice in writing to the other party of its intent to cancel the said Letter of Understanding.
4. Notwithstanding 3 above, the Union may at any time, by notice in writing to the Employer, cancel the terms of this Letter of Understanding.

4 On December 5, 2005, the Union, the Employer and nine other companies entered into the 2005 - 2010 renewal Standard Cablevision Agreement (the "Standard Agreement"). LOU 2004 was not attached to the renewed agreement. The continuation clause states as follows:

C. NEW AGREEMENT

- (a) Either party to this Agreement may, not more than three months prior to the 9th day of August, 2010, or any subsequent anniversary of that date, present to the other party, in writing, notice of intent to commence collective bargaining for the purpose of renewing or revising the Agreement or entering into a new Agreement.
- (b) During the period when collective bargaining negotiations are being conducted between the parties to amend this Agreement, the present Agreement shall continue in full force and effect until:
 - (i) the Union commences a lawful strike; or
 - (ii) the Company commences a lawful lockout; or
 - (iii) the parties enter into a new or amended agreement.

5 The Union, the Employer and other employers who are parties to the Standard Agreement commenced collective bargaining at the same table in July 2010 and bargaining continues as of the date of this application.

6 On Friday, January 7, 2011, the Union wrote to the Employer and informed the Employer that the Union was cancelling the terms of LOU 2004 effective immediately. The Employer had no recollection of signing LOU 2004 and requested a copy. They later obtained a copy of LOU 2004 from an employee. At the hearing, the Employer did not dispute that a representative of the Employer signed LOU 2004.

7 Later that day, counsel for the Employer wrote the Union stating its position that the withdrawal of the services of its members would constitute an illegal strike.

8 On Monday, January 10, 2011, at 8:00 a.m., the Union attended outside the workplace and informed employees Viatek was now a non-union company and that employees could continue to work for the Employer as a non-union company, not covered by the Standard Agreement. The Union told the employees if they did any work for Shaw Cable, under its collective agreement, Shaw Cable was required to contract out to unionized subcontractors, and, the employees could be charged under the Union's constitution. The employees did not report to work, and as of the date of this hearing, continued not to report to work. Almost all of the work performed by the Employer is for Shaw Cable.

9 On January 10, 2011, counsel for the Employer wrote to the Union restating its position. The Union maintained that it had the right to cancel the collective bargaining relationship. The Employer then filed this application.

10 At the hearing, the Employer claimed that the Union was taking this action to justify a refusal to continue to bargain with the Employer and to exclude the Employer

from the bargaining table. The Union claimed it did not take this action because of collective bargaining. It claims it has had a number of problems dealing with the Employer concerning issues such as sick leave benefits, overtime payment, and not using time cards. It also says it has been unsuccessful at resolving these problems and there is hostility by the Employer towards the Union and its members. The Employer disputes all of these allegations made by the Union.

11 This application was brought under Part 5 of the Code and the hearing commenced at 4:00 p.m. on January 11, 2011. An evidentiary hearing would be required to determine these disputed facts and would significantly delay the proceedings. The parties elected to proceed without calling evidence and therefore I do not place any reliance on the Union's assertions concerning its motivation for purporting to cancel the collective bargaining relationship. The objective fact that the Union took this action in the midst of collective bargaining is considered in the analysis below.

11 III. SUBMISSIONS

12 The Employer submits that if the parties intended LOU 2004 to continue once the Standard Agreement was renewed in 2005, it would have been incorporated into and attached to the Standard Agreement as every other letter of understanding signed off by the parties has been. It says this is fatal to the Union's assertion that LOU 2004 continues to bind the parties. LOU 2004 is clearly titled and marked as a letter of understanding. The Employer says, as it was not attached to the Standard Agreement, it has expired and does not form part of the bargaining relationship between the parties. The Employer says the Board should give no weight or value to it as the only binding document concerning the parties is the Standard Agreement.

13 The Employer submits the Standard Agreement has a continuation clause which binds the Union and, therefore, it cannot purport to cancel the collective bargaining relationship simply by giving notice.

14 The Employer submits that if the Board does not accept that LOU 2004 is no longer in effect, it should give LOU 2004 no weight as it is inconsistent with the continuation clause in the Standard Agreement. It says if LOU 2004 does somehow form part of the renewed Standard Agreement, it has to be read consistent with what the parties agreed to in that Standard Agreement. It says, to the extent that LOU 2004 is inconsistent with any terms of the Standard Agreement, the Standard Agreement must prevail.

