BRITISH COLUMBIA LABOUR RELATIONS BOARD

MAINROAD SOUTH ISLAND CONTRACTING LTD.

(the "Employer")

-and-

B.C. GOVERNMENT AND SERVICE EMPLOYEES' UNION

(the "Union")

PANEL:	Brent Mullin, Chair Philip Topalian, Vice-Chair Bruce R. Wilkins, Vice-Chair
APPEARANCES:	J. Najeeb Hassan, for the Employer Thomas F. Beasley, for the Ministry of Transportation Chris Buchanan, for the Union
CASE NO.:	56860
DATE OF DECISION:	February 28, 2008

DECISION OF THE BOARD

I. NATURE OF APPLICATIONS

1 The Employer applies under Section 141 of the *Labour Relations Code* (the "Code") for leave and reconsideration of BCLRB No. B192/2007 (the "Original Decision"), which dismissed the Employer's application for a declaration that the Union was only entitled to picket at the marshalling yards of the Employer. The Original Decision found the Union was also entitled to picket at the side of any road in the area in which the Employer has the contract to perform road maintenance services ("Service Area 1").

2 The Employer submits the Original Decision is inconsistent with Code principles. In particular, it submits that, in deciding whether roads in Service Area 1 were a site or place where Union members perform work, and therefore would be entitled to picket, the original panel erred by applying the wrong test. The Employer submits that the Original Decision applied a test of whether the employees *could* perform work at any road in Service Area 1, but for the strike, rather than a test of whether the employees *would* perform work. The Employer also submits it was denied a fair hearing because the evidence before the original panel did not support the conclusion that employees worked throughout Service Area 1 on all the roads and highways every day.

3 The Employer submits the matter is not moot because the labour dispute in the road maintenance industry has not entirely been settled. In the alternative, even if it is moot, the Employer submits that the Board should adjudicate its application because it raises important issues of law and policy concerning the scope of permissible picketing under the Code.

4 The Ministry of Transportation, which was not a party to this matter before the original panel, seeks to intervene in the Employer's application for reconsideration. It submits that it seeks intervenor status "in order to illustrate the disasterous [sic] affects that potentially flow from the Decision" and that the Ministry's "input is required in order for the Board to completely understand this dispute from the perspective of the government of British Columbia".

II. ANALYSIS AND DECISION

5 An application under Section 141 of the Code must meet the Board's established test before leave and reconsideration will be granted. An applicant must demonstrate a good, arguable case of sufficient merit that it may succeed on one of the established grounds for reconsideration: *Brinco Coal Mining Corporation*, BCLRB No. B74/93 (Leave for Reconsideration of BCLRB No. B6/93), 20 CLRBR (2d) 44 ("*Brinco*"). A *prima facie* case will not suffice; an applicant must raise a serious question as to the correctness of the Original Decision.

6 In *Brinco*, the Board noted that leave will rarely be granted where there is no practical utility to the appeal: that is, where the matter is moot because the underlying labour dispute has ended. However, as the Employer notes, the Board has exercised its discretion to reconsider where a matter raises an important issue of law and policy under the Code, notwithstanding that the underlying dispute may have ended. This is particularly the case with respect to the issue of the permissible scope of picketing, as this matter is often moot by the time leave for reconsideration is sought.

7 Accordingly, we would not necessarily decline to reconsider the Original Decision simply because the labour dispute has ended and the matter is therefore moot, if we were otherwise persuaded that leave for reconsideration should be granted. In order for leave to be granted, however, we must be persuaded that a serious question has been raised as to the correctness of the Original Decision.

8 The Employer submits that the Original Decision applied an incorrect test in determining that the roads in Service Area 1 were a site or place where the employees perform work, but for the strike. The Employer submits the Original Decision incorrectly applies a test of whether the employees *could* perform work at that site or location rather than whether the employees *would* perform work. The Employer further submits there was no evidence before the original panel which could properly lead it to conclude that employees would perform work on all the roadways throughout Service Area 1 every day, but for the strike.

9 In order to assess whether these arguments raise a serious question as to the correctness of the Original Decision, we begin with a review of that decision.

10 The Original Decision notes that the Employer provides highway maintenance services in Service Area 1 under a contract with the Ministry of Transportation (para. 2). The employees perform two types of work under the contract: “routine” road maintenance services and “quantified” road maintenance services (*ibid.*). The contract has a detailed schedule of maintenance specifications (“Schedule 21”) which sets out the routine and quantified maintenance work to be provided by the Employer (para. 3). Schedule 21 also sets out performance time frames for all the work to be performed under the contract (*ibid.*).

