Between
Louisiana-Pacific Canada Ltd. ("Louisiana-Pacific" or the "Employer"), and IWA-Canada, CLC, Local Union Number 1-424 (the "Union")

[1992] B.C.L.R.B.D. No. 74
No. C73/92
Case No. 11007
British Columbia Industrial Relations Council
Heard: April 24, 25 and 26, 1992
Judgment: April 27, 1992
Reasons: May 29, 1992

Panel: Joseph S. Crowder, Vice-Chairman
George Richardson, Member
Ken Scott, Member

Counsel: Grant Mebbs and Sharleen Dumont for the Employer. Shona Moore for the Union.

REASONS FOR THE COUNCIL'S DECISION

This matter arises from the Union's application pursuant to Sections 8 and 28 of the Industrial Relations Act (the "Act"), alleging that the Employer violated Sections 2(4)(a), 3(1), 3(3)(a)(i), 3(3)(b) and 3(3)(c) of the Act. Specifically, the Employer violated the Act when it discharged and suspended employees for wearing IWA stickers on company issued hard hats.

A hearing into this matter was held on April 24, 25 and 26, 1992, at Dawson Creek, B.C. At the conclusion of the hearing, the parties requested that the Panel issue its decision expeditiously. On Monday, April 27, the Panel issued an Order decision finding that the Employer had breached Sections 3(1) and 3(3)(a) of the Act and ordered specific remedies:

- 1.

  That Ward Grant forthwith be reinstated to his employment without loss of seniority;

- 2.

  That the discharge of Ward Grant in connection with the wearing of the "IWA sticker" on the hard hat worn by him at the workplace be rescinded;

- 3.

  That the disciplinary notation on the file of Ward Grant in connection with "initiatory suspension" issued agaisnt him on March 11, 1992 be rescinded;

- 4.

  That Louisiana-Pacific Canada Ltd. pay to Ward Grant a sum equal to his wages, bonuses and benefits lost by virtue of his termination;

- 5.

  That the suspensions and all other attendant disciplinary notations on the files of Dennis Veerling, Ted Alexander, Ed Henderson,Gerald Tanchuk, Mark Finkle, Bill Taylor and Trevor Marshall in connection with the wearing of the "**IWA** sticker" on hard hats at the workplace be rescinded;

- 6.

  That Louisiana-Pacific Canada Ltd. pay to Dennis Veerling, Ted Alexander, Ed Henderson, Gerald Tanchuk, Mark Finkle, Bill Taylor and Trevor Marshall a sum of money equal to their wages, bonuses and benefits lost by virtue of their suspensions; and

- 7.

  That Louisiana-Pacific Canada Ltd. post a copy of the Council's decision on all bulletin boards accessible for a period of not less than two weeks.

The reasons for that Order follow.

II

Louisiana-Pacific has operated a chipboard plant in Dawson Creek, B.C., for about five years. It is a state of the art facility operating 24 hours per day, seven days per week. Production employees work on a shift rotation basis working 12 hours shifts, four days on, then four nights on, then four days off. Four crews of 30 employees make up each of the A, B, C and D crews. Maintenance and other employees, including Ward Grant, work regular day shift, Monday through Friday. Some of the members of "A" crew and Grant are involved in this dispute.

The dispute centers around the Employer discharging Grant and suspending certain members of "A" crew for refusing to remove "**IWA** stickers" (the "stickers") from hard hats they are required to wear at work. The Employer issues hard hats to all employees at the time of hire. Employees "sign for" their hard hat and are responsible for its replacement cost under certain conditions. While the Employer's policy requires employees to turn in hard hats upon lay-off or termination, that policy has only recently been enforced. Prior to March of 1992, there is no evidence of former employees returning hard hats to the Employer, nor of the Employer reissuing used hard hats that had been turned in.

Since inception, the Employer has had a policy against "defacing of company property." From the company's point of view this applies to, and has always applied to, hard hats. Notwithstanding, Ted Alexander has worn a Canadian flag sticker (the "Canadian flag") on his hard hat for the past five years. Alexander has neither been requested to remove the Canadian flag from his hard hat, nor has he been disciplined for not doing so. Alexander is one of the members of the "A" crew suspended by the Employer for refusing to remove the **IWA** sticker from his hard hat. Other employees have, from time to time, worn or are

wearing stickers, for example, denoting support for the Boston Bruins, "scribbles" and other unauthorized markings on their hard hats. There is no evidence of those employees being disciplined for doing so.

