BRITISH COLUMBIA

LABOUR RELATIONS BOARD

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MULTIPLE FAX TRANSMITTAL

Date: August 16, 2010

Time: 3:25P.M.

Pages: 11
(including the cover page)

From: Chrissie Robinson
Acting Executive Assistant to
Philip Topalian, Vice-Chair

Faxed By: Chrissie

RE: Eurocan Pulp & Paper Company -and- Communications, Energy and Paperworkers Union of Canada, Local Union Nos. 298 and 1127
(Severance Pay/Layoff Grievance)
(Section 99 - Case No. 60614/10T)

To:	Taylor, Jordan, Chafetz	*Fax No:*	604 683-2798
Attention:	Donald J. Jordan, Q.C.		
To:	Rogers, Bobert & Burton	*Fax No:*	604 681-1475
Attention:	Daniel J. Rogers		
To:	Nicholas Glass	*Fax No:*	604 522-5055

Board decision BCLRB No. B136/2010 enclosed.

**NOTE: FACSIMILE OPERATOR, PLEASE CONTACT THE ABOVE INTENDED RECEIVER AS SOON AS POSSIBLE. THANK-YOU

PLEASE NOTE: Hard copy will be mailed

BRITISH COLUMBIA

LABOUR RELATIONS BOARD

August 16, 2010

"BY FAX"

To Interested Parties

Dear Sirs/Mesdames:

Re: Eurocan Pulp & Paper Company -and- Communications, Energy and Paperworkers Union of Canada, Local Union Nos. 298 and 1127 (Severance Pay/Layoff Grievance)
(Section 99 - Case No. 60614/10T)

Enclosed is a copy of the Board's decision (BCLRB No. B136/2010) rendered in connection with the above-noted matter.

Please note that an application for leave for reconsideration shall be subject to a fee of $200.00. Payment may be made by a credit card, cheque, debit card or by charging the amount to a pre-approved account.

Yours truly,

LABOUR RELATIONS BOARD

C. Robinson

Chrissie Robinson
Acting Executive Assistant to
Philip Topalian
Vice-Chair

Enclosure(s)
PT/cr

Interested Parties:

Eurocan Pulp & Paper Company
501 - 858 Beatty Street
Vancouver BC
V6B 1C1
ATTENTION: Elaine Jensen

Taylor, Jordan, Chafetz
Barristers and Solicitors
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Vancouver BC
V6Z 1S4
ATTENTION: Donald J. Jordan, Q.C. (for the Employer)

.../2

Interested Parties:

Communications, Energy and Paperworkers Union
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623 Enterprise Avenue
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V8C 2E5

Rogers, Bobert & Burton
Lawyers
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V6E 3W1
ATTENTION: Daniel J. Rogers (for the Unions)

cc: Nicholas Glass
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Vancouver BC
V6Z 2E6

BCLRB No. B136/2010

BRITISH COLUMBIA LABOUR RELATIONS BOARD

EUROCAN PULP & PAPER CO.

(the "Employer")

-and-

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL UNION NOS. 298 AND 1127

(the "Unions")

PANEL:	Philip Topalian, Vice-Chair
APPEARANCES:	Donald J. Jordan, Q.C., for the Employer Daniel J. Rogers, for the Unions
CASE NO.:	60614
DATE OF DECISION:	August 16, 2010

DECISION OF THE BOARD

I. NATURE OF THE APPLICATION

1 The Employer applies under Section 99(1)(b) of the *Labour Relations Code* (the "Code") for review of an arbitration award dated March 15, 2010 (Ministry No. A-034/10) (the "Award") of Arbitrator Nicholas Glass (the "Arbitrator"). The Employer alleges the Award is inconsistent with the principles expressed or implied in the Code.

II. THE AWARD

2 The Award dealt with a grievance regarding nine grievors (the "Grievors"), each of whom sought to continue their employment with the Employer after having given notice of their intention to resign from their employment at future dates. All of the Grievors withdrew their notices of resignation before resigning and stated they wished to continue in employment. The reason they withdrew their resignation notices was that the Employer announced that the mill where they worked would be closing and they wished to be eligible for severance payments under the parties' Collective Agreement. The Employer refused to let the Grievors withdraw their resignations. The Unions grieved alleging unjust dismissal of the Grievors.

3 At the hearing, counsel provided the Arbitrator with an agreed statement of facts. The Arbitrator also heard *viva voce* evidence.