11 Under the maintenance specifications for patrolling in Schedule 21, all roads in Service Area 1 must be patrolled within the performance time frames (para. 13). There are marshalling yards where equipment is kept, and employees attend at the beginning of their shifts to obtain directions from the Employer. Under normal circumstances, employees spend approximately five minutes in the marshalling yard, and the rest of their time is spent out working on the roads in the service area (para. 14).

12 The Employer is obliged under its contract with the Ministry to provide road maintenance services for all the roads and highways in Service Area 1; no roads or portions of highway in the area are excluded (para. 30). Bargaining unit members can be called in to perform work on any road or highway in Service Area 1 (*ibid.*). The work that the bargaining unit employees perform on the roads is the same throughout Service

Area 1, and all the work on the roads is governed by the same specifications set out in Schedule 21 (para. 35).

13 Under the Employer's contract with the Ministry, the Employer must patrol all the roads and highways in the service area "on a regular basis to determine what work needs to be done to maintain the safe condition of the roads" (para. 38). Specific roads are patrolled in accordance with the specifications in Schedule 21, and the patrol may or may not result in further routine maintenance work being performed (*ibid.*). Routine maintenance work on the roads arises on an as-needed basis and includes such things as filling or patching pot holes when they reach a certain depth, cutting back roadside vegetation when it grows to a specific height, and removing debris spilt or left on the road (para. 37).

14 At the time of the Employer's application, the Union was engaged in a lawful strike subject to an essential services order issued by the Board (para. 4). The Employer continued to use a subcontractor, OK Industries Ltd. ("OK Industries"), during the strike to perform certain road paving services which was not bargaining unit work. The Union wished to picket at the side of the roads in Service Area 1 where employees of OK Industries were working. The Employer objected, and applied for a declaration that the Union's proposed picketing at the side of roads in Service Area 1 where OK Industries was to perform work was impermissible under the Code (paras. 7-9).

15 The Employer argued that the roads where OK Industries was to do paving work were not sites or places of work where the bargaining unit employees perform work, because the most that could be said about those locations is that they were sites or places where the employees *could* perform work, not where they *would* perform work, but for the strike (para. 18). The Employer also argued that any work the bargaining unit members could or would perform at the location where OK Industries was to perform its work is not an integral and substantial part of the Employer's operation within the meaning of Section 65(3) (para. 19).

16 In response, the Union argued that, given the nature of the Employer's business, every roadway in Service Area 1 is a site or place where bargaining unit members perform work (para. 24). With respect to the argument that any bargaining unit work that could or would be performed at the locations where OK Industries works was a negligible part of the Employer's operation, the Union argued that the test for whether work is integral and substantial is not based on the quantity of the work but its nature. The nature of that type of work is integral and substantial to the operations of the Employer because it is road maintenance work and the Employer is a road maintenance contractor (para. 25).

17 The Original Decision notes that the Union sought to picket at the road side, not on the road, and that the Union acknowledged "that it is not allowed to impede or obstruct traffic and says it has no intention to do so" (para. 26). The Union intended to picket on the side of the roads with signs indicating it is on strike against the Employer, arguing that the road side is a public place traditionally used for protest or picketing, and that it is a place where the public sees them working throughout the year (*ibid.*).

18 The Original Decision begins its analysis by noting that, at the hearing, the Employer withdrew its alternative application for common site relief from the proposed picketing, and therefore the only issue was whether the Union's proposed picketing at the road side was permissible picketing under Section 65(3) (para. 28).

19 The Original Decision then notes that there are four criteria for permissible picketing in Section 65(3): the picketing must be at a site or place where a bargaining unit member performs work; it must be work under the control or direction of the employer; the work must be an integral and substantial part of the employer's operation, and the site or place must be a "a site or place of the lawful strike or lockout" (para. 29).

20 With respect to the first criteria, the Original Decision notes the Employer's argument that work on the roads must be work that would be performed but for the strike, not work that could be performed (para. 31). It also notes the Employer's argument that the work that could be performed at the specific location where OK Industries is to perform paving work is such a small percentage of the Employer's entire operation as to be insignificant, but finds that this argument is not relevant to the first criteria (*ibid.*).

21 The Original Decision deals with the Employer's argument that the work at the specific location is insignificant in its analysis of the third criteria, and finds that the "integral and substantial part" criteria are met (see paras. 34-40). The Employer does not take issue with this aspect of the analysis in its application for leave and reconsideration. It focuses instead on the Original Decision's conclusion that the picketing was permissible because the "but for" test, relevant to both the first and fourth criteria, was met.