15 The Employer also relies on Article 25 of the Standard Agreement which states that:

Except for the provisions of applicable legislation, this Agreement represents all the terms and conditions which govern the relations between the Union, the Company and those employees of the Company to whom this Agreement applies. No other or further terms and conditions, express or implied are applicable, except where, and to the extent of, further mutual agreements which are committed to writing by the parties and expressly appended to this agreement.

16 It says Article 25 supports its argument that LOU 2004 does not bind the parties
because the LOU 2004 is not appended to the Standard Agreement.

17 It also says LOU 2004 cannot be part of the Standard Agreement as it does not
comply with Section 50 of the *Labour Relations Code* (the "Code").

18 In support of its argument, the Employer also relies on *Armeco Construction Ltd.*,
BCLRB No. B270/84 ("*Armeco*"). It says the parties in *Armeco* had a very similar
continuation clause to the one in the Standard Agreement and the Board clearly stated
that parties cannot simply give notice and walk away from a collective agreement. The
Employer says, in *Armeco*, the Board rejected the Employer's argument that by
terminating the collective agreement, it also terminated the voluntary recognition
relationship. It submits that under Sections 46 and 47 of the Code, the parties are
required to bargain to renew collective agreements and this applies to voluntary
recognition relationships as well as parties to certifications.

19 The Employer also submits that the Union's actions are in violation of Section
45(2) of the Code as once notice to bargain is given, the terms and conditions of
employment must not be altered: *Flint Energy Services Ltd.*, [2006] 123 CLRBR (2d)
231.

20 The Employer argues that even if I accept the Union's argument that LOU 2004
is the foundational document, it is still subject to the provisions of the Code. The
Employer says parties cannot simply give notice and extinguish a bargaining
relationship. The Employer submits that 2004 LOU runs contrary to the express
provisions of the Code. More specifically, under Section 49(5) of the Code, if there is
any conflict between a provision of the collective agreement and the Code, the Code
prevails.

21 The Employer submits the Code has a process under Section 57 by which the
Union can withdraw the services of its members. The Employer says the Union's
actions in this case are in breach of Section 57. The Employer says the Code also has
a process by which a Union can expressly abandon its bargaining rights. In this case,
the Union has not applied under Sections 33(11) or 142 and therefore, by purporting to
abandon its bargaining rights, its actions are not in compliance with the Code.

22 The Employer submits that the process a Union must follow in order to abandon
its bargaining rights is set out in *Cimco Refrigeration, A Division of Toromont Industries
Ltd.*, BCLRB No. B250/95 ("*Cimco*") and *Mainland Labour Contracting Ltd.* BCLRB No,
B113/2009, 166 CLRBR (2d) 55 ("*Mainland Labour Contracting*"). Namely, that the
Union has to apply to the Board and notify the employees. Then, when deciding
whether to grant the application, the Board will ensure that there is no violation of any
unfair labour practice provisions, including bad faith bargaining, the duty of fair
representation provisions and any principles expressed or implied in the Code. Further,
the Employer submits that long service employees of Viatek have lost their company
seniority. They may have been assigned work with other companies through the Union,
but would be at the bottom of the seniority list with the other company. The Employer
submits that the Board must consider whether the Union has complied with Section 12
of the Code.

23 The Employer submits that to allow the Union to purport to cancel the collective bargaining relationship would allow it to circumvent the entire policy of the Code with respect to the withdrawal of services. It says the parties are in bargaining and this is an illegal strike contrary to Section 57.

24 The Union submits that there have always been two separate ways to obtain bargaining rights in British Columbia, a certification or a voluntary recognition. It says, in the construction industry more so than any other industry, the parties make wide use of voluntary recognition agreements rather than certifications. It says the two methods to obtain bargaining rights are fundamentally different. One involves the Board at the point of creation and the other is an exercise of private ordering through a freely negotiated voluntary recognition agreement. The Board has long recognized both as valid ways of obtaining bargaining rights and fundamentally different in nature.

25 It says the Board has the authority to scrutinize the product, i.e. the collective agreement. However, a voluntary recognition does not equate to a collective agreement. It may bind the parties to a collective agreement. However, it is more akin to a certification as it is where the entire relationship rests.

26 In *British Columbia and Yukon Territory Building and Construction Trades Council v. British Columbia (Industrial Relations Council)* (1988), 27 B.C.L.R. (2d) 164, [1988] B.C.J. No. 852 (aff'd: *British Columbia and Yukon Territory Building and Construction Trades Council v. Cairns Electric Ltd.* (1989), 39 B.C.L.R. (2d) 248, [1989] B.C.J. No. 1578) ("*Cairns Electric Ltd.*"), the Supreme Court of British Columbia found the Board could not apply the decertification provisions of the Code to a voluntary recognition because the Board did not have the jurisdiction. Section 34 is a legislative response to this court decision and expressly says that the provisions of Section 33 apply to voluntary recognition agreements.

