LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

UNITE HERE, LOCAL 40

UNION

ECN HOTEL MANAGEMENT LTD. (VACATION INN)

EMPLOYER

(Re: Murphy's Pub Closure – Employer Application for Costs Related to Adjournment and Union Application to Provide Additional Particulars)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Leo McGrady, Q.C. and Sonya Sabet-Rasekh
Representing the Employer:	Marcia McNeil
Dates of Submissions:	May 22; June 4, 6, 11, 15, 19 and 29; and July 6, 2012
Date of Decision:	July 12, 2012

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1. Pub Closure, Layoff, Grievance and Jurisdiction

[1] Murphy's Pub managed by Bill Murphy was one of the on-location, contracted service businesses at the full service Vacation Inn. In March 2011, new owners purchased the hotel, which had been operated by a receiver manager since July 2009.

[2] Employees directly employed by the employer work in the maintenance, front desk, housekeeping and lounge departments.

[3] The collective agreement between the union and employer provides for extension of the collective agreement to the contracted services in the pub.

> **2.04 CONTRACTED SERVICES**
> The Employer agrees that all work coming under the jurisdiction of this Union, in the certified area, performed by anyone, on behalf of, or at the instance of the Employer, directly or indirectly under contract or sub-contract, shall be performed by employees who are members of this Union or who shall become members in accordance with the terms and conditions as set out in this Agreement. Any such third party performing the work shall be bound by all the terms and conditions set out in this Collective Agreement as if it were signatory to this Collective Agreement.

[4] In June 2011, the new owners gave Mr. Murphy notice the lease for the pub premises would not be renewed. In August 2011 the employees of Murphy's Pub were given layoff notice effective September 30, 2011. The employees retain seniority and have recall rights for six months in the pub (Articles 9.03(b)(iii) and 10.05), but not other departments of the hotel or the contracted service restaurant.

[5] The union grieved the pub closure and layoffs on October 4, 2011. It identified six affected employees – Jamie Ayotte, Juanita Genge, Lynda Joyce, Jaime Morrison, Wayne Richards and Robert White – and possibly others.

[6] I was appointed arbitrator January 3, 2012 and on January 11th gave notice of hearing for May 7 to 9, 2012. The union and employer agree I am properly constituted

as an arbitrator under their collective agreement and the *Labour Relations Code* to finally decide the merits of the grievance.

2. Unsuccessful Decertification Applications (June and October 2011)

[7] The employer says the precarious future of the business and the third party contracted services was well known to the union and employees. In an effort to make the hotel a viable business, the new owners made agreements with debtors including the union and invested to upgrade the property.

[8] The employer says it decided it was not going to renew the lease for the pub premises in April, but delayed telling Mr. Murphy because an employees' application for cancellation of the union's certification was pending before the Labour Relations Board.

[9] The Board held a vote among all employees and on June 23, 2011 dismissed the cancellation application.

[10] On October 24, 2011, after the closure of the pub, certain employees applied to vary the certified bargaining unit to delete front desk, maintenance, housekeeping, lounge and pub employees directly employed by the employer.

[11] On February 9, 2012, the Board dismissed the application which sought, in effect, to cancel the union's certification for a smaller constituency of employees. At the same time, the Board denied the union's request to impose a time bar against future cancellation applications. (*ECN Holdings Ltd. (c.o.b. Vacation Inn (Certain Employees))* [2012] B.C.L.R.B.D. No. 41)

3. Union Disclosure of Grievance Particulars and Hearing Adjournment

[12] On March 28, 2012, the union gave notice it had retained new counsel for the upcoming arbitration. Union particulars of the grievance were delivered to counsel for the employer on Friday, April 20th with a request that reciprocal disclosure be made by April 26th. The union requested a witness summons on April 27th.

[13] The April 20th particulars reproduced in the accompanying Appendix frame a collective agreement dispute over layoff notice and seniority recall rights and identify collective agreement articles alleged to have been contravened. The focus is on the

employer's post-layoff actions and service activity in the former Murphy's Pub premises. Employer counsel reciprocated with the employer's particulars on Wednesday, May 2nd.

[14] Union counsel interviewed prospective witnesses in Victoria on the weekend before the scheduled Monday hearing. After 6:00 p.m. on Sunday, May 6th, he sent additional particulars reproduced in the Appendix to counsel for the employer. She did not read them until Monday morning.

[15] The main focus of these particulars is employer actions in relation to the employees' Spring application for cancellation of the union's certification and Fall application to vary the certification.