Jim Heinemann became plant manager on November 4, 1991. Heinemann came from another Louisiana-Pacific operation in the U.S.A. where he had been successful in improving its performance. He brought a strong mandate with him to Dawson Creek, that being to "turn it around" and make it profitable. Upon his arrival, he made it clear to supervisors and employees alike that the manner of operations had to change and that company rules and policies would be enforced. Heinemann perceived the plant to have been run in a "lax" manner with little control over production and policy. The plant was shut down in December 1991 and reopened in January 1992. By then, the effects of Heinemann's "tightening up" were noticeable to employees and management alike. While they did not always agree with Heinemann's methods, the evidence is they agreed that the change was necessary and that the performance of the plant was improving. The benefits of Heinemann's management style became very visible in February and March. In both months, successive production records were achieved. As well, employees enjoyed record production bonuses for each month.

On January 7, 1992, an employee was disciplined for writing profanities on a company memo in violation of the Employer's policy prohibiting the defacing of company property. By February, the **IWA** commenced its second organizing campaign in less than six months of Louisiana-Pacific's employees at the Dawson Creek plant. **IWA** stickers began appearing throughout the plant attached to doors, walls, windows, machinery and the like. Union literature was also readily available in the employees' lunchroom. Management removed stickers displayed throughout the plant and regularly removed any Union literature from the employees' lunchroom.

A representation vote was held on March 6, 7 and 8, 1992. During this time, Keith Havenor (yard superintendent) told Grant that he was worried about losing his job if the **IWA** won the vote because of his style of supervision. Havenor testified in cross-examination that the **IWA** was not welcome at the plant. This view was confirmed by other company witnesses. Heinemann testified that Louisiana-Pacific has always preferred to operate non-union. After the vote, **IWA** stickers appeared in greater quantities throughout the plant. In response, on March 11, 1992, Heinemann issued a memo to all employees restating company policy against the defacing of company property. In particular, he wrote:

- This letter is to remind you that the placement of **IWA** stickers, buttons, or any other unauthorized items on Company property will result in disciplinary action....This includes hard hats, Company vehicles, equipment, our building, etc....
  - (emphasis added)

This was the first time that the company specifically addressed hard hats and **IWA** stickers in such a rule. Subsequently, stickering in the plant and on equipment decreased.

However, the stickering of employee time cards continued. This created some payroll problems. Removing the stickers resulted in some hours of work

recorded on the time card prior to the sticker being placed thereon being lifted off. Thus, payroll had difficulty determining the actual hours of work for certain employees. In response to this, on March 16, 1992, Heinemann issued a second memo to all employees, this time calling for a halt to the stickering of time cards and warning of disciplinary action. The result was that stickering of time cards ceased.

Coincidental with the foregoing, on March 11, Grant received two warnings. The first was a written warning for carelessness. Grant had parked the "bobcat" on the maintenance shop driveway and left it unattended for a few moments. During that time the bobcat rolled backward down the gently sloping driveway, across the road, and came to a stop adjacent to a snowbank piled on the opposite side of the road. Notwithstanding the bobcat was in poor mechanical repair, Grant took no extra precautions to prevent the bobcat from rolling backward. As it turns out, the bobcat was apparently involved in a "near miss" with an inbound freight truck.
About 45 minutes later, Grant was again disciplined by the Employer. This time he was given an "initiatory of a suspension" warning (the equivalent of a disciplinary suspension from work but without loss of time or pay). The Employer's justification was that Grant had "kicked" open two man doors, a green end equipment locker door, and had used the phone in the foreman's office without permission. Grant's evidence was that he couldn't recall "kicking" the doors as alleged but, rather, that he regularly kicked open the doors in question. At times this was necessary due to his hands and arms being laden with tools and equipment necessary in his work. His explanation for using the phone in the foreman's office was that the telephone in the employees' lunchroom was in poor repair making conversation nearly inaudible. As well, he had sensitive personal matters that he had to discuss with his wife.

On March 12, 1992, the Union became certified. On March 24 the Union's counsel wrote an "opinion" expressing the right of employees to wear **IWA** stickers on their persons, including on their hard hats while at work. By April 14 this opinion had circulated to a number of employees. As a result, Grant and several members of "A" crew reported to work with **IWA** stickers on their hard hats.

On April 15, prior to commencing their shift, the Employer confronted the "A" crew demanding that they remove the **IWA** stickers from their hard hats. Those employees who refused to do so were suspended from work. Grant reported for work sporting three **IWA** stickers on his hard hat. At 7:30 a.m. he was fired for refusing to remove the **IWA** stickers.

April 20, 1992, was "A" crew's next scheduled tour of duty, following on the heels of their April 15 suspension. When they reported for work, management again directed that they remove the **IWA** stickers from their hard hats or they would be suspended. One employee removed the **IWA** sticker from his hard hat and returned to work. Others refused to do so and were again suspended from work and have been suspended ever since.