4 The agreed statement of facts is set out in the Award. In short, eight of the nine Grievors applied for Transition Assistance Program funding ("TAP funding") as part of the Province's Community Transitions Program/Transition Assistance Program (the "Program"). Under the Program, successful applicants could receive up to $35,000 (depending on their age and the number of years they were employed in the forestry sector) by electing to resign/retire from their current forestry sector job and not return to work for the same employer, on the same site, or for an affiliated company for at least 18 months. The Program's final application period ended on August 31, 2009 and for most applicants the date for resignation or retirement must have been on or before October 31, 2009, with certain exceptions.

5 All of the Grievors applied for early retirement pension benefits under the Pulp and Paper Industry Pension Plan. As part of their application for pension benefits, they signed a declaration certifying they intended to terminate their employment in the pulp and paper industry as of a certain date.

6 All of the Grievors except one spoke with representatives in the Employer's Human Resources department (Jody Cook, Heather Weunsche, and/or Patricia Urbanowski) regarding the TAP funding and their pension applications. They were told by these representatives that they could change their minds about retiring right up until they cashed their first pension cheque. Cook also told several of the Grievors that her

father had signed the pension forms, but then changed his mind about retirement and came back to work.

7 On October 28, 2009, the Employer announced that it would be permanently closing the mill on February 17, 2010. This triggered Article 23 of the Collective Agreement, the severance pay article. The amount of severance pay the Grievors would be eligible to receive under this article ranged from $46,764.52 to $101,172.00 When the mill closure was announced, none of the Grievors had commenced their retirement. Each of the Grievors contacted the Employer to advise that they wished to revoke their resignation and return to work. In each case, the Employer refused to let them withdraw their resignation.

8 Doug Peterson, the Employee Relations Manager, testified for the Employer. Among other things, he confirmed that the Employer was aware that Cook, Weunsche, and Urbanowski had told the Grievors they were free to change their minds about retiring before their actual retirement date. He also confirmed that other employees had been permitted to change their minds about retirement in the past. He confirmed that others would have filled out similar forms and made similar declarations as done by the Grievors. He also confirmed that around the time of the mill closure announcement and over the next few days, the Employer heard that each of the nine Grievors wished to revoke their resignations. On cross-examination, Peterson agreed that as shutting down a mill is a big job and it is necessary to take thorough steps to avoid damage to the mill, it was a busy time and that if the Grievors had come back, the Employer could have found work for them to do.

9 The Unions argued that an expression of an intention to retire at a specified time in the future does not by itself operate to sever the employment relationship and an employee is free, in most circumstances, to retract that notice of intention before the specified date. The Unions argued the Employer's consent is not required to revoke that expression of intention and remain an employee with rights and protections under the Collective Agreement.

10 The Employer argued that arbitral authority holds that once a notice of resignation has been given, effective at a later date, such notice cannot be revoked without the permission or consent of the Employer. The notice operates as a resignation regardless of the date it is effective, and the employee loses the protection of the Collective Agreement. As such, the Employer argued, the Arbitrator has no jurisdiction to provide a remedy for the employee. The Employer argued this authority should be preferred as it is geared to the context of a collective bargaining environment.

11 After reviewing the authorities cited by the Employer and the Unions, the Arbitrator found the arbitral authorities relied on by the Employer contained a faulty analysis—none of the authorities acknowledged the distinction between a notice of intent to resign, and the carrying out or giving effect to that intent by severance of the employment relationship:

> Where a notice of intent to resign on a future date is delivered, there is obviously intent to sever the employment relationship. The notice is unambiguous evidence of that intent. But the authorities are unanimous that pure intent is not enough to sever the relationship. There must be something more, often found in subsequent conduct which establishes that the intent has been brought to fruition and the severance has occurred.
>
> In the case of a notice of intent to resign on a future date, the moment of fruition, the severance event, is spelled out and defined: It is to be the passing of the date set out in the notice. There is no need to search for objective conduct and spend time reviewing and analyzing ambiguous facts. The job is done by the author and provider of the notice. The failure to acknowledge this is the consistent and fatal flaw in these three decisions relied on by Mr. Jordan. The retraction in each case occurs while the grievor is still an employee, so the rationale for arbitrators to ignore the retraction and refuse any relief disappears. (Award, p. 29)

12 The Arbitrator also noted there can be differences between the common law and arbitral jurisprudence, but found those differences were able to be reconciled in this case:

> While there are sometimes variations and occasionally contradictions between the common law related to employment and the law of employment under a collective bargaining regime, there is nothing in the authorities I have been referred to which militates against reconciling these two branches of the law, when it comes to the point under consideration here. The observations of Mr. Justice Hutcheon, a distinguished labour lawyer in his day, carry the weight of a superior court or tribunal, certainly superior to this one. Once the error in the arbitration cases is identified and acknowledged there is no sound principle of collective bargaining law which stands in the way of applying the reasoning of the Court of Appeal in *Tolman* to an arbitration on the point under *the Labour Relations Code of BC*.
>
> To address the two possible instances referred to in *Tolman* when a retraction might not be effective: There was as I have found, no detriment to the employer of the kind to ground an estoppel by reason of the grievors' expressed intent to resign, and no argument was made or could have been made that there was some overarching contractual obligation of the kind suggested in *Tolman* to proceed with ending their employment on the dates set out in their notices. (Award, pp. 29-30)

13 As a result, the Arbitrator concluded the Grievors' retraction of their notices of intent to resign were effective in each case and allowed the grievances.

III. THE PARTIES' POSITIONS

14 The Employer argues the Arbitrator erred in relying on the common law approach set out in the British Columbia Court of Appeal decision in *Tolman v. Gearmatic Co.*, [1986] B.C.J. No. 481 (C.A.) ("*Tolman*"). Specifically, the Employer argues the Arbitrator failed to recognize the fundamental differences between his remedial authority under the Code, which is fettered by the requirement to find a breach of a collective agreement, and that of a superior court judge in a wrongful dismissal trial.

15 The Employer argues the Arbitrator ignored the fact that his remedial authority under the Code is contingent upon his finding a breach of the Collective Agreement. As the Arbitrator did not find a breach of the Collective Agreement, the Employer says the Arbitrator lacked the remedial authority to overturn the Employer's decision to refuse to allow the Grievors to revoke their resignations. As such, the Employer argues the Award cannot stand.

16 The Unions argue the Board should not interfere with the Award. The Unions say the Arbitrator made a genuine effort to interpret the Collective Agreement; the Award is not inconsistent with the principles of the Code; and the Award contains a reasoned analysis.

17 With respect to the Employer's argument the Arbitrator ignored the fact that his remedial authority is contingent on finding a breach of the Collective Agreement, the Unions say the Arbitrator considered all the arbitration cases cited by both parties and applied principles of arbitral jurisprudence with respect to resignations. In particular, the Arbitrator applied the arbitral principle that an employee must do something to carry his resolution to leave his employment into effect. The Unions say the Arbitrator did not act in a manner inconsistent with the principles expressed or implied in the Code by adopting the principles in *Tolman*. What the Arbitrator did was come to a different conclusion regarding what amounts to the "something more" than some other arbitrators. As there is no definition or assistance in the Collective Agreement as to what amounts to a resignation, he had to determine this based on the common law and arbitral principles.

18 With respect to the Employer's argument that there was no breach of the Collective Agreement, the Unions say the Arbitrator found the Employer breached the Collective Agreement by finding the Employer terminated the employees without just cause by refusing to allow them to revoke their notices of resignation.

19 In reply, the Employer argues there is no arbitral support for the proposition that if an employee purports to revoke their resignation prior to its date of implementation then there cannot have been an "objective" element to the resignation. The Employer says the subsequent acts of applying for pensions or other programs which are predicated upon resignation are examples of objective follow through.

20 The Employer also argues it was a breach of the principles expressed or implied in the Code for the Arbitrator to hold that he was bound by the British Columbia Court of

Appeal decision in *Tolman*. The Employer says the Arbitrator ought to have followed the arbitral jurisprudence from a collective agreement environment.

21 Finally, with respect to the Unions' argument that the Arbitrator found there was a termination without "just cause", the Employer says that basis is not found in the Award. In any event, the Employer argues that based on the arbitral jurisprudence, the act of resignation was complete long before its final effective date. All of the employees had evidenced a clear subjective intention to resign and had followed that up with objective acts implementing the resignation.

IV. ANALYSIS AND DECISION

22 Section 99 of the Code does not provide a full-fledged avenue of appeal from arbitrators' decisions: *Simon Fraser University*, BCLRB No. 16/76, [1976] 2 Canadian LRBR 54. The Board's review is limited to deciding whether a party was denied a fair hearing or the award is inconsistent with the principles expressed or implied in the Code. In this case, the Employer says the Award was inconsistent with the principles expressed or implied in the Code.

