

BRITISH COLUMBIA LABOUR RELATIONS BOARD

CERTAIN EMPLOYEES OF KALAWSKY PONTIAC BUICK
GMC (1989) LTD. (now known as KALAWSKY
CHEVROLET BUICK GMC (1989) LTD.)

("Certain Employees")

-and-

KALAWSKY PONTIAC BUICK GMC (1989) LTD. (now
known as KALAWSKY CHEVROLET BUICK GMC (1989)
LTD.)

(the "Employer" or the "Company")

-and-

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION, LOCAL 1518

(the "Union")

PANEL:	Leah Terai, Vice-Chair
APPEARANCES:	Certain Employees, for themselves J. Najeeb Hassan, for the Employer Brett Matthews, for the Union
CASE NO.:	65960
DATE OF DECISION:	October 21, 2013

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 Certain Employees apply under Section 142 of the *Labour Relations Code* (the "Code") to delete employees located at 1700 Columbia Avenue, Castlegar, BC from the bargaining unit.

II. BACKGROUND

2 On July 17, 1998, the Board certified the Union as the bargaining agent for employees in a unit composed of "employees at 1700 Columbia Avenue, Castlegar, BC, except office staff and employees employed as car sales persons". The Employer operates a motor vehicle dealership (the "Dealership") at 1700 Columbia Avenue.

3 In or about early 2008, the Employer purchased T & T Auto Body Ltd. located at 2308 6th Avenue, Castlegar and began operating Kalawsky Collision Centre Ltd. (the "Body Shop"). The Employer agreed to recognize the Union at the Body Shop through a voluntary common employer agreement. Since 2008, both the Body Shop and the Dealership have been governed by one Collective Agreement and the certification.

4 The bargaining unit is made up of employees who work at two separate locations, the Dealership and the Body Shop. The Union says there are four employees who work at the Body Shop; the Employer says there are five. There is no dispute there are 13 employees who work at the Dealership. However, the Employer says one individual has been off work on long-term disability for three years and does not have a sufficient continuing interest in the bargaining unit. The Union's position is that this individual continues to be an employee and disagrees he does not have a sufficient continuing interest.

5 The Dealership is approximately a three-minute drive from the Body Shop. When the Body Shop opened in 2008, three employees moved from the Dealership to work at the Body Shop. The Union says there is a fourth Body Shop employee who is a car wash/lot person who performs the same job as the car wash/lot person employed at the Dealership. Certain Employees and the Employer say this individual is an apprentice at the Body Shop whose duties currently include car and shop clean up whereas the car wash/lot position at the Dealership does not involve an apprenticeship.

6 There are three separate trades with the Employer, each with a training and apprenticeship program. The Auto Body Technicians and Auto Body Painter work only at the Body Shop. Automotive Technicians work only at the Dealership. The employees in the Body Shop trades do not work with the Dealership trades and there are no overlapping duties between them.

7 The Collective Agreement describes the following classifications at Article 5.05:

- I. Body Shop Journeyman
- II. Sr. Body Shop Journeyman
- III. Senior Parts Person
- IV. Journeyman Parts Person
- V. Service Advisor
- VI. Maintenance Technician
- VII. Journeyman Technicians
- VIII. Senior Journeyman Technicians
- IX. Detail Persons
- X. Car Wash/Lot Person; and
- XI. Lube Rack Attendant

8 Article 9.02 provides:

All employees shall be retained or recalled by reason of seniority, provided they are qualified and capable of immediately performing the work available.

9 Article 16.01 provides for procedures on recall:

- (a) Employees who are under notice of layoff or laid off shall be recalled to vacant positions in their former classifications before such positions are filled by new employees.
- (b) Laid-off Bargaining Unit employees who wish to be considered for vacancies in other than [sic] their own classification must so advise the General Manager.
- (c) Employees referred to in 16.01 (a), based on seniority, will be recalled if they have the sufficient qualifications and the ability to fill the job requirements and were members in good standing of the Union when laid off.
- (d) Employees laid off in accordance with the above provisions by the Employer shall be recalled to work in order of length of service with the Employer, provided:
 - (i) for employees with less than one (1) year of service, no more than six (6) months has elapsed since the last day worked by the employee;
 - (ii) for employees with one (1) year or more of service, no more than twelve (12) months has elapsed since the last day worked by the employee.

If an employee, when contacted for proper and sufficient reason, is not immediately available to commence work, the next employee on the list can be hired temporarily. If the contacted employee

cannot report for work until three (3) working days later, he or she shall exchange their seniority with the next employee on the list who is immediately available for employment until he or she is recalled, at which time they shall resume their original seniority status. If they do not report in one (1) calendar week from the date of recall without proper or sufficient reason, they shall be dropped from the seniority list.