III

ARGUMENT

The arguments of the parties may be summarized as follows. The Employer argues that the case is essentially about management rights, about the open

defiance of a company rule or insubordination. The circumstances disclose no presence of anti-union animus. The Act does not require that the Employer prove that discipline or dismissal is warranted by reason that "proper cause" to discipline or dismiss existed. The test of permissible employer action in relation to a decision to terminate an employee, under conditions where a union presence is a factor, is anti-union animus, in whole or in part. Anti-union animus must be distinguished from general anti-union sentiment. An employer may prefer to operate without a union without being in breach of the Act. There must be a connection between the conduct and the antiunion animus. The Employer argues that the "work now, grieve later" principle applies, even though there is no collective agreement in place. An employee must comply with an employer's lawful instructions. This case is not, as the Union argues, a case of freedom of expression.

Grant was properly disciplined for the "bobcat incident". Grant exhibited carelessness by leaving the bobcat on an incline where it could roll down. He knew it could roll. The discipline had nothing to do with the presence of the **IWA.** Similarly, the discipline for the "door kicking" incidents is not related to the **IWA.** The next incident, involving Grant, concerning the **IWA** stickers on hard hats, took place one month later. The employees who were disciplined knew it was against company policy to place stickers on company property. The Employer does not take issue with the message on the stickers, but rather the fact that they were placed on company issued hard hats. Freedom of expression, may in any event, be limited, for example, by the property rights of others. The Employer urges the Panel to look at the period subsequent to Heinemann's arrival. The rules were in place long before he began enforcing them. The period prior to his arrival is, therefore, of limited relevance. The March 11, 1992 memo specifically addressed **IWA** stickers because the **IWA** stickers was the problem at hand. No anti-union animus should be inferred from that.

The Union argues that this case has nothing to do with the "work now, grieve later" principle but falls squarely within the Act. The Union points to fundamental freedoms for employees set out in Section 2. The employees are participating in "lawful activities" of a Union. In cases under Section 3(3)(a), the onus is on the Employer to establish, on the balance of probabilities, that its actions were not tainted by anti-union animus. The wearing of Union buttons is a legitimate activity. The Union notes that it is not an absolute right, but an employer must demonstrate some adverse impact. The Employer has not done so.

The Union argues that it encountered a difficult situation at Louisiana-Pacific. This is the second Union drive. The company has resisted the Union. The stickers on the hard hats appeared after the certification. It is not appropriate to characterize the placing of **Union stickers** as defacing company property. The March 11, 1992 memo goes directly to the integrity of the **IWA** as the bargaining agent for the employees. The Union notes that the continued support among the employees is essential for the Union in obtaining a collective agreement. The organization process is a continuous one, and not limited to and ending at the time of certification. The employees have been wearing insignia, emblems, stickers, felt pen writing and other types of markings on their hard hats for approximately 5 years. It is inconceivable that the management did not notice. However, as noted above, the Employer's prohibition went precisely to **IWA** stickers. While the company may "own" the hard hats, the employees have in many ways treated them as their own. The bobcat incident reflects anti-union

animus because others were not disciplined for similar matters. Furthermore, Grant was disciplined a second time on that very same day for kicking a door. The Employer was clearly looking for a reason to fire someone who they knew to be a key Union supporter.

IV

CONCLUSION

The test of permissible employer action in relation to a decision to terminate or suspend an employee under conditions where a union's presence is a fact, is anti-union animus. A breach of the Act's unfair labour practice provisions pertaining to dismissals or suspension occurs where an employer's decision to terminate the employment of, or discipline, an employee is tainted, in whole or in part, by anti-union animus. General anti-union sentiment per se on the part of an employer is not sufficient. There must be a nexus between the employer's conduct and the anti-union animus before the employer is in breach of the Act. Under Section 8(6), the onus of proof is on the employer to show, on the balance of probabilities, an absence of anti-union animus, in whole or in part. That standard may be an onerous one for an employer. However, employers rarely advertise their anti-union activities, rather, anti-union intentions have to be pieced together from a pattern of circumstantial evidence.

We will first deal with the termination of Grant's employment and the suspension of other employees for wearing **IWA** stickers on their hard hats. The Panel is of the view that the Employer's policy, at the time it was put in place, was tainted by anti-union animus. On the one hand, the Employer had a serious problem with graffiti and **Union stickers** appearing throughout the plant. In part, the Employer's reactions were in response to this. On the other hand, the Employer's policy memo of March 11, 1992 reiterating the Employer's policy against the defacing of property, was, on its face clearly and specifically directed at **IWA** stickers. While there is no disagreement that the Employer has not sought to limit the expression of support for the Union on personal property such as lunch boxes, tshirts and the like, in a historical context, the evidence points to the presence of anti-union animus. It is clear on the evidence, that employees have, in the past, decorated their hard hats with stickers, such as the Canadian flag, or Boston Bruins, "scribbles", or other unauthorized markings. It is equally clear on the evidence that management has not taken any steps to prohibit such conduct until faced with the **IWA** stickers. The Employer argues that it was not aware of that conduct. However, in this Panel's view, that is simply not credible, given the length of time the plant has been in operation and the frequency of interaction between staff and management, testified to by the employees. The Panel disagrees with the Employer's argument that it should only consider the period from Heinemann's arrival at the plant. The March 11, 1992 memo was clearly and specifically directed at **IWA** stickers and even during Heinemann's tenure, other employees wore a variety of stickers and "scribbles" on their hard hats. The Panel finds that the Employer was motivated in whole or in part by anti-union animus and, therefore, the termination of Grant's employment and the suspension of the other employees cannot stand and the disciplinary notations in respect of this incident must be removed from their files.

