Canada
Labour
Relations
Board

Conseil
Canadien des
Relations du
Travail

REASONS FOR DECISION

David Grundy,
complainant,

and

British Columbia Telephone Company,
respondent,

and

Telecommunications Workers Union,
intervenor.

Board File: 745-966

The Board was composed of Mr. James E. Dorsey, Vice—Chairman, and Messrs. James B. Abson and Hugh R. Jamieson, Members.

APPEARANCES

Richard B. Covell and John D. Banks for the complainant.

Alan J. Hamilton for the employer.

Edgar Norman for the intervenor.

I

David Grundy is a supervisory employee of British Columbia Telephone Company who refused to perform the work of bargaining unit employees while they were on strike earlier this year. On March 13, 1981 he complained his employer punished him for this action contrary to section 184(3) (c) of the Code, which states:

> *"184. (3) No employer and no person acting on behalf of an employer shall*
>
> *(c) suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike that is not prohibited by this Part;"*

The employees on strike were represented by the Telecommunications Workers Union. The strike was lawful under Part V of the Code. Grundy has been found by this Board in 1979 to be an employee under Part V of the Code.

Notice of hearing was given on May 8 for June 9 in Vancouver. No party notified the Board that a day would not be sufficient. It was not and a continuation was scheduled for August 31 and September 1 and 2 in Vancouver. It was during this adjournment that the union applied to intervene. The dates for continuation were unavoidably postponed and the union was granted intervenor status. The hearing concluded in Vancouver on November 25 and 26.

II

Grundy's decision and the alleged employer retaliatory action did not occur in an industrial relations vacuum. To place it in its proper setting we must describe other events and some proceedings before the Board prior to 1981 as well as the environment of the 1980—81 strike within which these events occurred.

In 1979 there were two certified bargaining units in the employer's operation. There was a small unit of nurses certified March 17, 1975. That certification was revoked October 6, 1981 after a vote of 10 to 1 by all employees in the unit. The second unit is represented by the TWU. Its dimensions have evolved and fluctuated over the years and have been the subject of lengthy proceedings before this Board in the 1970's. They began when employees outside the unit sought representation through separate organizations. The union intervened to assert a claim over these employees. In 1976, on an application by the Society of Telephone Engineers and Managers (STEM), in which the union intervened, the Board found certain non-bargaining unit persons in the marketing department to be employees under the Code (see British Columbia

Telephone Company (1976), 20 di 239; [1976] 1 Can LRBR 273; and 76 CLLC 16,015). In 1977, on the application of the Telephone Supervisors' Association (TSA) the Board found certain non-bargaining unit plant supervisors to he employees but found the proposed plant supervisory unit to be inappropriate (British Columbia Teleohone Companv (1977), 33 di 361; [1977] 2 Can LRBR 385; and 77 CLLC 16,107). The Board also found STEM's proposed departmental supervisory unit to be inappropriate (British Columbia Telephone Company (1977), 22 di 507; [1977] 2 Can LRBR 404; and 77 CLLC 16,108). At the time the TWU was certified in 1949 there were 3,672 bargaining unit employees and 323 excluded persons. In 1964 the total complement was approximately 4,200. As of December 31, 1975 there were over 10,500 of which 1,902 were outside the bargaining unit. In October, 1976 the excluded number was 1,983.

When STEM and TSA failed, the union continued to press for reordering of its bargaining unit. During 1977 collective bargaining the Board declined to create a single bargaining unit of employees of the employer and Canadian Telephone and Supplies Ltd. (British Columbia Telephone Company (1977), 24 di 164; [1978] 1 Can LRBR 236; and 78 CLLC 16,122). This was done in 1979 (British Columbia Telephone Company (1979), 38 di 205). In 1978 the union sought to have its bargaining unit redefined to include persons not previously included. The Telecommunications Employees Managerial and Professional Organization (TEMPO, which was formerly STEM and TSA) intervened and opposed the application, which was unsuccessful (British Columbia Telephone Company (1978), 28 di 909; [1978] 2 Can LRBR 387; and 78 CLLC 16,146).

Through the late 1970's the collective bargaining relationship of the employer and TWU was strife-ridden. Each round of bargaining produced economic confrontation. There was a work stoppage in the 1977-78 negotiations. Non-bargaining unit personnel maintained the employer's operation during the work stoppage. When it was concluded more bargaining unit review

proceedings were processed by the Board. This time TEMPO was the intervenor.

While these proceedings were before the Board a bargaining unit employee refused to do work he said was the work of employees of another employer in the provincial jurisdiction who were on strike. The employer disciplined and a section 184(3) (c) complaint was filed. The issue was whether the section covered a refusal to do the work of employees of another employer. A majority of the Board decided it did not (British Columbia Telephone Company (1979), 37 di 20; [1979] 2 Can LRBR 297; and 80 CLLC 16,007). This conclusion was affirmed by a majority of the Board in plenary session later in the year (British Columbia Telephone Company (1979), 38 di 124; [1980] 1 Can LRBR 340; and 80 CLLC 16,003). These proceedings heightened awareness of everyone at British Columbia Telephone Company of the existence and scope of section 184 (3) (c).