27 The Union disagrees with the Employer's position that an application under Section 33 is the only way that a union can end its bargaining relationship with an employer. It also says that Section 142 does not apply as it is solely for the purpose of varying a certification. The Union says a voluntary recognition can also be ended under conditions agreed to by the parties.

28 The Union submits that the language agreed upon in LOU 2004 is very clear. It provides the Union with an unrestricted and unfettered right to cancel the voluntary recognition. It says LOU 2004 it is not an ancillary document that needs to be appended to or is supplemental to the Standard Agreement. The Union submits that LOU 2004 is the equivalent of a certification in that it is where the bargaining relationship originates. The parties agreed the bargaining relationship can be cancelled on certain terms. It says the fact that the Union has the right to cancel at any time may seem like a harsh agreement, but if the Employer did not like it, it did not have to sign it. Voluntary recognition must be by agreement. The Union says this is consistent with Section 2 and other first principles of the Code. The parties have the freedom to define their own relationship. It says the Board encourages parties to exercise self government as much as possible. LOU 2004 is an agreement of the parties and "a deal is a deal".

29 The Union says the Board does not have free standing jurisdiction over voluntary recognitions like certifications, the scope of Board jurisdiction has been expanded with Section 34 but has not changed the fundamental premise. It submits that if the Board ignores the voluntary recognition agreement and treats it as if it does not exist just because a collective agreement was entered into, then the advantage of entering into voluntary recognition agreements is lost. It is clear here that the parties agreed on express ways to end the relationship. They agreed on the Standard Agreement in force at the time applying and contemplated a series of agreements applying. They also agreed, at the same time, on the ability of the Union to cancel the voluntary recognition at anytime. The Board has no jurisdiction to stop this unless it is contrary to the Code. It says the ability to cancel a voluntary recognition is not contrary to the Code. It says it is not an illegal strike as there is no strike here. It is no longer collective bargaining. The Union has walked away from the relationship.

30 The Union says LOU 2004 is not inconsistent with the Standard Agreement continuation clause as it says "during the period when collective bargaining negotiations are being conducted between the parties to amend this Agreement, the present Agreement shall continue in full force and effect until: (i) the Union commences a lawful strike, or (ii) the Company commences a lawful lockout; or (iii) the parties enter into a new or amended agreement". It says the parties are no longer in a period when collective bargaining negotiations are being conducted. It says that period ended when the Union exercised its rights under LOU 2004 and ended the voluntary recognition agreement.

31 The Union submits that the Board has limited jurisdiction over voluntary recognition relationships: *McDonald & Ross Construction Ltd.*, BCLRB No. B228/2007, 149 C.L.R.B.R. (2d) 123 (application for reconsideration dismissed: BCLRB No. B27/2008, 153 C.L.R.B.R. (2d) 239; judicial review petition dismissed: *McDonald v. United Assn. Of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 170*, 2008 BCSC 1212) ("*McDonald & Ross*"). The Union relies on *Sodexo MS Canada Ltd.*, BCLRB No. 35/2009, 177 CLRBR (2d) 279 ("*Sodexo*"), where the Board found that, under its limited jurisdiction, it could not grant a partial decertification under Section 142 for a bargaining unit created by a voluntary recognition agreement.

32 The Union agrees that a union can come to the Board to apply to revoke its bargaining rights created by a voluntary recognition agreement. However, in cases like *Cimco*, the union had to come to the Board because it did not have the clear language found in LOU 2004, which allowed them to cancel the relationship at any time.

33 The Union says LOU 2004 is not contrary to any provision or principle under the Code. Concerning the duty of fair representation, it says it is not for the Employer to say employee rights should be considered. It also says there are all kinds of applications and proceedings at the Board where employees are affected but are not consulted by the Board. The Union says it has not violated Section 57 or any other provision of the Code as it has not engaged in a strike. It has simply ended its voluntary recognition agreement as it is entitled to do under LOU 2004.

IV. ANALYSIS AND DECISION

34 The issue in this case is whether the Union can invoke the provision in LOU 2004 which states that it can "...at any time, by notice in writing to the Employer, cancel the terms of this Letter of Understanding". If it can, it is not engaged in an illegal strike. Instead, it has ended the voluntary recognition relationship established by LOU 2004 and there is no continuing collective bargaining relationship between the Union and the Employer.