Furthermore, the Employer also interfered with the "administration or formation" of a trade union by virtue of the manner in which it introduced its

policy. The Employer singled out **IWA** stickers for special treatment. The Employer's actions affected a large number of employees, known to support the Union. While the Employer may not have intended this, its March 11, 1992 memo, as well as the termination/suspensions, sent a clear message to other employees. The Panel also notes that the memo was issued at a particularly sensitive time, namely, shortly after the certification was granted. This was, after all, the Unions' second certification application. Furthermore, there was no evidence that the stickers damaged the hard hats, interfered with production, or affected relations with customers. In short, the termination and suspensions were in breach of the Act.

Turning now to the discipline of Grant, the Act does not impose a "proper cause" standard. The Act does not establish that an employer is required to prove that a dismissal is warranted by reason that "proper cause" to dismiss existed, for example, as that term is understood in common law or labour law jurisprudence. On the other hand, as noted by the Panel in one of the cases referred to by the Employer, Focus Building Service Ltd., IRC No. C90/87:

- Notwithstanding the lack of a standard which is the equivalent to the just cause requirement of collective agreements which is mandated in the Act, where proof of a union presence exists an employer would be most imprudent to base his defence to a complaint that it violated Section 3(3)(a) upon a cause which was not substantial but whimsical or capricious. Such a defence would, naturally, bring the fact of the union presence into high relief. Any suspicion that the termination was improperly motivated would, under these circumstances, likely be resolved in favour of such a finding, in my view. For such practical reasons, employers faced with a complaint based on Section 3(3)(a) usually attempt to establish some justification for the termination. In my opinion that is a pragmatic and necessary response to the approach the Council takes to complaint determination under Part 1 of the Act.
  (at 9; emphasis added)

In the circumstances of this case, the Panel finds that the discipline of Grant for the "door-kicking incidents" and for the use of the foreman's telephone belong to the category of the discipline described as "not substantial but whimsical or capricious". The Panel is satisfied that "the initiatory suspension" issued against Grant was tainted by the Employer's anti-union animus. Grant was known by management to be a key Union supporter during the organizing campaign. The Employer initiated discipline against him without first providing him with an opportunity to rebut the charges. The Panel was invited to "take a view" of the plant. During this "view", the Panel looked at the doors in question and is satisfied that no damage was caused by Grant's alleged kicks. Rather, heavy usage and wearmarks are plainly visible, suggesting that the doors are regularly opened by varying means. Grant's use of the foreman's telephone is adequately explained as well, in Grant's uncontradicted evidence, namely that the employee telephone in the lunch room is inaudible. In the result, the discipline cannot stand and must be removed from his personnel file.

On the other hand, the discipline in respect of the "bobcat incident", on the balance of probabilities, is not tainted by anti-union animus. It is simply a case of discipline for operating equipment in an unsafe manner. The incident came to Heinemann's attention due to a complaint from a truck driver. Heinemann left it to the yard supervisor, Havenor, to investigate and deal with the matter. Grant knew that the bobcat was in disrepair when he left it on the incline. Normally, he testified, he took it upon himself to assure that it would not roll. This time he did not. Furthermore, he was less than forthright when Havenor first asked him about the incident. Only when specifically asked a second time, the following day, did he own up to it. In all of the circumstances the Panel is satisfied that there was no anti-union animus in respect of this incident in the discipline which followed.

While the Council has the remedial authority to order legal and other costs in cases of this nature, this authority has been used sparingly. The Panel finds that, in this case, costs would not be appropriate. However, in all of the circumstances, it is appropriate that the Employer post a copy of the decision on its bulletin boards. Given the nature of the Council's disposition, it is not necessary that the Council declare that the employees are entitled to wear IWA stickers on their hard hats. Finally, the Panel declines the Union's request to grant access to the plant for the Union to explain the Council's decision. There is no evidence that the Union would be unable to communicate with the employees, directly or indirectly.