10 The Collective Agreement does not provide bumping rights.

11 The progression and advancement for employees such as Apprentice Body Shop Technician and Senior Body Shop Journeyman including a Body Shop Painter is within the Body Shop, not the Dealership. Body Shop Journeymen may advance to become Senior Body Shop Journeymen. The Apprentice may advance to become a Body Shop Journeyman, ultimately a Senior Body Shop Journeyman. Similarly, progression and advancement for Automotive Technicians working in the Dealership is within the Dealership. The Automotive Technicians who are Journeymen may advance to become a Senior Automotive Technician.

12 The Body Shop and Dealership have different hours of operation. The employees of the Body Shop and Dealership have different start and end times for their shifts. The Body Shop and Dealership are operated separately, each with its own management presence. Each has its own customer base. There is no employee interchange between the Body Shop and the Dealership. Management at the Body Shop does not assign or allocate work to employees at the Dealership or vice versa.

13 III. POSITIONS OF THE PARTIES

13 The Union objects to the application brought by Certain Employees. It submits there are presently 17 employees in the bargaining unit and the variance sought would exclude all but 4 employees from the certification. It submits there is no practical impediment to Certain Employees organizing a decertification in the ordinary manner under Section 33 of the Code.

14 The Union submits granting the application will cause harm to the four employees who would remain in the bargaining unit as well as to the collective bargaining relationship. The Union submits where the Board has found there is no practical impediment to a total decertification, the Board has required that those seeking to leave the unit do so pursuant to Section 33 rather than Section 142. It submits on the facts in the present case, there is no practical impediment to Certain Employees decertifying the unit as a whole. It submits the employees at the Body Shop are known to the employees at the Dealership as Castlegar is a small town and three Body Shop employees previously worked at the Dealership. It submits Certain Employees have access to the seniority list and the Body Shop is just a three-minute drive from the Dealership.

15 With respect to adverse consequences, the Union submits allowing the application would leave a bargaining unit of four employees. It says employees enjoy Company-wide seniority which may be exercised pursuant to Article 9.06 when jobs become vacant or when new classifications are created. Article 9.06 states the "senior employee applying who has the ability and qualifications to do the job shall receive such job".

16 The Union submits the Collective Agreement provides that employees who are laid off may choose to be recalled for vacancies in classifications other than their own and such recall would be in order of seniority provided they have sufficient qualifications and the ability to fill the job requirements and were members in good standing in the Union when laid off. The Union submits when the scope of the bargaining unit is reduced from 17 employees at 2 locations including multiple classifications to a unit of 4 employees, such a change will materially affect the value of the seniority and recall provisions it has referred to.

17 The Union submits the bargaining power associated with a 17-person bargaining unit encompassing several classifications across the Employer's operations is substantially greater than the bargaining power of a 4-person bargaining unit of Body Shop employees. It submits it would not be unreasonable to assume that the terms and conditions of employment of the Body Shop employees would suffer in the long term. The Union says if it were to engage in job action, it presently would be permitted to exert economic pressure by striking and picketing at both the Dealership and the Body Shop. Allowing the application to limit this action to the Body Shop would substantially affect the Union's ability to advance the interests of the four Body Shop employees.

18 The Union submits assuming that the majority of the Dealership employees wish to leave the unit and assuming that Certain Employees can establish that a unit of Body Shop employees alone is appropriate for collective bargaining, the Board must weigh the presumed wishes of the Dealership employees against the detrimental effects on the remaining employees and on the collective bargaining relationship. It submits the effect on both the Body Shop employees and the collective bargaining relationship would be substantial and in allowing the application, particularly when it is practically possible to decertify the unit as a whole, those effects outweigh the presumed wishes of the Dealership employees. Accordingly, it submits the Board ought to refuse to exercise its discretion and decline to vary the scope of the bargaining unit.

19 Certain Employees submit that the Body Shop and Dealership are independent businesses and have been operated as such. They submit they are not aware of all of the employees of the Body Shop as alleged by the Union and any knowledge is based on business interactions. Certain Employees emphasize that their application has shown that they wish to exercise their choice to remove the Union as their representative. With respect to the Union's submission of harm, Certain Employees submit due to the current economic situation and lack of skilled trades people in the Kootenay region, workers are able to negotiate significantly without the support of a union and many employers are paying top dollar and benefits. As such, they submit

collective bargaining for the remaining employees will not be significantly impacted by decertification of the Dealership.