[16] The union did not allege contraventions of additional provisions of the collective agreement. It alleged contraventions of the *Labour Relations Code*. It also alleged the employer acted in April 2011 to pressure employees, through threat of closing the business and the employees' consequent loss of employment, to persuade the union to forego collection of severance pay and contribution payments the employer owed to benefit trusts. The union says the employees petitioned the union to this effect.

[17] At the beginning of the hearing on May 7th, the employer objected to enlarging the scope of the hearing to include alleged unfair labour practices before and at the time of the cancellation application and the June vote among employees. No complaint had been made to the Labour Relations Board and there had been no union objection to the eligibility of Cecilia Aldea, who is referred to in the appended May 6th particulars, to participate in the vote.

[18] I ruled the allegations of fact related to the cancellation application and allegations of contraventions of the *Labour Relations Code* based on these facts are asserted by the union as the true, previously unrevealed, reason for the pub closure. The alleged facts and contraventions of the *Labour Relations Code* are within my jurisdiction and must be heard if I am to have regard to the real substance of the matter in dispute and the respective merit of the positions of the union and employer.

[19] However, it was unfair to compel the employer to respond and defend against the new allegations disclosed so close to the beginning of the hearing. There was no

agreement to adjourn to the second or third scheduled hearing day. Consequently, the hearing was adjourned with a direction the union provide full and complete particulars by May 14th. The employer expressly reserved a right to pursue costs related to the adjournment. The additional union particulars of May 14th are reproduced in the Appendix.

[20] The hearing is scheduled to continue November 1, 2, 5 and possibly 8, 2012.

4. Employer Application for Costs – Adjournment and Inadequate Particulars

[21] After receipt of the May 14th particulars, the employer applied for an order that the union pay the employer's share of the costs related to the adjourned hearing, which include my fees and disbursements and associated taxes.

[22] The employer submits the May 14th particulars are inadequate.

- They do not identify the management persons who it is alleged made requests and to whom Melanie Evans, who is referred to the appended May 14, 2012 particulars, was to report.
- They do not identify the employees who were reluctant to report before May 2012.
- They make assertions that reasonable inquiry would demonstrate are inaccurate. For example, the woman named Trish, who is referred to the appended May 14, 2012 particulars, was hired in 2010, not just before the decertification vote, as would be disclosed in union dues remittance statements from the employer.
- There is no stated connection between the particulars and grievance allegations.
- There is no basis for the assertion the employer's action prevented unfair labour practice allegations being made to the Labour Relations Board at the time of the decertification and variance applications.
- There was no second vote as alleged and any objection to employee eligibility to vote can be made at the time a voter's list is prepared.

[23] The employer submits: "the Union's attempt at the last possible moment to raise unfounded allegations which were properly addressed during the decertification before

the Labour Relations Board is conduct worthy of rebuke, and that the Employer should not be obliged to bear the costs of the scheduled hearing in the circumstances." In subsequent submissions, the employer enlarged the claim for costs to include a failure by the union to comply with my order of May 7th to provide full and complete particulars by May 14th.

[24] At a conference call on June 6, 2012 to hear the employer's application, the employer relied on the approach and decision in *Cargo Link Transport Ltd.* [2010] B.C.C.A.A.A. No. 99 (Larson) and [2011] B.C.C.A.A.A. No. 1 (Larson).

[25] In response, the union submitted perfection is not required when providing particulars and it has provided sufficient particulars to enable the employer to respond. It acknowledges its particulars have fallen short in some instances when it has been unable to confirm who acted when. It acknowledges it needs to provide further clarification. It says some employees have been reluctant to speak to the union after the employer threatened to and did close the pub.

[26] The union submits, in the absence of a collective agreement or statutory provision, a grievance arbitrator has no jurisdiction to order that one party pay the other party's share of grievance-arbitration costs. (*City of Dawson Creek* [1987] B.C.C.A.A.A. No. 252 (Dorsey); *British Columbia Ferry Corporation* [2002] B.C.C.A.A.A. No. 358 (McEwen); *Weeneebayko Health Ahtuskaywin* [2011] O.L.A.A. No. 20 (Newman)) Sharing of costs is directed by s. 90 of the *Labour Relations Code* and Article 20.13 of the collective agreement.