JOSEPH S. CROWDER
VICE-CHAIRMAN

GEORGE RICHARDSON
MEMBER

KEN SCOTT
MEMBER

Fletcher's Fine Foods Ltd. v. United Food and Commercial Workers International Union, Local 118 (Hard Hats Grievance)

IN THE MATTER OF an Arbitration
AND IN THE MATTER OF a collective agreement
AND IN THE MATTER OF a union policy grievance, (Company requiring removal of decals from the hard hats of Union representatives on the joint Health and Safety Committee)
Between
Fletcher's Fine Foods Ltd. (Red Deer), (hereinafter referred to as "the company"), and
United Food and Commercial Workers International Union A.F.L. - C.I.O. - C.L.C., Local No. 1118, (Red Deer), (hereinafter referred to as "the union")

[2000] A.G.A.A. No. 59
91 L.A.C. (4th) 66
File No. Alta. G.A.A. 47
Alberta
Grievance Arbitration

A.V.M. Beattie, Arbitrator

Heard: Red Deer, June 22, 1999
Award: June 28, 2000
(24 paras.)

Appearances:

David B. Mercer, counsel, Wayne Covey, Business Representative, Witness, Albert Johnson, Business Representative, Doug Legear, Chief Shop Steward, Brad Robinson, Unit Chair, for the union.
D. Sean Day, counsel, Dale Bright, Supervisor of Health and Safety and Human Resources, Witness, for the company.

GRIEVANCE ARBITRATION AWARD

GRIEVANCE

1 The grievance dated October 28, 1998 (Exhibit 2) states:

- Fletcher's Fine Foods Ltd. acted in an unjust, unfair, unreasonable, and in a discriminatory manner by unilaterally, and arbitrarily requiring Union Health and Safety Committee Members to remove decals from their **hardhats** which signify that such individuals are elected Union Safety Committee members of the Joint Health & Safety Committee.

The adjustment requested is:

- Full Redress including. 1. Declaration that the employer breached the Collective Agreement. 2. Order the employer allow such decals to be worn by the union Health & Safety Committee members.

SUMMARY

2 Commencing in 1989, by agreement between the parties, those members of the Union who were members of the Union-Employer Health and Safety Committee ("the Committee") wore orange hard hats and those Union members who were stewards and Union representatives wore green hard hats. (The Union supplied the hats.) All members of the Committee had decals which were affixed to their helmets with the insignia "Health and Safety Committee Member".

3 Following a lock-out/strike in 1998 (and the coming into effect of the current Collective Agreement) the Company directed that all employees were to wear yellow hats. The Union ordered decals prominently showing the name of the Union and beneath, somewhat less prominently, "Safety Rep," ("the decals"). The Union representatives on the Committee affixed the decals to their yellow hard hats. The Company ordered those persons to remove the decals. They did so, following the principle of "obey now, grieve later," and filed the present grievance.

Held: The Company's rule is unreasonable. The Company is ordered to permit the Union representatives on the Committee to wear the decals on their hard hats.

COLLECTIVE AGREEMENT

- ARTICLE 3 - MANAGEMENT
- It is agreed that the Company retains all of the customary and ordinary functions of management except as they are expressly restricted by the terms of this Agreement.
- ARTICLE 12 - SAFETY AND HEALTH

12.01 Co-operation on Safety The Union and the Employer shall co-operate in establishing rules and practices which promote an occupational environment which will enhance the physiological and psychological conditions of employees and which will provide protection from factors adverse to employee health and safety.

12.02 Union-Employer Health and Safety Committee A Health and Safety Committee shall be established which is composed of up to five (5) Union and five (5) Employer representatives. The Health and Safety Committee shall hold meetings as requested by the Union or by the Employer for jointly considering, monitoring, inspecting, investigating and reviewing health and safety conditions and practices and to improve existing health and safety conditions and practices.

12.06 Compliance with Health and Safety Legislation The Employer shall comply with all applicable federal, provincial and municipal health and safety legislation and regulations. All standards established under the legislation and regulations shall constitute minimum acceptable practice to be improved upon by Agreement of the Union-Employer Health and Safety Committee or negotiations with the Union.

12.10 Rights to Refuse and No Disciplinary Action No Employee shall be discharged, penalized or disciplined for refusing to work on a job or any workplace or to operate any equipment where he/she in conjunction with the Health and Safety Committee, ascertains that it would be unsafe or unhealthily to himself/herself, an unborn child, a workmate or the public, or where it would be contrary to applicable federal, provincial or municipal health and safety legislation or regulations. There shall be no loss of pay or seniority during the period of refusal. No employee shall be ordered or permitted to work on a job, which another worker has refused until the matter is investigated by the Health and Safety Committee and satisfactorily settled.

EVIDENCE

4 See "Summary" above.

5 Mr. Covey testified on behalf of the Union. He is a Business Representative and chief spokesman for the Union which has approximately 2500 members. The Company's plant at Red Deer employs approximately 650 Union members. The public does not have access to the plant.

6 Mr. Covey testified that the Union, in 1989, had proposed the different colour hard hats so that the Union members of the Committee and the Union stewards and representatives could be more easily identified and employees would be able "to go to the right person." (Management representatives wore white hats.) The Company had agreed with the Union's proposal. The decals (Exhibit 4) which were supplied by the Company and affixed to the hard hats of all Committee members, both management and Union were as follows (the print being green):

[Quicklaw note: See paper copy for Company decals.]