By 1979 the number of bargaining unit employees had risen to over 10,000 and the number of excluded persons was 2,250. The Board redefined the union's bargaining unit to maintain the boundaries in existence (British Columbia Telephone Company (1979), 38 di 14; and [1979] 3 Can LRBR 350). That decision was unanimously affirmed by the Board in plenary session (British Columbia Telephone Company (1980), 40 di 97).

In the meantime and while these proceedings were before the Board, TEMPO applied for a unit of 2,186 of the entire 2,250 persons outside the TWU bargaining unit. Efforts to organize all or part of these employees had begun as early as 1964 by organizations preceeding TEMPO (STEM and its predecessor GOPE (Group of Professional Engineers) and its amalgamated organization MMA (Marketing Management Association) and TSA and its predecessor PSA (Plant Supervisors Association)). The Board had to decide how many of the 2,250 are employees under the Code and eligible to engage in collective bargaining. The answer was 2,075 (British

Columbia Telephone Company (1979), 38 di 145). A representation vote was held and 1,876 of them voted. Of these, 896 (47.8%) voted for representation by TEMPO. The certification bid had failed. There was, however, a large number of employees in favour of union representation.

The TWU estimates there are now over 2,800 persons outside its bargaining unit. The number is important to the TWU because it represents the potentially available manpower to operate the telephone system during a strike. With current technology that number can keep the system operating and craftsmen among them may repair, maintain and expand the system during a strike or lockout.

At this juncture we will introduce the 1980—81 negotiations for a new collective agreement. The volleys and counter—volleys began after the collective agreement expired on December 31, 1979 and accelerated during the spring. The Board became involved in one lay—off threat and union response in June, 1980 (British Columbia Telephone Company (1980), 40 di 163; [1980] 3 Can LRBR 31; and 80 CLLC 16,062). By the fall of 1980 matters were accelerating with the union withdrawing the services of 585 construction employees in the coastal division on September 22. Earlier the TWU had sought to persuade supervisors and engineers to remain "neutral" in the following communication:

> *"September 22, 1980*
>
> *TO 1st LEVEL MANAGEMENT/ENGINEER EMPLOYEEES:*
>
> *We find it incredible that the Company has turned down it's third Conciliation Report in a row. First Dr. Hall's in 1977, then Justice Hutcheon's, we had threatened to burst into the buildings before they accepted the Hutcheon report, now they have rejected the Peck Report.*
>
> *I suppose it is not necessary to point out, their counter proposal in fact is the Peck Report with the Union half removed.*
>
> *It has been asked of us again what would the Union do for any supervisor or engineer that stays neutral, if there is a dispute.*
>
> *1. If only a small number, even one supports us, we will ensure along with Section 184 3C of Part V of the code,*

you receive a protecting letter.

2. *If a large number of supervisors become involved, we will work together to ensure the Handicapped, elderly, sick, hospitals, Doctors, etc. receive service.*

3. *If enough become involved we will ensure that you could set up an autonamous local, entirely on your own with your own by-laws and get at least a voluntary letter of agreement, now.*

You could have a lawyer of your choice assist you in writing your by-laws.

On behalf of the
Telecommunications Workers Union

W.G. Clark
President

Our advice to you is go in, only do your own job. P.S. Keep this letter, it is our guarantee of the above commitments."

Early in 1981 the strike accelerated until it became a full fledged work stoppage on February 4. Another communication was sent to the non—bargaining unit employees on February 14.

"February 14, 1981

KNOW YOUR RIGHTS

As of today February 14, 1981 several B. C. Tel Supervisors have refused to do TWU work while we are on strike. Five of these Supervisors have refused by quoting the Canada Labour Code, Section 184 — Paragraph 3C.

> *c. 'suspend, discharge or impose any financial or other penalty on an employee, or take any other disciplinary action against an employee, by reason of his refusal to perform all or some of the duties and responsibilities of another employee who is participating in a strike that is not prohibited by this Part:*

We are not asking you to support the TWU or join the TWU. We are asking you to refuse to do our work. You are protected by Canadian Law when you refuse.

You are only prolonging this dispute and creating a very difficult situation by taking part in this strike.

There is no need for you to work as a strike breaker and remember that in the near future we will have to work together.

William C. Clark
President"

The strike lasted six weeks and was a bitter event. Buildings were occupied and the British Columbia Labour Relations Board was inundated with applications to regulate picketing. The courts saw their share of litigation and contempt proceedings. The last issue to be resolved was a difference about the discipline and recall of employees who engaged in picket line encounters with supervisors. The arbitration proceedings of those issues are still before the courts.

III

David Grundy was an Outside Plant (O.P.) Engineering and Construction Supervisor prior to the strike. He was not in the bargaining unit. He is a married man of 40 years of age with three children and has been employed by the employer for 21 years. He completed high school in Nelson and one year at the University of British Columbia. He joined the employer as an engineering technician and worked in Kamloops and Nelson. In 1968 he became an engineering supervisor in Prince George and later moved to Vancouver. In 1971 he was promoted to a third level supervisor in outside plant-coastal section. In 1973 he became a division outside plant engineer - coastal east and in October, 1977 he came to his current position in Castlegar as outside plant engineering and construction supervisor in the West Kootenay district. This was a demotion at Grundy's request. He wanted the move.