[27] The union submits an award of costs in *Cargo Link Transport Ltd.* was wrongly decided contrary to a grievance arbitrator's jurisdiction and has not gained favour with other arbitrators. In 2011, Arbitrator Gray did not embrace Arbitrator Larson's approach and decision in *Cargo Link Transport Ltd.*

> Labour arbitrators derive their authority from the agreements under which they are appointed and any applicable legislation. Article 10.06 of the collective agreement between these parties provides that "Each of the parties hereto will equally share the fees and expenses of the arbitrator." The agreement is otherwise silent about the matter of "costs," as are the Minutes of Settlement and the *Labour Relations Act.*
>
> Some remedial powers are implicit in the nature of an arbitrator's role, such as the power to award compensatory damages. The power to award costs is not one of them,

> particularly not under a collective agreement negotiated in the shadow of the common and long standing arbitral view that an arbitrator has no power to award costs unless the collective agreement or some applicable statute expressly so provides.
>
> Tempting as it is to find an exception that can be applied in an egregious case like this, I can find no principled basis for one. The Larson award on which the union relies offers no explanation for its departure from the arbitral jurisprudence or the language of the applicable collective agreement. Nor am I persuaded by the bald assertion in the aforementioned PSLRB decision that the power to award costs exists "where that loss occurs as a result of the other party's actions." It is difficult to imagine a case in which a party's costs of pursuing (or defending) a grievance could not be said to result from the other party's actions. While I understand that the reference was to actions that were procedurally improper and provoked unnecessary legal expense, the good that such an exception would serve in a small number of clear cases would be far outweighed by the harm that would be done to the labour arbitration process by injecting into every case the possibility of debate about whether the actions of one party or the other in the arbitration process were sufficiently improper or unnecessary as to make it liable for some part of the opposite party's costs pursuant to the supposed exception. It is that harm to the process that leads me to say that if I nevertheless do somehow have the authority to award costs, I would not exercise it the absence of some applicable collective agreement or statutory provision reflecting a decision by the parties or the legislature to add that complexity to rights disputes in labour relations.
>
> Accordingly, I will not order the payment of costs here. (*AmbuTrans Inc.* [2011] O.L.A.A. No. 555 (Gray), ¶ 50-53)

5. Union Application to Permit Provision of Further Particulars

[28] Within days of the final submission on the employer's application for costs, the union applied to vary the May 7th order to permit it to provide further particulars "recently received." In doing so the union would also supply additional information to meet the employer's stated concerns about the insufficiency of the May 6th and 14th particulars. In its application the union characterises the employer's conversations with employees about the union foregoing collecting severance pay and employer benefit contributions as integral to the employer's alleged role in the cancellation of certification application.

[29] As stated on May 7th and repeatedly since then, the union asserts employees did not report the employer's action to the union and it could not provide particulars of what it did not know.

[30] The union states further diligence after May 7th has uncovered further information "because the concerned employees have been encouraged by the fact the hearing has begun, and that they now feel they will be protected."

[31] The employer does not want any more particulars from the union and wants the May 6th and 14th particulars excluded as part of the case it must answer. The employer submits it went through both Labour Relations Board proceedings with the union represented by its previous counsel and no allegation of any employer unfair labour practice was made to the Board. When it was to have received complete particulars on May 7th, it submits what was received did not clarify the allegations in the May 6th particulars and it confronts a "revolving door of allegations, without proper foundation, which serve only to obscure the real issue in dispute in the grievance." All because the union failed to exercise due diligence to identify any allegations with a sound factual foundation, which the employer "vehemently" denies exist. "The Employer should not be required to continuously 'aim at a moving target' and should not be expected to respond to an ever-growing list of baseless allegations."

[32] The union replies the employer seeks to benefit from its wrongdoing. Employer threats silenced the employees for almost a year and now the union is to be prevented from seeking redress because that silence precluded the union from knowing what was happening and acting on that knowledge. The union's simple goal is to provide clarification not create a moving target. This is not procedurally prejudicial to the employer.

6. Discussion, Analysis and Decision

[33] Union-employer relationships can have frustrating periods and, at times, the behaviour of one party in a relationship can induce a desire to rebuke and punish the other's conduct. The behaviour of the recalcitrant employer in *Cargo Link Transport Ltd*, which did not appear at the arbitration hearing, evoked an order by Arbitrator Larson that the employer pay the union's share of the arbitration proceeding costs. Hopefully, Arbitrator Larson and the union had more success in having the employer comply with this order than the union had having the employer comply with the earlier procedural order that led to the punitive costs order.