35 Voluntary recognition relationships can be created in a variety of ways including, by a letter of understanding. I accept the Union's argument that unions and employers are able to define the conditions on which their voluntary recognition relationship can be created and ended. For example, this is reflected in the common practice in the construction industry of entering into project agreements where a union is voluntarily recognized by an employer for a specific construction project and the parties expressly agree that the relationship ends with the completion of the project. In those circumstances, the parties generally agree to abide by a union's standard collective agreement. In the circumstances where an employer continues to operate on another project that was not the subject of the project agreement, the union does not have a continuing relationship with the employer whether or not a renewal standard agreement was entered into during the term of the project. The voluntary recognition relationship is terminated under the agreed terms set out by the parties in the project agreement.

36 LOU 2004 is clear on its face. It establishes the Employer's agreement to voluntarily recognize the Union. It sets out the parties' agreement to abide by the terms of the Standard Agreement and successor agreements designated by the Union. It also sets out, as a term of the voluntary recognition agreement, that LOU 2004 can be cancelled by the Employer or the Union upon written notice of the intention to cancel from year to year, or it can be cancelled by the Union in writing at any time. I find LOU 2004 is a foundational agreement between the parties which establishes their collective bargaining relationship. It is separate from the Standard Agreement. It is not the typical sort of letter of understanding which adds to or varies specific terms set out in the collective agreement as required by Article 25 of the Standard Agreement. I find that, like a project agreement, LOU 2004 continues to exist and need not be attached to the renewal Standard Agreement.

37 Turning to the Employer's alternative arguments, it primarily argues that the Union cannot simply give notice to extinguish bargaining rights despite the existence of point 4 in LOU 2004. It says this is inconsistent with provisions in the Standard Agreement, sections of the Code and principles of the Code.

38 The Employer argues that to the extent that LOU 2004 is inconsistent with the terms of the Standard Agreement, the Standard Agreement must prevail. In particular, the Employer says the continuation clause in the Standard Agreement prevails. As I have dismissed the Employer's primary argument that LOU 2004 no longer exists, I do not accept the assertion that the continuation clause prevails over the language in points 3 and 4 of the LOU 2004 concerning the manner in which the voluntary recognition relationship can be cancelled. I also find that Article 25 in the Standard Agreement does not render LOU 2004 void as LOU 2004 relates to the foundation of

the voluntary recognition relationship. If the Union invokes point 4 of LOU 2004, it is cancelling the terms of LOU 2004 which includes point 1 where the parties agree to abide by all the terms of the Standard Agreement.

39 I accept that voluntary recognition relationships are fundamentally different than relationships flowing from a certification obtained through the Board's statutory processes. In *British Columbia and Yukon Territory Building and Construction Trades Council v. Cairns Electric Ltd.* (1989), 39 B.C.L.R. (2d) 248, [1989] B.C.J. No. 1578, the court upheld the decision of the Supreme Court of British Columbia which found that the Board could scrutinize the product of voluntary bargaining, the collective agreement, but its authority did not extend to regulation of the voluntary recognition relationship. In response to that case, the legislature enacted Section 34 of the Code which made Section 33 of the Code applicable to voluntary recognition agreements, thus giving express jurisdiction to the Board to determine whether bargaining rights flowing from voluntary recognition agreements should be cancelled.

40 The Board's jurisdiction concerning regulation of the voluntary recognition relationships is limited: *McDonald & Ross* and *Sodexo*. In *McDonald & Ross*, at para. 16, the Board stated:

Voluntary recognition differs from certification in several key respects. Voluntary recognition originates outside of the Board's jurisdiction. It is born out of the parties' agreement as opposed to statutory compulsion. A voluntary recognition agreement establishes terms of employment like a collective agreement negotiated between an employer and a certified union. Under a voluntary recognition agreement, the parties exercise the freedom to define the boundaries of the bargaining unit, without the Board's scrutiny. It is precisely that freedom to define the bargaining relationship that is considered a principle advantage of voluntary recognition over certification: *Delta Hospital*, p.367.

41 In this case the parties have defined the terms upon which the bargaining relationship will commence and can be terminated. I accept the Union's argument that if the Board finds that LOU 2004 is void or unenforceable simply because it has a term agreeing to abide by the Standard Agreement, with a continuation clause, then one of the principle advantages of the voluntary recognition agreement would be lost. Namely, it would be unable to end the voluntary recognition relationship without meeting the requirements to cancel a certification issued by the Board.

42 The provision in LOU 2004 at issue in this case appears to be unique. There were no cases presented by the parties that dealt with a voluntary recognition agreement providing an express term that it could be cancelled at any time with notice. However, the fact that it is unique does not mean that it is contrary to the principles of the Code or specific sections of the Code.