22 With respect to this argument, the Original Decision states:

> The Employer argues that I must find that but for the strike the employees "would" work at the location where the Union is picketing. It says the test is not but for the strike the employees "could" work at that location. The maintenance specifications require that all roads and highways be patrolled on a regular basis. I therefore find that but for the strike the employees would work on all the roads and highways in Service Area 1. However, even if the patrolling was not required, I would find that due to the responsive or reactionary nature of the Employer's business, it is sufficient for the purpose of the fourth criteria in Section 65(3) to find that but for the strike the employees could work at that location. During normal times, the employees are working throughout Service Area 1 on all the roads and highways every day. It would be artificial to require a determination of exactly where the employees would work when under normal circumstances the exact location on the roads where they perform work is always changing in response to conditions on the roads in Service Area 1. (para. 42)

23 We find the application for leave and reconsideration does not raise a serious question as to the correctness of the Original Decision. We find the Original Decision

concludes that the bargaining unit employees *would* work on all the roads and highways in Service Area 1, but for the strike. Thus, we find the correct test was applied. While the Employer argued (and continues to argue) that the issue is whether the bargaining unit employees *would* (as opposed to could) work at the specific locations within Service Area 1 where OK Industries was to do its work, we agree with the Original Decision that it would be "artificial to require a determination of exactly where the employees would work when under normal circumstances the exact location on the roads where they perform work is always changing in response to conditions on the roads in Service Area 1" (para. 42).

24 In other circumstances, it may not be "artificial" to require a determination of exactly where, within a given geographical area, employees would perform work under normal circumstances. For example, if the exact locations where the bargaining unit employees had performed work was relatively fixed and not "always changing", then picketing may be permissible only at those locations. Those, however, were not the facts in this case.

25 It is notable that the Employer did not argue that there were only certain road locations where picketing was permissible; it argued that there were *no* road locations where picketing was permissible, and that the only location where picketing was permissible was the marshalling yards. Yet the facts were that the employees performed virtually all of their work on the roads, not in the marshalling yards. Given the particular factual circumstances of this case – where there was no possible middle ground between the Employer's position that no road was a site or place where the employees performed work and the Union's position that every road was a site or place of work – we find the Original Decision did not err in preferring the latter position under a Section 65(3) analysis.

26 The Employer argues that the Original Decision effectively allows the Union to picket the Employer's entire operation, rather than just those locations where the employees would perform work, but for the strike. The Employer submits that this goes further than the Board has indicated is appropriate in terms of permissible picketing under Section 65(3). The Employer submits that the Board has interpreted that provision as basing the limits of permissible picketing not on the scope of the Employer's operation but rather on the locations where the employees perform work.

27 We agree that the focus under Section 65(3) is on the location or locations where the employees perform work, not on the scope of the Employer's operation. However, in this case, the location where the employees perform work can only reasonably be described as all the roadways within Service Area 1. It cannot be broken down into a multitude of specific locations where work is performed, since those locations are always changing. Nor is it reasonable in the circumstances to conclude that the employees would only perform work in the marshalling yards, but for the strike, since that conclusion is patently not consistent with the facts.

28 The Employer submits the Original Decision is inconsistent with the Board's decision in *Coca-Cola Bottling Ltd.*, BCLRB No. B285/2001 (Leave for Reconsideration

of BCLRB No. B210/99), 72 CLRBR (2d) 171 ("*Coca-Cola*"). In *Coca-Cola*, the Employer submits, the Board did not allow picketing at any time at the location at issue. It merely allowed picketing when the striking bargaining unit employees would actually have been performing work at the location.

29 In our view, there is no inconsistency between the Original Decision and *Coca-Cola*. In *Coca-Cola*, the Board tailored the right to picket under Section 65(3) to the actual work circumstances of the employees involved in the labour dispute. The Original Decision does the same thing, though in different circumstances. In the present matter, it is not possible to know exactly where or when the employees would be performing their routine maintenance and patrolling work on the roads of Service Area 1. We agree with the Original Decision that it would be "artificial" in the circumstances to try to make such a determination. However, we find the Original Decision applies the same principles and approach as in *Coca-Cola*, to define the basic Section 65(3) right to picket in relation to the nature of the work performed by the employees in the labour dispute.