In this position Grundy reported to Carl Anderson, Customer Service Manager, Outside Plant Engineering and Construction (Interior Division), who in turn reported to Carlton Swabey, Division Customer Service Manager, who in turn reported to a vice—president. Grundy was supervisor in Castlegar supervising 30 craftsmen, 4 clerks and 4 construction supervisory positions (total 38) and three technicians, 1 draftsman and 1 clerk (total 5). The former 38 performed the construction function, while the latter 5 performed the engineering function (total 43). His

counterpart in Cranbrook, G. Bird, supervised a total of 36 and in Williams Lake, J. MacKay supervised a total of 26. In the division these three and a division O.P. engineer and construction operations supervisor reported to Anderson. The Board in 1979 had drawn the line between employee and non—employee between Anderson and those he supervised. To complete the divisional picture there were three district customer service managers supervising service, office and installation operations in the division. They were located in Nelson, Cranbrook, and Kamloops and Williams Lake. The manager in Nelson was H. Dyrndahl. They are not employees under the Code.

This divisional customer service organization where O.P. engineering and construction are combined and report to a single manager (Anderson) and not to district customer service managers (e.g. Dyrndahl) is the universally established and uniformly applied organization throughout the company.

Swabey took up his position in Kamloops in 1977. He has been with the employer for 31 years. He began as an apprentice lineman and occupied his first non-bargaining unit position in 1954. Anderson has been with the employer for 24 years. He is a member of TEMPO and was its president in 1976-77.

The customer service manager deals directly with the public. He might like to have more control over the O.P. construction function but over the years it has become more closely related with the engineering function. In 1977 the creation of the organization described above was discussed among supervisors in the division and approved by Swabey. Its implementation was delayed by a three month labour dispute with TWU. Grundy came to the newly amalgamated function.

This organization was a further step in the centralization of construction functions in Castlegar. Over one million dollars was spent for a new building in Castlegar and was occupied in

March, 1980 to house construction, engineering, automative, stores, construction control, and local installation and repair functions. The objective was an integrated functional, geographic, and organizational structure combining tasks, manpower and equipment housed and centered in Castlegar. This decision to centralize was first taken six or seven years ago.

In 1980 Castlegar construction was 13 1/2% below the divisional average. The solution was to allow Grundy to devote more time to construction by hiring a new engineering supervisor and to fill one construction supervisor vacancy. Grundy spoke to Anderson who received approval from Swabey and the personnel department and the positions were posted after discussions during the summer of 1980. The staff development department approved the new position at level 5 under Grundy's direction (level 5) but reporting to Anderson. Applications were received. A construction supervisor's position at Williams Lake was also to be filled. Grundy and MacKay met Cherie Chapman of employee development on January 26, 1981 to review the candidates and set February 12 or 13 as the interview date. The strike intervened.

Grundy had been through strikes in the past. In 1969 he worked 7 days a week, 12 hours a day for 6 or 7 weeks operating a switchboard in Prince George. In 1977-78 he worked for 6 days a week, 10 hours a day for 3 months over Christmas as a customer service assignment clerk processing new orders. He found the experience detrimental to his family life and he was no longer prepared to be a "pawn between the TWU and employer". In the 1977-78 strike he was ignorant of his rights under the Code but through TEMPO became aware of his employee status.

In early 1980 TEMPO circulated a newsletter about section 184(3)(c). In August or September Grundy resolved, after living under the threat of a strike all that year, that he would tell his employer what he would do if there were a strike. He knew the employer's expectation was that he would do bargaining unit work.

He told Anderson and Dyrndahl over the phone and later told Dyrndahl in person that he would do his regular duties on regular hours and any emergency work. He thought he should use any strike time to improve administrative and operational aspects of his responsibilities. Dyrndahl, who was not called to testify, did not agree but set the problem aside to be confronted when, and if, it arose in the future. Between August and February Grundy explained his position to the supervisors beneath him, none of whom had more than one year service as a supervisor or were called to testify. He told them they must each decide for himself. In the division, Anderson and Swabey, who have worked together for eight years have agreed to disagree about TEMPO and not let it interfere with their work.

On February 5 the TWU occupied the building in Castlegar and locked Grundy out until February 9. He spent the next couple of days cleaning up after the occupiers. On February 10 the TWU picketed and that evening Grundy met Dyrndahl who told him people were coming from Vancouver to work the switchboards 6 days a week, 10 hours a day. He said he thought Grundy would do the same.

Grundy had conversations with Dyrndahl on February 12 and was asked to go to Nelson to do bargaining unit work as a service centre assignment clerk. Grundy refused. He recalls the exchange as follows: Dyrndahl asked Grundy to reconsider and Grundy said he had fully considered the matter. Dyrndahl then said "I will have to ask you to go home". Grundy did and then called Dyrndahl to ask what his status was. Dyrndahl said there was no work available. Grundy asked if he should consider himself suspended. Dyrndahl said "I guess ". Grundy was off work without pay for over five weeks. He did not receive unemployment insurance. He testified the issue to him was that "in some respects personal rights are above corporate rights". He would not do work he did not consider necessary during the strike. Grundy's encounter with Dyrndahl, with whom he has worked closely over the years was not a personal conflict.