43 There are provisions in the Code which govern the termination or revocation of bargaining rights. However, even though bargaining rights established under a voluntary recognition agreement can be revoked under Section 33, this does not lead me to conclude that it is the only manner in which they may be terminated. As noted above, project agreements can be terminated by agreement of the parties at the end of

the particular project, even though the standard collective agreement that the parties agreed to be bound by during the project continues. An application is not made to the Board to specifically approve the end of a project agreement.

44 In *Cimco*, at para. 50, the Board stated:

Under Section 33(11) a union can apply to abandon its bargaining rights on the basis of express renunciation. The Board retains a discretion in dealing with that application. In exercising that discretion the Board will take into account whether the actions of the union constitute a breach of its duty to bargain in good faith with the employer or would they constitute a breach under Section 12 of the Code. In addition, the Board will take into account whether the application would circumvent any other provisions or policies of the Code. The existence of a collective agreement is a factor to be considered but does not per se preclude an application for abandonment.

45 However, in *Cimco*, the Board was setting out general principles to provide guidance to parties applying to revoke bargaining rights under Section 33(11) of the Code and therefore did not have to deal with the argument that the parties to the voluntary recognition agreement had expressly agreed on the conditions upon which the relationship could be cancelled. I am therefore not persuaded by the general principles in *Cimco*, or the test set out by the original panel in *Mainland Labour Contracting* that the Union in this case, which is bound by a voluntary recognition agreement, must apply to the Board to cancel its bargaining rights when it is relying on an express written term agreed to by the parties.

46 Accordingly, I do not accept the Employer's argument that the employees need to be notified of this application. In this case, as in all cases where the Board scrutinizes a voluntary recognition agreement, the issue has arisen in the context of another application under the Code. In *McDonald & Ross*, the Board stated:

The Board only reviews voluntary recognitions when they arise in the context of a Code proceeding. For example, a union may apply to convert a voluntary recognition into a certification under Section 18(4). Sometimes, a collective agreement under a voluntary recognition is raised as a bar to an application for certification. (para. 18)

47 In this case, the Code proceeding is the Employer's application under Part 5 of the Code alleging that the Union is engaged in an illegal strike. The Union relies on the provision in LOU 2004 that states that it can cancel at any time as an answer to the Employer's assertion that it is engaged in an illegal strike. This is the reason the Board is now reviewing the voluntary recognition.

48 In order to determine that the Union can rely on the provision in LOU 2004, it must be found to be consistent with Code principles and not in violation of any provision of the Code.

49 I do not find that point 4 in LOU 2004 is contrary to the Union's duty of fair representation to its members or its duty to bargain in good faith on the facts in this

case. LOU 2004 establishes the commencement and cancellation of the voluntary collective bargaining relationship between the parties. The fact that the Union has exercised its right under LOU 2004 to end the relationship does not, in and of itself, persuade me that the Board should inquire into whether there are any concerns relating to the Union's representation of its members. Concerning the duty to bargain in good faith, I accept the Union's argument that it has no obligation to return to the bargaining table as it has ended the bargaining relationship. The Employer asserts in its complaint that the timing of the Union's conduct is intended to justify a refusal to continue to bargain with the Employer. The Union agrees that it refuses to bargain with the Employer. The Employer does not assert that the Union is taking this action to pressure the Employer to agree to any proposals made at the bargaining table. As I have found LOU 2004 entitles the Union to cancel the voluntary recognition relationship, the fact that this occurred during bargaining does not persuade me, in and of itself, it is a violation of the duty to bargain in good faith.

50 The Employer relies on *Armeco* for the principle that the parties are required by the Code to bargain to renew collective agreements. I accept the Employer's argument that the continuation clause in *Armeco* is similar to the continuation clause in the Standard Agreement. However, the distinguishing fact is that the parties in *Armeco* did not have a separate voluntary recognition agreement which established the relationship and expressly stated that the Union could at any time, by notice in writing to the Employer, cancel the voluntary recognition agreement.

51 The language in point 4 of the LOU 2004 is clear. LOU 2004 does not form part of the Standard Agreement. It exists as the foundation agreement creating the collective bargaining relationship between the Employer and the Union and includes terms under which it can be cancelled. It was agreed to by the parties and is binding on them.

52 In conclusion, I find that the Union is not engaged in an illegal strike. It has ended the collective bargaining relationship with the Employer by invoking its right to cancel LOU 2004.

53 The application is dismissed.

LABOUR RELATIONS BOARD

"ALLISON MATACHESKIE"

ALLISON MATACHESKIE
VICE-CHAIR AND REGISTRAR