30 The Employer takes issue with the statement in paragraph 42 of the Original Decision that the employees work throughout Service Area 1 on all the roads and highways "every day", submitting that there was no evidentiary basis for this conclusion. Accepting, for the sake of argument, that there was not evidence before the original panel that employees worked throughout Service Area 1 on all the roads "every day", nonetheless it is undisputed that the job duties of the employees required them to patrol all the roads throughout Service Area 1, and that this patrolling took place on a regular basis. Even if this work, including patrolling, did not take place on every road every day, we find the undisputed facts are sufficient to maintain the Original Decision's conclusion that but for the strike, employees would perform work on roads throughout Service Area 1, and therefore the roads are a site or place of lawful strike and properly subject to permissible picketing.

31 Thus, even if the original panel erred, or breached natural justice, in finding that work took place on all the roads "every day", we are able to cure this error or breach by re-examining the issue in the absence of this evidentiary finding. We find that, even if it is accepted that work did not take place on every road every day, but only that work took place on all the roads in Service Area 1 on a regular basis, the Original Decision's conclusion with respect to the scope of permissible picketing remains correct.

32 Given our determination that the Employer's application for leave and reconsideration does not raise a serious question as to the correctness of the Original Decision, we find it unnecessary to decide whether the application should also be dismissed on the basis of mootness.

33 With respect to the Ministry's application for intervenor status, we note the application does not add to the grounds for reconsideration raised by the Employer in its application for reconsideration. Rather, the Ministry claims the Original Decision has affected the Ministry in a "direct and legally material way".

34 To explain this claim, the Ministry states that the Union engaged in picketing activities in another service area on August 20, 2007, and the Ministry took the position that that picketing was illegal and brought a cease and desist application to the Board on August 21, 2007. The Ministry then states that, although the pickets "were removed upon bringing [of] the application, Ministry action was required to remove the picketers from interfering with a third-party contractor". The Ministry complains that, as a result of the Original Decision, "those illegal pickets might arguably have some basis in law".

35 The Ministry further submits that the Original Decision "has the potential of allowing similar pickets to take place on virtually every road in the province of British Columbia". It further claims that "[e]very such picket would have a direct affect on the Ministry and its mandate to safely maintain the roads of the province". It claims that "[a]s the steward of the roadways, the Ministry must be permitted interested party status to protect its interests that flow from this application for reconsideration".

36 Alternatively, if its application for interested party status is rejected, the Ministry seeks intervenor status. It submits that the compensation it gives contractors such as the Employer "has a direct affect on the compensation negotiated with the unionized workforce in each of the Province's 28 Service Areas", and that the road maintenance dispute, out of which the Original Decision and application for reconsideration arose, "was a direct result of the contractor's ability to negotiate terms with the Union based on the Ministry's prescribed compensation formula. The Ministry's role in this regard must be illustrated to the Board."

37 The Ministry further submits that it is "the only party with the degree of understanding required to explain the whole of the highway maintenance and construction regime in British Columbia" and that it is "only with the Ministry's evidence that the Board and the greater labour relations community will understand the full scope of the Decision". The Ministry concludes by saying, as noted earlier, that it seeks to intervene in order to illustrate the "disasterous [sic] affects that potentially flow from the Decision".

38 We find that while the Ministry cites examples where picketing during the course of the labour dispute has impeded or obstructed traffic, those examples are unrelated to this decision, and the Original Decision cannot possibly be read as permitting or condoning such conduct. As noted in the Original Decision, the Union only sought to, and was granted, a primary site right to picket at the side of the road. The Original Decision recognizes that permissible picketing under the Code does not include impeding or obstructing traffic (para. 26).

39 Nor does peaceful and lawful picketing at the side of the road either legally or inevitably lead to other, prohibited conduct. To the extent the Ministry is concerned with the potential for such other, prohibited conduct, it could be dealt with by either the Board, under the Code's common site picketing provisions, or the Courts, under the Courts' general jurisdiction in respect to tortious and criminal behaviour. The Original Decision does not affect the use of such measures to ensure that the roads and highways in the province are not obstructed by picketing.

40 Lastly, we find that the control the Ministry asserts over the compensation of the highway maintenance contractors, and the effect of that compensation on collective bargaining with their unionized workforce, does not assist the Ministry's position that it is an independent, but affected, party that should be granted standing.

41 In conclusion, we do not find that the Ministry's application meets the Board's established tests for either interested party or intervenor status.

42 For the above reasons, the Ministry's application is denied.

III. CONCLUSION

43 For the above reasons, the applications are dismissed.

LABOUR RELATIONS BOARD

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