All of this was reported by Dyrndahl to Swabey who agreed with the action he had taken. Swabey then contacted Laurie Smith, Director of Industrial Relations. Grundy was not alone. Three other employees, including Bird, took the same position. Smith discussed the matter with others, including Theodore Boresky, Head of the employer's Emergency Operation Centre, "a co-ordinating centre responsible for reporting of activity and administration of supervisory forces performing bargaining unit work during work stoppages". It was decided these persons would be laid off. Grundy's record of employment states the cause of the employment separation is a shortage of work due to a labour dispute.

On the advice of counsel Grundy went back to work on February 23. At noon Dyrndahl called Grundy. He was annoyed and said Grundy had damaged morale more than anyone in the company. The conversation was emotional. Dyrndahl said Grundy should go home and he did. It is unclear when, if ever, Grundy was clearly told he was laid—off. The February 23 conversation generated a letter from Grundy and a telephone response from Dyrndahl. Internally and for unemployment insurance the employer treated him as temporarily laid-off. His medical and other benefits were continued.

The question of the hours non-bargaining unit employees were required to work during the strike was a serious point for Grundy. It was also an issue for Bird. He was willing to work his regular hours but not 10 hours a day, 6 days a week. He was sent home and later asked counsel to seek an opinion from the Department of Labour. He received the following:

> *"May 14, 1981*
>
> *Mr. Richard D. Covell*
> *Clarke, Covell, Banks*
> *Barristers and Solicitors*
> *1109 Robson Street*
> *Vancouver, B.C.*
> *V6B lB5*
>
> *Dear Mr. Covell:*

Re: Canada Labour Code, Part III - Averaging Plans
Complaint involving Mr. Gary Bird, T.E.M.P.O. and
British Columbia Telephone Company

I am in receipt of a further response from our Legal Services Branch in light of the additional information supplied by you regarding Mr. Bird's duties. Mr. Bouffard, Departmental Solicitor, expresses the opinion that Mr. Bird and the other employees like him are excluded from Division I of Part III of the Code, although they are covered by the other Divisions of the Code.

Considerations in arriving at this conclusion was the fact that although these employees do not exercise the highest functions of management responsibility, they definitely exercise (before and after the strike) some managerial functions and the least that can be said is that they are 'superintendents' and excluded from the application of hours of work by subsection 27(3) or the Code.

Yours truly,

B.W. Dodd
Acting Regional Director
Mountain Region

750 Cambie Street
Vancouver, B.C.
V6B 2P2"

If this opinion is correct the choice for the non-bargaining unit employees is to exercise their right under section 184(3) (c) or work long hours with no protection under Division 1 of Part III of the Code.

During the strike Grundy expected to return to his pre-strike duties after the bargaining impasse was resolved. Throughout his twenty-one years he had never been disciplined. In 1978 he was rated as "exceeding overall job requirements". There is only one higher rating. In his performance summary Anderson described his situation as follows:

"No standards/objectives were set between Mr. Grundy and his former supervisor.

For the most part his job has been one of gathering together the engineering loose ends for the West Kootenay and charting a course for proper development of the outside plant for that area. The direction is established and the work is well under way. This process has been less than a full time job and cannot utilize all of his abilities.

In order to better utilize his talents and allow him to apply some of his ingenuity Mr. Grundy has been given the

outside plant construction and maintenance responsibilities as well as engineering."

The following year Grundy received the same rating and a favourable performance summary. In 1980 he was again rated by Anderson as "exceeding overall job requirements". As in past years this review on November 10, 1980 set "standards/objectives" for the coming year. They included "select one construction supervisor and one engineering supervisor by 81.02.28". As in the year before, it was assessed that Grundy "could be considered for promotion immediately" but Grundy indicated he "prefers current assignment and does not wish to be considered for either lateral or promotional assignments at this time". Four months later at the end of the strike he was not only considered, but assigned.

A few days before the end of the strike Swabey called Grundy at home and asked if he would like to be relocated because the feelings of other supervisors were against him. Grundy refused and Swabey said that, because of what Grundy and others did, he would have to make some organizational changes. Grundy returned to work on March 23. By notice from Swabey on March 20 an organizational change became effective March 23. The stated reason was to be "more responsive to customer requirements".

The change affected Grundy and Bird, but not MacKay. Their construction functions were transferred to the district customer service manager. In Grundy's case this was to Dyrndahl and reduced his staff from 43 to 5. He was left in Castlegar, but the construction crew reported to Dyrndahl in Nelson. On March 23 Grundy was told by Dyrndahl that the change was made because the construction supervisors were not willing to work with him.

This change was initiated by Swabey who testified he had contemplated it for some time. During the strike the employer was seeking to maintain service: all operator assisted calls, some new installations, and equipment maintenance. All planning or non—operational functions ceased. The three construction

supervisors assisted the employer and behaved as expected. Grundy did not. The three supervisors, each of whom Grundy had to deal with because of performance problems before the strike, told Dyrndahl and Swabey in a two and one-half hour meeting in Castlegar on March 18 that they did not agree with Grundy's position and felt they did not have his support. Swabey decided to reorganize. He called Laurie Smith and related his plans. Smith considered it. He spoke to Boresky. He spoke to the president of the company. He considered that Grundy would not lose pay or benefits or classification. He thought it was a good move to defuse tensions. Swabey had said it was a move he had planned for some time. Smith did not think it would be contrary to section 184(3) (c) and he concurred.