20 The Employer submits the employees seeking to leave the bargaining unit represent a rational and defensible group and the remaining employees at the Body Shop will continue to be a unit appropriate for collective bargaining. It submits the application by Certain Employees will not affect the remaining bargaining unit and it would not be practically possible for the employees to decertify the entire bargaining unit.

21 With respect to the first step set out in *Certain Employees of White Spot Limited*, BCLRB No. B16/2001 (Leave for Reconsideration of BCLRB No. B440/99), 65 C.L.R.B.R. (2d) 161 ("*White Spot*") as to whether a rational and defensible line can be drawn around the group of employees seeking to leave the bargaining unit and whether the remaining employees would continue to be a unit appropriate for collective bargaining, the Employer submits the Union has not objected to the application on this basis. The Employer says it will nonetheless address this part of the *White Spot* test. It submits the application includes all of the employees in the bargaining unit at the Dealership. This is not a case where only some of the employees at the Dealership are included in the application. It says the fact that the bargaining unit is comprised of more than one work location also supports the application by Certain Employees (*White Spot* at para. 114). Furthermore, the Employer submits the Dealership employees do not work at all with the Body Shop employees or vice versa. There are no shared duties or overlapping responsibilities by any employees from the Dealership and the Body Shop. It submits the remaining bargaining unit is appropriate for collective bargaining and reviews the factors in *Island Medical Laboratories Ltd.*, BCLRB No. B308/93 (Leave for Reconsideration of IRC No. C217/92 and BCLRB No. B49/93), 19 C.L.R.B.R. (2d) 161 including similarity of skills, qualifications and working conditions of the employees in the Body Shop. It reviews its administrative structure noting there are two separate businesses which operate under different names those being "Kalawsky Chevrolet" and "Kalawsky Collision Centre". It says the employees are subject to layoff and recall by classification. The classifications at the Body Shop exist only at the Body Shop. The Employer notes there is a geographic separation between the Body Shop and the Dealership. It reviews the factor of functional integration and submits there is no functional integration whatsoever between the employees of the Body Shop and the employees of the Dealership and notes the types of work performed at the Dealership and the Body Shop are fundamentally different and require different skilled trades qualifications. It notes the Union organized an all-employee certification at the Dealership and it was only with the consent and assistance of the two companies that make up the common employer that the Union represents the Body Shop employees.

22 With respect to the second part of the *White Spot* test, the Employer submits there will be no impact on the Body Shop employees because they have nothing to do with Dealership employees. It says layoff under the Collective Agreement is based on seniority within a classification and the Body Shop and Dealership do not share classifications. Accordingly, it says the removal of Dealership employees from the bargaining unit will not result in reduced employment security for the Body Shop

employees. It says moreover, employees who are laid off have no bumping rights so removal of the Dealership employees will have no impact on the employment security of the Body Shop employees. It says there has never been a posting at the Dealership that has been filled by a Body Shop employee nor vice versa.

23 The Employer submits there is no potential, let alone real, impact on the collective bargaining relationship. The remaining unit is a separate business unit. There is an extreme shortage of auto body tradesmen and it is this shortage that will influence the economics of collective bargaining for those employees, not what might be happening at the Dealership. It submits even if one concludes that the partial decertification will have some impact on the remaining employees, that impact must be so significant as to outweigh the wishes of Certain Employees (*Certain Employees of British Columbia Automobile Association*, BCLRB No. B106/2011, 197 C.L.R.B.R. (2d) 227 at para. 53).

24 The Employer submits it is not practically possible for the Dealership employees to decertify the entire bargaining unit. It notes the Body Shop and Dealership are geographically separate and the Dealership service department and Body Shop have different hours of operation. It submits the Body Shop and Dealership employees generally do not know one another. It says only three of the four Body Shop employees who are known to the Dealership employees remain working for the Employer. It submits the two groups of employees have no reason to see one another during normal day-to-day operations, tool box meetings are held separately at each location and training opportunities are based on area of specialization. It submits it does not publish employee contact information and there is no internal Company email as between Dealership and Body Shop employees. It submits there has been more than a 50% turnover of employees in the bargaining unit in the past 5 years and the bargaining unit is not made up of a stable, long-service employee complement working at the same location with a great deal of employee interchange. It submits the Dealership employees do not know the Body Shop employees; they work at distinctly separate locations, performing different work, and it is not practically possible for the Dealership employees to decertify the entire bargaining unit.