The only other decals which the Company allowed Union members to affix were for Union representatives (as distinguished from Union representatives on the Committee). All employees also have their names on the front of their hats and their employee numbers on the back.

7 Mr. Bright testified on behalf of the Company. He is the Supervisor of Health and Safety and Human Resources. He said that after the 1998 lock-out/strike the Company realized that the former hard hats had gone mouldy. The Company had "a reasonable supply of yellow hats on hand because of the strike" (the yellow hats had been worn by replacement workers during the lock-out/strike and previously had been worn by probationary employees). Mr. Bright said the Company had tried to obtain 500 red hard hats (which was the colour previously worn by most employees) but it was impossible to obtain them on short notice. The Company decided that it "was better to use yellow hard hats than have none" and also recognized that it was achieving a cost saving in not having to obtain new hard hats. Blue hard hats were issued to Lead Hands and white hard hats to Supervisors and Quality Assurance. Visitors wear grey hard hats. Stripes were placed on the yellow hats to signify probationary employees.

8 Mr. Covey said the Union obtained their own decals (Exhibit 3) which were as follows (the decals are in colour with "UFCW Local Union 1118" in blue and "Canada" and "Safety Rep." in red):

[Quicklaw note: See paper copy for Union decals.]

The decals were issued to the five Union representatives on the Committee and some alternate Committee representatives. The Union also obtained very similar decals for Shop Stewards and Union representatives except the word "Union" replaces "Safety Rep."; apparently those persons have been allowed by the Company to affix those decals to their hard hats.

9 Mr. Covey said the Union would have preferred to continue to use different coloured hard hats to signify Union Committee representatives but when that was not allowed they introduced the decals so there would be some means by which employees could identify Union representatives on the Committee. He referred to provisions in Article 12 of the Collective Agreement (above) such as clause 12.10 which, in the Union's opinion, warrants the identification of the Union representatives on the Committee, and 12.14 (modified duties) which are assigned by the Committee. He also noted that the Committee members must have first aid training so it is important that they be identifiable by employees. He referred to the fact that the Committee has the right, in an investigation, to shut down a line. He said that "in the sea of yellow" the decal is not as effective as the different coloured hard hats but it "is better than nothing - it gives an employee a better chance of finding the reps".

10 Mr. Bright testified that the Company, after the lock-out/strike, restricted decals to the green and white committee decals (Exhibit 4, above), and those for Union representatives, in order to "look more professional," as part of the HACCP ("Hazard Alert Critical Control Point") program. Previously all sorts of stickers, such as those of sports teams, were allowed. He referred to the Committee as a joint committee which meets regularly in a round-table atmosphere, with "hats off" and members do not repeat outside statements which are made at the meetings. It is agreed that the Committee is mandated under the Occupational Health and Safety Act as well as the Collective Agreement. Mr. Bright said management members of the Committee are able to be identified by the green decals on their white hats and Union members by the green decals on their yellow hats.

11 Mr. Covey testified that the Union wants their own decals (Exhibit 3) and not the green decals (Exhibit 4) because: (1) the green decals are too small and (2) they do not designate the Union's elected representatives on the Committee. He said there was no problem with visibility before, not because of the green decals, but because of the distinctive colour of the hard hats worn by the Union representatives on the Committee.

12 In cross-examination Mr. Bright said he considered the decals (Exhibit 3) to be a challenge to the concept of a joint Health and Safety Committee and "argumentative." He agreed that they were "not a challenge to management or interference with management rights." He said he did not find them embarrassing or insulting, nor did they affect the Company's business interests or production. There was the following question from Counsel and answer by Mr. Bright, in cross-examination:

> Q: What's the harm in buying five orange hard hats and putting them back (allowing Union members of the Committee to wear them)?
>
> A: In my opinion it would be no problem (whether they are orange) or (another) colour to indicate the Union Health and Safety Committee members.

Mr. Bright said, in cross-examination, that he sees the Union decals (Exhibit 3) as "deeply involved in UFCW and the Safety Committee secondary with no indication that it is a joint interest." He conceded that he would have no objection to a decal which identified and emphasized the joint Committee and had a less conspicuous "UFCW," but his preference is the decal (Exhibit 4) presently worn by all Committee members.

SUMMARY OF ARGUMENT OF THE UNION

13 Mr. Mercer, Counsel for the Union, argued:

- 1.

  The Company's prohibition was offensive, unfair and discriminatory, striking at the heart of the Collective Agreement and specifically Articles 2 and 12 (above). The Company's position is indefensible and inexplicable. It appears that the Company's only objective was to discredit the Union after the lock-out/strike.

- 2.