Swabey is a division head and he may make organizational changes without the approval of employee development or industrial relations but, if he does, in Smith's words "he must take the flack". In this case he introduced a change unique in the company without approval from employee development. Then to relieve Dyrndahl's increased workload he created a new classification, construction/installation operations supervisor, again unique, and requested it be filled. This was the workload problem Grundy had and for which the new engineering supervisor was to be hired. Employee development has yet to concur in Swabey's changes. There was no change by Swabey in Williams Lake and MacKay proceeded after the strike as planned and approved before the strike.

Anderson was not told about the reorganization, until two days after Grundy, even though it removed 66 employees from his sphere of supervision (38 under Grundy and 28 under Bird). His response was that it was a serious mistake and a retrograde step. He told Swabey that he should allow Grundy to work out any differences with his supervisors and rely upon him to get operations back to normal. Neither he nor Grundy know of any prior experience where supervisors directly influenced to whom they will report. Anderson did have some advance notice there

might be a change. In mid-March during the strike, Jack Carlisle, Vice—President and chief operating officer, and another vice-president, were visiting the area to elaborate the employer's position during the strike and reinforce the esprit de corps. Carlisle was asked about Grundy and he replied Grundy would keep his job, however it was unknown what his future would be.

Swabey testified Grundy is quite competent and these events should have no bearing on his future. He and Smith say the reorganization was contemplated for some time, but accelerated because of the desire to lessen post-strike tensions.

Grundy says he lost the biggest part of his job. Before the strike he was spending three-quarters of his time on the construction aspect of his responsibilities. He says the change was a diminuation of his authority, an assault on his character and dignity, and a decrease is his status. He still works in Castlegar as do those he formerly supervised but they now report to Dyrndahl in Nelson. He believes his future opportunities are "zilch". Since the strike and reorganization he has been socially ostracized by many in his work place.

Feelings have run high on this issue in the West Kootenays which was a hotspot during the strike. In the smaller communities individuals and their stands are not anonymous as they may be in the lower mainland. Grundy says there are about 70 craftsmen in the area and 12 supervisors capable of doing, and who did, their work during the strike. Although emotions may run high during a strike, the supervisors and bargaining unit people returned to old relationships once the strike ended. Anderson thinks some of the emotion is rooted in Trail Tel & Tel and Nelson Tel & Tel, smaller formerly independent companies acquired by the employer. For the employer, its actions were a practical response to a difficult situation. For Grundy, supported by TEMPO, it is a personal issue grounded in a matter of principle. For the TWU the issue is one of the balance of power during a strike.

IV

Before turning to section 184 (3) (c) and the merits of the complaint, there is a preliminary matter. After the complaint was filed and at the time of the adjournment, counsel for Grundy requested the Board to issue an interim order restraining the employer from implementing any reorganization. In support or his request, he relied upon the Board's remedial authority in sections 121 and 189, which state:

> "*121. The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by, or as may be incidental to the attainment of the objects of, this Part including, without restricting the generality of the foregoing, the making of orders requiring compliance with the provisions of this Part, with any regulation made under this Part or with any decision made in respect of a matter before the Board.*
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> *** * * ***
>
> "*189. Where, under section 188, the Board determines that a party to a complaint has failed to comply with subsection 124(4) or section 136.1, 148, 161.1, 184, 185 or 186, the Board may, by order, require the party to comply with that subsection or section and may*
>
> *(b) in respect of a failure to comply with paragraph 184(3)(a), (c) or (f), by order, require an employer to*
>
> *(i) employ, continue to employ or permit to return to the duties of his employment any employee or other person whom the employer or any person acting on behalf of the employer has refused to employ or continue to employ or has suspended or discharged for a reason that is prohibited by one of those paragraphs,*
>
> *(ii) pay to any employee or other person affected by that failure compensation not exceeding such sum as, in the opinion of the Board, is equivalent to the remuneration that would, but for that failure, have been paid by the employer to that employee or other person, and*
>
> *(iii) rescind any disciplinary action taken in respect of and pay compensation to any employee affected by that failure, not exceeding such sum as, in the opinion of the Board, is equivalent to any financial or other penalty imposed on the employee by the employer; and, for the purpose of ensuring the fulfilment of the objectives of this Part, the Board may, in respect of any failure to comply with any provision to which this section applies and in addition to or in lieu of any other order that the Board is authorized to make under this section, by order, require an employer or a trade union to do or refrain from doing any thing that it is equitable to require the employer or trade union to do or refrain from doing in order to remedy or counteract any consequence of such failure to comply that is adverse*

to the fulfilment of those objectives."

He also relied upon section 22 of the Board's regulations, which states:

> *"22. The Board may adjourn or postpone any hearing for such time, to such place and on such terms as it deems fit."*

After receipt of written submissions, the Board denied the request "without making any final determination with respect to its jurisdiction."

Basically that decision was made for two reasons. First, the Board is seriously concerned about whether it has jurisdiction to make such an anticipatory order. Section 189 authority is predicated upon a Board determination that there has been a failure to comply with the Code. The Federal Court of Appeal has had occasion to express itself on the interplay and authority of the Board under these two sections.