25 In response, the Union says its objection rests entirely on the second stage of the *White Spot* analysis. It submits the Employer's submissions under part one of the *White Spot* test ought not to be considered by the Board. It submits its objection to the application is on the basis that Certain Employees should, if they no longer wish to be represented by the Union, organize a total decertification pursuant to Section 33 of the Code. It submits since Certain Employees face no practical impediment to total decertification, the Board ought not exercise its discretion to allow Certain Employees' application. It submits if Certain Employees no longer wish to be represented they should pursue a Section 33 decertification where the entire bargaining unit would have a say. It disputes the Employer's submissions as to why it would be practically impossible for Certain Employees to decertify the unit as a whole. The Union further submits the Employer does not address the Union's assertions with respect to the impact on the collective bargaining relationship and the remaining employees.

IV. ANALYSIS AND DECISION

26 The Board's policy concerning partial decertification is set out in *White Spot* and provides a two-stage analysis. First, the Board must be satisfied that a rational and defensible line can be drawn around the group leaving the unit and the group remaining is appropriate for collective bargaining. If that threshold is satisfied, the Board weighs the wishes of employees seeking the variance against the impact of granting the application, both on employees remaining in the unit and on the collective bargaining relationship as a whole. Additional factors include the timing and context of the application along with whether it is a practical impossibility to decertify the entire unit.

27 With respect to the threshold question, there is no dispute between the parties that a rational line can be drawn around the group leaving the unit, and the group remaining is appropriate for collective bargaining. The bargaining unit consists of approximately 17 employees at 2 workplaces. The workplaces were voluntarily recognized as a common employer. The Employer operates each location as a distinct business and there is no functional integration between the Body Shop and the Dealership. I am satisfied that the application meets the threshold question.

28 The second part of the *White Spot* analysis is to weigh the wishes of the employees seeking the variance against the impact of granting the application. This was described in *White Spot* as follows:

An application for partial decertification will almost invariably have an impact on the employees who would be left in the remaining bargaining unit. Opportunities for promotion, training, or career advancement, collective agreement seniority and other rights, and the ability to transfer to different work areas or locations, might all be affected. Depending on the circumstances, however, that impact may be great or small. The effect on the rights and interests of the remaining employees must be weighed against the wishes of the applicants for partial decertification. The effect must be real, as opposed to hypothetical. The focus of the inquiry is likely to be on the impact on collective agreement rights, but can include other interests, such as career advancement opportunities.
(para. 105)

29 The Union says the employees enjoy Company-wide seniority which may be exercised when jobs become vacant, when new classifications are created, or for recall to vacancies and classifications other than their own. The Union says if the scope of the bargaining unit is reduced from 17 employees at 2 locations including multiple classifications to a unit of 4 employees at one location, such a change will materially affect the value of the seniority and recall provisions. The Employer says there will be no impact on the four Body Shop employees because layoff is based on seniority in a classification and the Body Shop and Dealership do not share classifications. Further, employees who are laid off have no bumping rights so the removal of Dealership employees will have no impact on employment security for Body Shop employees.

30 With respect to the impact of the departure of the Dealership employees on the Body Shop employees remaining, I accept the Union's position that there will be adverse consequences on the ability or opportunity for a Body Shop employee to use seniority to apply for vacancies or newly created classifications or for the purpose of recall. While the Employer notes that layoff is based on seniority within a classification and the Body Shop and Dealership do not share classifications, that does not address the circumstances raised by the Union where an employee may seek to exercise seniority with respect to recall to a classification other than their own (subject to qualifications and/or ability as set out in the Collective Agreement). I accept this as a real, not hypothetical, impact on the Collective Agreement entitlements of the Body Shop employees. As was noted by the Board in *Certain Employees of White Spot Limited*, BCLRB No. B336/2001, 75 C.L.R.B.R. (2d) 1:

The only form of negative impact argued before us was the diminishment of the value of the transfer and recall rights set out in the Collective Agreement. The reference to a "real" effect does not preclude giving weight to loss of opportunity, particularly where the opportunity in question is derived by exercise of right enforceable under the Collective Agreement. This is so irrespective of whether the rights have been actually used in the past. For example, a partial decertification involving one of two sites may have a substantial effect on at least the recall and transfer rights of the remaining employees, even if no downsizing has actually occurred in the past. The right to transfer in the event of downsizing is "real" even though it is a right designed to provide protection in the event of a potential future occurrence. (para. 74)

31 With respect to the impact of granting the application on the collective bargaining relationship, the Board in *White Spot* stated:

In addition to the effect on the employees in the unit remaining, the Board will consider the destabilizing impact of a successful application on the union's collective bargaining relationship with the employer. Once again, a real and not a hypothetical impact on that relationship will be required to constitute a reason for precluding the application from proceeding. It is expected that any reduction in the size of the bargaining unit will have at least some impact on the union's bargaining strength, but this is not sufficient in itself to counterbalance the weight that should be given to employee choice on the issue of representation. Evidence of the effect, if any, that the threat of partial decertification by the applicant employees has had on the collective bargaining relationship may be helpful to determining the impact of the application. (para. 106)

32 As noted in the excerpt above, it is expected that any reduction in the size of the bargaining unit will have at least some impact on the union's bargaining strength. The Union submits the bargaining power associated with a 17-person bargaining unit with several classifications across 2 operations is greater than the bargaining power of a 4-

person bargaining unit of Body Shop employees. The Employer submits because the remaining unit is a separate business unit, there is no impact on the collective bargaining relationship. Certain Employees submit due to the current economic situation workers such as those who would remain at the Body Shop would not be impacted as there is a shortage of skilled trades people in the Kootenay region.

33 In this case, given the number of employees at the Dealership in relation to the four Body Shop employees who would remain, I conclude the bargaining power of the Union would be impacted. Although a line may be drawn between the Body Shop and Dealership operations and employees, I am persuaded that reducing the bargaining unit to one-fifth its present size would have a substantial impact on the Union's bargaining strength with respect to the remaining Body Shop employees. I agree with the Union's position that a shortage of trades persons will exist whether or not the application is granted and it does not address the question of harm to the collective bargaining relationship.

34 The Union's primary objection is that the application ought to have been made pursuant to Section 33 of the Code because it has not been established that there is no practical possibility for Certain Employees to decertify the unit as a whole. This factor was discussed in *White Spot*:

Another relevant consideration is the practical difficulty inherent in decertifying the unit as a whole. Where there is no practical possibility of decertifying the entire unit, for geographic or other reasons, the Board may be more inclined to allow partial decertification. Conversely, where the application is for decertification of a portion of a single integrated unit, and there appears to be a realistic possibility of decertifying the unit as a whole, this may be a factor which would make the Board less inclined to allow partial decertification. (para. 111)

35 Certain Employees say they are not aware of all of the employees of the Body Shop and to the extent they are aware, it is based on their business relationship. The Employer says the Dealership and Body Shop are geographically separate and are not within easy walking distance. It says the Dealership opens at 7:30 a.m. and closes at 5:30 p.m. during the week and the Body Shop opens at 8:00 a.m. and closes at 4:30 p.m. It says there are only four employees at the Dealership who worked with some of the Body Shop employees at the time they moved to the Body Shop and only three of them remain working for the Employer at the Body Shop. It submits the Dealership employees have no reason to see one another on a day-to-day basis and there is insufficient time for Dealership employees to travel to the Body Shop during break times even if the break times aligned. Further, the Employer submits there is no opportunity for the Dealership employees to meet with the Body Shop employees before or after their shifts. It says it does not provide contact information for its employees and there is no internal Company email system.

36 The Union says with even moderate diligence, Certain Employees could find contact information for the four employees at the Body Shop. It notes Castlegar is a town with a population of less than 8,000 people. It says the two locations are approximately 1,800 metres apart, a driving distance of 3 minutes. It submits the Employer's submissions regarding shift times or break times do not illustrate organizing to be a practical impossibility. In any event, the Union says neither the Employer nor Certain Employees have explained why it would be impossible for Certain Employees to meet Body Shop employees prior to the start of their shift.

37 Having reviewed the submissions of the parties on this factor, I am not persuaded that applying for decertification for the entire unit under Section 33 of the Code is not a practical possibility. In this case, there are four Body Shop employees, three who formerly worked at the Dealership and are known to some of the employees at the Dealership. The Body Shop is a three-minute drive from the Dealership. As was noted in *White Spot*, while the Board was changing its policy on partial decertification it did "not intend to change the policy from one which effectively precludes partial decertification to one which makes it readily available 'on demand'" (para. 80).

38 Allowing a partial decertification involves the exercise of the Board's discretion and represents an exception to the majoritarian principle governing the cancellation of bargaining rights under Section 33 of the Code. Weighing the factor of employee wishes against the impact on the employees remaining in the bargaining unit, the impact on the collective bargaining relationship, and considering whether decertification of the entire unit is a practical possibility, along with the Board's comments above, I decline to exercise my discretion to grant the application. In these circumstances, it is not necessary to decide whether the one individual at issue has a sufficient continuing interest.

V. CONCLUSION

39 For the reasons set out above, the application of Certain Employees under Section 142 of the Code is dismissed.

LABOUR RELATIONS BOARD

"LEAH TERAJ"

LEAH TERAJ
VICE-CHAIR