  Denying the Union the right to have its Committee members wear distinctive coloured hats or at least, distinctive decals, constitutes a unilaterally imposed, unreasonable rule, contrary to the principles established in Lumber & Sawmill Workers' Union, Loc. 2537 and KVP Co. (1965) 16 L.A.C. 73 (Robinson), which was relied upon in White Spot Ltd. (below).

- 3.

  In order to succeed, the Company has to show that wearing the decals is offensive, provocative, embarrassing, disruptive, critical of management, insulting, or interferes with production and legitimate business interest (see cases cited, below). The Company cannot meet that onus in any respect. The award of Arbitrator Craven in National Steel Car Ltd. (below) provides comprehensive, helpful guidelines. Although the Union is not contending that the Charter of Rights be applied, the principle of freedom of expression is to be respected.

14 Counsel for the Union relied upon or referred to:

- Canada Post Corp. and C.U.P.W. (1986) 28 L.A.C. (3d) 58 (Outhouse, Canada)
- The Crown in Right of Ontario (Ministry of Solicitor-General) and Ontario Public Service Employees Union (Polfer) (1986) 23 L.A.C. (3d) 289 (Crown Employees Grievances Settlement Board, Delisle, Vice-Chairman)
- White Spot Ltd. and C.A.I.M.A.W., Food and Service Workers, Loc. 112 (1991) 21 L.A.C. (4th) 421 (McPhillips, British Columbia)
- Quan v. Canada (Treasury Board) (F.C.A.) (1990) 2 F.C. 191 (Fed. C.A.)

- Canada (Treasury Board - Employment & Immigration) and Bodkin (1989) 6 L.A.C. (4th) 412 (Canada, Public Service Staff Relations Board, Galipeau, Member)
- National Steel Car Ltd. and U.S.W.A., Loc. 7135 (1998) 76 L.A.C. (4th) 176 (Craven, Ontario)

SUMMARY OF ARGUMENT OF THE COMPANY

15 Mr. Day, Counsel for the Company, argued:

- 1.

  The Company does not dispute the principles of the law as presented by the Union; it is in the application of those principles that the differences between the parties are apparent.

- 2.

  There is a distinct difference between the joint Committee and the Union. A member of the Committee is, first and foremost just that, and not primarily a representative of the Union or management. Accordingly, Exhibit 4 is appropriate and Exhibit 3, which focuses primarily on the Union identity, is not appropriate.

- 3.

  The case does not turn on the law, but rather on the specific facts. The Company has engaged in a reasonable exercise of its management rights.

- 4.

  In fact, the Union's objective of identifying their representatives on the Committee has been met in that they wear yellow hats and the joint Committee decal, the colour of the hat distinguishing them from Company Committee members.

16 Counsel for the Company relied upon or referred to:

- The Bay (Windsor) and R.W.D.S.U., Loc. 1000 (1990) 16 L.A.C. (4th) 298 (Shime, Ontario)

DECISION

17 I have difficulty understanding the Company's objection to (1) the former practice of a distinctive colour hard hat for Union representatives on the Committee and (2) the Union's response of distinctive decals when the Company directed that the Union members of the Committee could no longer wear the distinctly coloured hats.

18 Although it is not the relief sought in this Arbitration, I will offer the opinion ("obiter") that the Company should reconsider its banning of the distinctive colour hard hats for Union representatives on the Committee. The "joint" decal could then be applied. That arrangement apparently worked for nearly ten years. The Company's witness had "no problem" with such an arrangement.

19 If the Company is not disposed to that resolution (without the Union having to launch and pursue a grievance specifically directed to that result) then I see no problem with the Union being permitted to introduce its own distinctive Committee decal (such as Exhibit 3).

20 As Counsel for the Union contended, the arbitral jurisprudence leaves little doubt that the Union's decals are appropriate and that the Company's "rule" banning them is an unreasonable one as judged by the K.V.P. guidelines. The only grounds of objection of the Company apparently is that the decals (Exhibit 3) should signify a joint committee, with any union identification apparently either eliminated or minimized. Yet the Union members were, for many years, clearly identifiable by the colour of their hard hats and the Company witness at the Hearing has "no problem" with that type of arrangement. One has to question the Company's agenda in resisting the Union's initiative.

21 The passage from Arbitrator Outhouse's award in Canada Post and C.U.P.W. (above), at pp. 67, 68 provides the answer to the present issue, and has been relied upon extensively in subsequent cases:

- In my opinion, the foregoing cases are quite easily reconcilable and have a common underlying theme. Stated quite simply, it is that an employer must be able to show some overriding interest in order to justify restricting an employee's freedom of expression, particularly where the employee seeks to exercise that freedom in the pursuit of a lawful union activity. Such overriding interests will frequently, as demonstrated in the above cases, take the form of maintaining an orderly work-place as well as good customer relations. Thus, employees are not entitled, while at work, to express themselves either in verbal or written form in a manner which is calculated to disrupt production or bring the employer into disrepute with its customers. On the other hand, absent any interference with production or harm to customer relations, an employee's freedom of expression and the right to participate in lawful union activities cannot validly be circumscribed by the employer.