> *"Two provisions of the Code were invoked as justifying the order, viz section 121 and section 189. The former, which is found among provisions dealing with the general powers of the Board, in my opinion, is merely an authorization to do what is necessary or incidental to the effective use of other powers and adds nothing to what, if anything, the Board might properly order under section 189."*
>
> (Halifax Longshoremen's Association v. Nauss et al (1981), 37 N.R. 242 at p. 243 per Thurlow, C.J. See also the statements at p. 252, per Pratte, J.)

This view of the modest scope of section 121 was previously expressed in The Union of Production Employees of Quebec and Acadia v. Canadian Broadcasting Corporation et al, unreported Fed. C.A., April 8, 1981, per Pratte, J. More recently, the Federal Court of Appeal has said the following:

> *"However, section 121 deals with the general powers of the Board and is merely authorization to do what is necessary or incidental to the effective use of other powers specifically given elsewhere in the Code to the Board. In my view, it confers no powers additional to those expressly given to the Board under section 189."*
>
> (Manitoba Pool Elevators v. Canada Labour Relations Board et al, unreported, November 13, 1981, per Heald, J. at p. 10)

Although the Board may not share this interpretation and the Supreme Court of Canada has granted leave to appeal the first two decisions, we were not anxious to use the occasion of this case to press the Board's authority under section 121 into frontier areas. For expressions of the Board's view of its authority under section 121 see Gerald Abbott (1977), 26 di 543; [1978] 1 Can LRBR 305; and 78 CLLC 16,127; Bank of Nova Scotia, Vancouver Heights Branch (1978), 23 di 901; and [1978] 2 Can LRBR 181; CJMS Radio Montréal Limitée (1978), 27 di 796; and [1979] 1 Can LRBR 332; British Columbia Telephone Company (1979), 38 di 14; and [1979] 3 Can LRBR 350; Cyprus Anvil Mining Corporation (1979), 37 di 92; and American Airlines [1981] 3 Can LRBR 90.

Of equal importance, we were not persuaded, notwithstanding the unfortunate delays, that the complaint and consequences required the urgent and novel treatment requested by counsel. The interim order was therefore denied.

V

Section 184 (3) (c) of the Code has been the vehicle for very few complaints since its enactment in 1973. In the one case for which the Board issued reasons for decision the section was interpreted to apply only to employees of the same employer.

To arrive at that conclusion the Board examined the purpose of the section in the overall context of the Code. Its uniqueness was exp1ained as follows:

> *"Was section 184(3) (c) an attempt to salvage a measure of recommended employee protection from that portion of the Task Force Report while leaving the law of picketing substantially unchanged? Such a conclusion is supported by the fact that it is the only provision in the Code which appears to expressly address the realm of economic conflict.*
>
> *At the minimum, it has the effect of depriving an employer from using disciplinary sanctions to force his unorganized employees or those in a non-striking unit to do the work of his striking employees. This as a limitation on his ability to reduce or withstand the economic consequences of a strike. If more broadly*

> *construed, section 184(3)(c) would have a further impact of this sort by reducing the ability of allies of a struck employer. At the same time it is a respect for employee interests in not acting as strikebreakers."*
>
> (British Columbia Telephone Company (1979) 37 di *20;* [1979] 2 Can LRBR 297; and 80 CLLC 16,007 at pages 25, 301, and 14,099)

The reason for the existence of section 184(3) (c) is grounded in the conflict-threat nature of bargaining under the Code where the Code abstains from regulating activity. The only exception is this section which is intended to protect an "employee" who refuses to do the duties and responsibilities of another employee who is lawfully on strike. The Code protects the striking employee (see sections 184 (3) (a) (vi) and (d) and Bell Canada [1981] 2 Can LRBR 148; and 81 CLLC 16,083). Only through section 184 (3) (c) does it go one step further and address others who may be affected by a strike, but it does so in a limited fashion. Because its application may affect the balance of power in economic conflict, its limitations should be clearly understood.

Section 184 (3) (c) prohibits retaliation by an employer against an "employee", not all persons generally — only employees under the Code (see section 107(1)). In other paragraphs of section 184 the Code speaks of "persons". The use of these two words in section 184 was discussed at length in General Aviation Services Ltd. (1978), 34 di 587; and [1979] 1 Can LRBR 285.

Section 184(3) (c) affords protection only when the other employee who is engaged in the bargaining conflict is on strike. Not when he is locked out. That fact may influence whether an employer locks out or awaits a strike or a union acts more quickly to commence a strike. Perhaps the strike will be in response to a lockout. The issue can become clouded. But section 184(3) (c), unlike section 184(3) (d) for example, speaks only of a strike and not a lockout.

The strike must be a lawful strike under Part V of the Code.