23 The Employer argues the Arbitrator erred in ignoring the fact that his remedial authority was contingent upon a finding that the Employer breached the Collective Agreement. The Employer points to several authorities, including the decision in *Canada Post Corp. and Canadian Union of Postal Workers (Dolen Grievance)*, Ministry No. C-070/96, 59 L.A.C. (4th) 71 (Munroe) (and the cases cited therein) for the proposition that the Employer's refusal to allow the Grievors to revoke their resignations is not a contravention of the Collective Agreement.

24 I am not persuaded by this argument. The Arbitrator was dealing with grievances alleging "unjust dismissal of the grievors" (Award, p. 2). The grievances relate to the refusal by the Employer to continue to employ the Grievors, who were employed by the Employer at the time they sought to revoke their resignations. As well, at p. 28, the Arbitrator noted that until the employment relationship is severed:

> ...the employee remains an employee with rights under the collective agreement. This includes the right to be dismissed only with just cause. Just cause does not include ignoring an employee's declared intent and desire to remain in employment on the mistaken basis that they have already resigned... .

25 I do not accept the Employer's argument. I find the Arbitrator was dealing with a dispute arising under the Collective Agreement and had the authority to embark on the analysis he did.

26 Moreover, I find the critical question the Arbitrator was asking was whether the resignations were effective. He found, based on the facts of this case, the Grievors had not fulfilled the objective requirement to effect their resignations.

27 In finding that the resignations were not effective, the Arbitrator considered the specific facts in this case—including the fact that the Grievors were told by representatives of the Employer that they could withdraw their resignations at any time prior to receiving their first pension cheque; that the date they had indicated they would be resigning had not yet passed; that there was no detriment to the Employer of the kind to ground an estoppel by reason of the Grievors' expressed intent to resign; and that there was no argument that there was a contractual obligation to proceed with ending their employment on the dates set out in their notices.

28 In arriving at his conclusion, the Arbitrator considered the case authorities cited to him by both parties and the facts before him. The Arbitrator found the authority relied upon by the Employer to be distinguishable. For example, in some of the cases relied upon by the Employer, the grievors had already left their employ and sought to return to work. In those cases, each of which turned on their own facts, the resignations were found to be effective and the employer was not in breach of the collective agreement for refusing to take back individuals who had already resigned. In this case, the Grievors continued to be employees of the Employer when they sought to revoke their resignations.

29 Ultimately, in finding the Grievors' resignations were not effective, the Arbitrator preferred the reasoning of the British Columbia Court of Appeal in *Tolman*, which held in part:

> ...there may be circumstances which lead to the legal conclusion that an employee and an employer have agreed that the contract of employment will end on a particular date or with the happening of a particular event. There may also be circumstances which lead to the legal conclusion that an employee is estopped from asserting his right to change his mind after he had announced the date of his retirement. Neither set of circumstances is present in this case. ...
>
> Unless the employer acted to its detriment on the expressing of intention to resign, the plaintiff remained free to change his mind. ...
> (*Tolman*, paras. 13-14)

30 The Arbitrator found, in the circumstances of this case, the Grievors were not estopped from asserting their right to change their minds regarding their resignations. While arguably there is authority that could have pointed him to a different result (as well as authority that pointed him to this result), he found that the expressed intention to resign on the facts of this case, was not sufficient to render the resignations effective. An arbitrator is entitled to select a line of jurisprudence to follow in respect of an issue.

31 The Employer disagrees with the Arbitrator's choice of approach from among the diverging lines of authority. While the Employer may prefer one approach to another, that does not provide the Board with a basis for interfering with the Award.

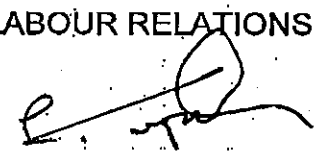
32 In the present case, the Arbitrator clearly considered the arguments and authorities to which he was referred by the parties in arriving at his conclusion.

33 I am also not persuaded by the Employer's argument that the Arbitrator was wrong in following a judicial authority rather than an arbitral authority, for two reasons. First, I find that the principle that the act of resignation has in it a subjective as well as an objective element is not just a judicial principle but is also an arbitral principle. Second, I find that the Arbitrator did not err in looking to judicial authority and, in any event, I find the Arbitrator did not rely exclusively on judicial authority, but also turned his mind to relevant arbitral authorities.

34 This case turned on its particular facts and I find the Arbitrator applied the relevant case law to those facts in coming to the determination that the resignations were not effective in the circumstances of this case. I find the Award is not inconsistent with the principles expressed or implied in the Code.

35 For the reasons above, the Employer's application is dismissed.

LABOUR RELATIONS BOARD



PHILIP TOPALIAN
VICE-CHAIR