22 In the Ontario Public Service Employees case (above) the company instituted a rule against wearing a union pin while in uniform. The Crown Employees Grievance Settlement Board held the rule to be unreasonable. At p.292 the Board quoted with approval the following passage from McKeller General Hospital and Ontario Nurses' Assoc. (1984) 15 L.A.C. (3d) 353 at p. 362:

- ... a test of reasonableness entails some element of proportionality between the objectives which are sought and the means by which those purposes are accomplished. Simply having some reason or rationale relevant to the employment relationship will not justify an employer's decision or policy if the competing claims and interest of the employee which it denies is, on some objective standard, more substantial and fundamental.

23 The same result occurred in White Spot Ltd. (above). In that case reference was made to cases in which "the buttons ... were large and expressed

collective agreement." I do not see the Exhibit 3 decals as being offensive in any way. There is nothing about the decals which brings them within the various criteria established in the awards as being objectionable or unreasonable. Arbitrator Carven reviewed the subject extensively in National Steel Car Ltd. He wrote at pp. 193, 194:

- In White Spot, it was a "serious restriction on personal freedom" for the employer to refuse to permit employees (engaged in direct commerce with the public) to wear small pins identifying their union on their company uniforms. A review of the cases showed that union buttons had been prohibited where they were "offensive, provocative, embarrassing, disruptive, critical, or insulting." In allowing the grievance, the arbitrator recites this passage from Re Air Canada and Canadian Air Lines Employees' Assoc. (1985), 19 L.A.C. (3d) 23 (Brent) at 31:

    - In the instant case there is no evidence to suggest that the buttons offended any customer or that the company's business was in any way disrupted or interfered with because of the buttons. The message on the button is no more than an expression of support for the union, and the right of employees to join and participate in the lawful activities of a trade union is protected under the Canada Labour Code. The button does not mention the company. Aside from maintaining its uniform regulations, the company can show no interest which should be regarded as competing with this lawful activity of its employees. Therefore, given all of the circumstances which prevail in this case, for the company to prohibit the wearing of those buttons under the threat of discipline is unlawful interference, coercion or restraint within the meaning of and as prohibited by art. 19.01.091.

In that case there was, as in the present case, a history of permitted identification. Arbitrator Craven's remarks at pp. 201, 202 are pertinent to the present determination:

- Turning specifically to the grievance about **union stickers**, it is not contended that the stickers in evidence are in any way "offensive, provocative, embarrassing, disruptive, critical or insulting," to quote the list in White Spot. The stickers identify the trade union with representation rights for employees in the bargaining unit, and assert its interest in occupational health and safety. This is precisely the sort of emblem or insignia that the cases have said may be worn by employees as a "lawful union activity" protected by the collective bargaining legislation, subject to reasonable limits in the workplace. The Union asserts the right to have employees wear these stickers on hard hats supplied to them by the Company, and on their personal clothing. The Company does not take specific exception to hard hats or personal clothing, but argues that if stickers are permitted at all, they will find their way onto walls and equipment, thereby compromising the Company's interest in good housekeeping and in maintaining the appearance of its recently expanded and refurbished facilities.

representatives might be put off by the unprofessional appearance of walls and equipment littered with stickers of various kinds.

- The Company is undoubtedly entitled to make and enforce reasonable rules to prevent littering and the defacing of Company property. The evidence is that when, during the local election, the Company asked the Union to confine its sticker campaign to hard hats and personal clothing, there was substantial compliance. There is nothing in evidence to suggest that the Company's reasonable efforts to keep its property sticker-free have met with resistance or indifference. On the contrary, it is acknowledged that recent house-keeping audits have not found serious problems of littering or defacement. In my opinion, the Company has not demonstrated on the balance of probabilities that its image or business is threatened by the wearing of stickers like those in exhibits 10 and 11 on employees' hard hats and personal clothing. Nor has it demonstrated that littering and defacement has become a problem of such magnitude in the workplace to warrant a blanket restriction on previously-tolerated expression. The Company is entitled to put employees on notice that they are not to affix stickers to walls or equipment. In view of the lengthy history of **union stickers** in the plant, and taking into consideration the union's recognition rights and the legitimate interest of employees in expressing their support for the union by displaying its insignia, it is excessive and unreasonable to go further and ban these stickers from hard hats and personal clothing. I therefore declare the Company's new policy to be unreasonable to the extent that it prohibits employees from wearing stickers like those in exhibits 10 and 11 on hard hats and personal clothing.

24 Accordingly the grievance is allowed. I find the Company's rule banning the Exhibit 3 decals to be unreasonable and I order that the Company permit the Union representatives on the Committee to wear the Exhibit 3 decals (or some reasonable alternative) on their hard hats.

qp/d/qlcsw