Section 184 (3) (c) does not say an employee may continue to work at his normal functions during the strike of other employees. It does not say the employer may not lay-off because of a refusal to perform struck work. A strike is an extraordinary event and an employer, if it seeks to continue to operate, will have to reorder its affairs and seek to perform the work of those on strike. The Code does not prohibit this or the engaging of outside help as under Quebec legislation (Labour Code, R.S.Q. 1977, c. C-27, s. 109a) or in British Columbia (Labour Code, R.S.B.C. 1979, c. 212, s. 3(3)(d)). The Code contemplates employers seeking to operate and asking non-striking employees to assist. If they refuse, the Code contemplates they may be laid-off during the strike. This is why there is no reference to lay-off in section 184(3) (c) as in 184(3) (a), for example.

By implication section 184(3) (c) says an employee may refuse to do certain struck work - of another employee of the same employer lawfully on strike. That right is narrower than in Manitoba where there is an express provision saying an employer who refuges to perform work "which would directly facilitate the operation or business of another employer whose employees in Canada are locked out or on a legal strike". (The Labour Relations Act, C.C.S.M., c. Ll0, s. 12). In Manitooa there is a prohibition against "any disciplinary action", which one court has described as follows:

> *"Discipline, within this context, means to punish and since the section deals with an employee who is subject to a collective agreement the discipline or punishment should be considered in the context of the agreement. Discipline does not include a detriment which flows incidentally from the actions of the employee but which were not imposed by the employer. The employer is not bound to insure the employee against all of the consequences of his chosen conduct."*
> (Canada Safeway Limited (1979), 79 CLLC 14,218 (Man. Q.B.) at p. 178)

What is or is not struck work may be an issue of contention in some cases (e.g. Sydney Police Commission [1977] 1 Can LRBR 431 (N.S.)).

As a general conclusion, section 184(3) (c) recognizes the intensity of feelings among employees to adhere to privately held or union advocated principles of not doing the work of others on strike. The employee's motivation is irrelevant. It may be a matter of principle, or merely a matter of avoiding conflict with fellow employees, or feeling that the performance of some struck work is beyond current knowledge or skills, or for some, demeaning, or not wishing to appear to or actually work against family members who are on strike, or finding the performance of struck work too arduous or consuming of time intended for family or other life goals, or merely not wanting to become involved. It could be any of a number of other reasons. The Code allows the employer to seek to operate and perform the work of employees on strike. At the same time it allows other employees to choose whether they will be instruments through which the employer seeks to attain its bargaining goals.

Some employers undoubtedly wish to create an environment within which they can expect and even demand the assistance of employees to defeat the strike efforts of other employees. However, the Code gives the choice to the individual employee. He may pay a large price if he chooses against the employer's wishes. He may be laid off and lose income, although he may see that as a form of self help if benefits that striking employees win are generally passed on to him. He may lose status and even friends among fellow employees who disagree with his stand and work as expected. In subtle and often unproveable ways his actions may affect decisions others make about him in his future career. The Code has not and maybe cannot address all of these consequences of the individual's exercise of his rights.

But on one thing the Code is clear. The employer and no person acting on its behalf shall "suspend, discharge or impose any financial or <u>other penalty</u> on an employee, or <u>take any other disciplinary action</u>" against the employee. That protection in the

Canada Labour Code converts a normal three sided issue - employer, striking union and public - into a four sided affair. The non-striking employee affected by the dispute is not automatically thrust into the employer's camp. He has some rights and the Code aims at protecting against employer retaliation for the exercise of those rights.

V

Grundy's complaint has raised several important issues. The TWU asks the Board to conclude that section 184(3) (c) is violated if the employer's actions decrease the employee's choice to refuse to do struck work by making it the only available work and if the effect is to increase the employer's ability to withstand a strike. Here the violation occurs if the employee's choice is to do struck work or be laid off.

For its position focusing on effect rather than intent it cites the following words of the Board.

> *"In the absence of prohibited motice not all employer action is permitted. Action that has a prohibited effect regardless of motive will contravene the Code. Some that has an adverse effect on collective bargaining purposes of the Code or the exercise of employee freedoms under the Code must be examined in light of the competing entrepreneurial and collective bargaining interest. These matters are discussed at length in Canadian Imperial Bank of Commerce, North Hills Shopping Centre and Victoria Hills Branches (1979), 34 di 651; [1979] 1 Can LRBR 266; and (1979), 80 CLLC 16,001 and Banque Canadienne Nationale (1979), 35 di 39; and [1980] 1 Can LRBR 470."*
>
> (Bell Canada, supra, at p. 151)

Grundy, in part of his submission, argues section 184(3) (c) is generally intended to facilitate the collective bargaining process by encouraging speedy resolution of conflict through this implicit right in the non-striking employee.

The employer says these proceedings in some form were inevitable because of the goals of the unions. It says it merely

responded to a human relations problem with practical solutions. Grundy was not suspended but laid off because there was no work for him. The reorganization was accelerated to solve a problem of relations among its supervisors. There was no "financial penalty", only the loss of pay as a natural consequence of the decision not to work. There was no "other penalty" or "disciplinary action" on the facts, only a change that normally occurs in many reorganizations. It candidly admits the case is close on this issue. It submits the Board should not consider any question of discrimination because this language is not used in section 184(3)(c). It is expressly used in section 184(3)(a) and paragraph (vi) of that section could also cover the facts, but no complaint was made under that section. It reads:

> *"184. (3) No employer and no person acting on behalf of an employer shall*
>
> *(a) refuse to employ or to continue to employ or suspend, transfer, lay off or otherwise discriminate against any person in regard to employment, pay or any other term or condition of employment or intimidate, threaten or otherwise discipline any person, because the person*
>
> *(vi) has participated in a strike that is not prohibited by this Part or exercised any right under this Part;"*
>
> (emphasis added)

If the Board finds a contravention, it asks the Board to consider the legitimate business concerns of the employer in fashioning any remedy.

For Grundy the matter is open and shut. He is being penalized "by reason of his refusal" and the casual connection between his actions and the employer's response is crystal clear. The onus is on the employer under section 188(3) and it has not been satisfied.

For us the answer on the facts is also clear. We will not pause to comment on our conclusions about who was forgetful or embroidered his testimony in what areas. The key players must

work together and we are sure they wish to leave this remnant of the emotions of the past strike as quickly as possible.

There is no doubt Swabey and the employer altered their intentions, notwithstanding contrary testimony, to diminish Grundy's responsibilities, job content, authority and status because he refused to perform struck work. Rather than respect Grundy's right to refuse to perform struck work and return to normal after the strike, the employer catered to and chose to enforce the preferences of three junior employees who failed to demonstrate the maturity to respect Grundy's freedom of individual choice. If the complaining supervisors preference not to work with Grundy was because of his parentage or political or religious beliefs or some other personal characteristic unrelated to the job, we are sure the employer would have been far less responsive. But in this instance the employer had a vested interest in discouraging the individual employee's exercise of the choice not to do struck work.

In this case we conclude the employer wanted to reward and punish. It wanted to reward and seek to reinforce the attitude of those who acted as it expected all non—bargaining unit employees to behave. It wanted to punish those who did not. It rewarded the three supervisors and punished Grundy by creating a unique organizational structure setting Grundy, and Bird who acted similarly, apart and separate from the others. In effect, rather than seek to promote harmonious relations among its supervisors it ingrained their attitudal differences into its institutional structure. For Grundy and to us the penalty is clear and obvious. He was stripped of responsibility, respect and status. Except for the more blatant act of discharge or demotion in classification, it is difficult to conceive of a penalty more stinging for a supervisory employee. A loss of status or prestige has been enough for the courts to determine the termination of an employment relationship (e.g. O'Grady v. Insurance Corporation of British Columbia (1975) 63 D.L.R. (3d) 370 (B.C.S.C.); and Burton

v. MacMillan Bloedel Limited [1976] 4 W.W.R. 267 B.C.S.C.)). We therefore find the employer contravened section 184 (3) (c) when it changed Grundy's responsibilities and reorganized to achieve this after the strike.

There was confusion and uncertainty about Grundy's status during the strike. The main actors were unsure of their rights and the operation of the Code. We are satisfied the employer did not suspend (a disciplinary measure) but laid—off Grundy when he refused to do bargaining unit work because it did not intend to perform any other work during the strike. It did not contravene section 184(3) (c) in this action which we find permissible under the Code. To this extent we do not accept the submission of the TWU. Because we have found a motivation to punish we do not consider it necessary on these facts to determine if it is an essential element to finding a breach of section 184 (3) (c).

What is an appropriate remedy? The Board's authority is wide and discretionary. Under section 189(b)(i) we may require the employer to permit Grundy "to return to the duties of his employment". Under paragraph (iii) we may order the payment of compensation of a sum equivalent to any "penalty imposed on the employee". Under section 189 generally we may take action to "remedy or counteract any consequences" of the violation "for the purposes of ensuring the fulfilment of the objectives of this Part".

Our experience with this employer has taught us about its structure and organization and how much it operates on an ordered approach to organizational structure and managerial philosophies. Here Swabey introduced a deviation fashioned to penalize and discipline Grundy. We order that this organizational change be reversed and Grundy be reinvested with all the duties and authority he had before the strike. We further order he be permitted to proceed with recruiting for the supervisors positions it was intended he would fill. Further, in the future, his

performance will not be detrimentally assessed because of his inability in 1981 to carry out the objectives of his position as a result of the reorganization.

These remedies are intended to place Grundy back to where he should have been after the strike ended. There is much that cannot be undone, but we consider it is important for Grundy's reputation and for future relations among the employees of this employer that the Board's findings and explanation of section 184(3) (c) be widely known among non-bargaining unit employees. We therefore direct the employer to distribute, at its expense, a copy of these reasons for decision and accompanying summary prepared by the Board to each employee not represented by the TWU. These are the employees in the former nurses' unit and the unit in which the unsuccessful representation vote for TEMPO was conducted. This distribution is to be made not late than February 5, 1982 and must be accompanied by a brief note from the employer stating only the following:

> *"The Canada Labour Relations Board has found British Columbia Telephone Company failed to comply with section 184 (3)(c) of the Canada Labour Code (Part V) at the conclusion of the latest strike by TWU. It has ordered that a copy of its reasons for decision be distributed to all employees outside the TWU bargaining unit who are covered by this section of the Code."*

The Board retains jurisdiction to decide any questions about the interpretation and application of its decision. We have not issued a formal order in the expectation it will not be necessary.

James E. Dorsey
Vice Chairman

James D. Abson
Member

Hugh R. Jamieson
Member

DATED at Ottawa this 9th day of December, 1981.

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