[34] It is my opinion I do not have jurisdiction to order costs under this collective agreement or the *Labour Relations Code*. If I do have jurisdiction, I agree with Arbitrator Gray's view of the injurious effects of introducing costs as an "extraneous to

ordinary costs" exception, as characterized by Arbitrator Larson, that will creep into becoming a common application and friction point in grievance-arbitration. For these reasons, I recently took a different approach to address employer non-compliance with a pre-hearing disclosure order in *Compass Group Canada (Nanaimo Seniors Centre)* [2012] B.C.C.A.A.A. No. 67 and [2012] B.C.C.A.A.A. No. 77. In appropriate circumstances, the same approach could be taken with a recalcitrant union. Therefore, the employer's application for costs is dismissed.

[35] On the matter of particulars, the difference is not about the particulars exchanged on April 20th and 26th or the employer's post-layoff actions and service activity in the former Murphy's Pub premises. Presumably in the absence of the union's May 6th particulars and allegations, both the union and employer were ready to proceed and arbitrate as planned and scheduled on May 7th. For this reason, this decision is only addressing particulars related to alleged unfair labour practice allegations.

[36] The three sets of union particulars are accumulative. Further to my order, it was reasonable for the union to provide additional particulars and not repeat the May 6th particulars on May 14, 2012.

[37] If a specific union particular is inaccurate or a mistaken statement, presumably that will be discovered in preparation for the arbitration hearing or become a matter of evidence on which a finding of fact will have to be made.

[38] If the evidence discloses the union's assertion that certain matters were not or could not have been disclosed earlier is not correct, then, if the grievance is allowed, that will be a matter that can be addressed in determining an appropriate remedy.

[39] The union acknowledges it needs to provide further clarification which it intends to do in the near future. I agree. For the employer's comfort in light of the history of this grievance-arbitration and to prevent further delays, I have decided the union must provide clarification by a date after which no new particulars can be advanced or relied on at the arbitration.

[40] Therefore, I allow the union's application and direct that it is to provide to counsel for the employer a single statement of full and final particulars that includes the May 6th

and 14th particulars, but not the April 20th particulars, with any clarifications and additional particulars no later than August 10, 2012.

[41] If known to the union, this statement of full and final particulars is to include the following with respect to the union's May 6, 2012 particulars:

1. The name of the manager who spoke to Jamie Ayotte.
2. The name of the employer representatives who met with Cecilia Aldea.
3. The names of the employees who participated in the mock vote; the place and manner in which the vote was conducted; and the name of the management personnel to whom Cecilia Aldea reported the results of the vote.
4. The name of the employer representative who spoke to employees on April 20, 2011 and the names of the employees to whom that representative spoke.

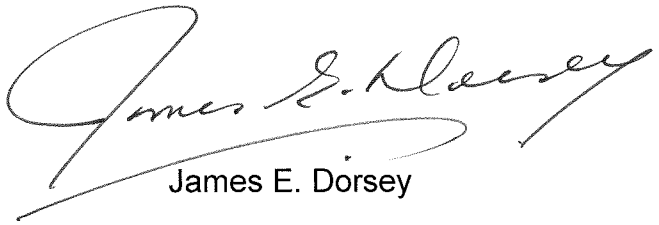
[42] If known to the union, this statement of full and final particulars is to include the following with respect to the union's May 14, 2012 particulars:

1. The names of the employees to whom Ms Ayotte told what Mr. Murphy had said and the time and place at which she told each.
2. The names of management personnel who requested Trish to collect signatures and the names of the employees to whom she spoke.
3. The names of management personnel who requested Melanie Evans to question employees, to whom she reported the results and the names of employees to whom she spoke.
4. The names of the five newly hired employees and when they were employed.
5. The name of the management personnel who told Shannon Dickson she was hired as a no-voter and to report on the staff's view of the union.

[43] The employer is directed to provide to the union its particulars with respect to all matters in dispute no later than September 10, 2012.

[44] The delivery dates of August 10th and September 10th can be varied by agreement of the union and employer.

JULY 12, 2012, NORTH VANCOUVER, BRITISH COLUMBIA.



James E. Dorsey

Appendix

Union Particulars Provided April 20, 2012

Collective Agreement Articles violated by the Employer

- Article 4
- Article 6.01(b)
- Article 10
- Any other applicable articles

Particulars of Violation

1. The Vacation Inn (the "Hotel") has a pub known as "Murph's Pub" (the "Pub"). The Pub is located adjacent a Lounge at the Hotel.
2. Pub employees were members of the Union and were employed by the Hotel for service at the Pub as servers, bartenders, or both. Pub employees have been well-known Union activists.
3. In or about July 2009, the Hotel was placed into receivership and the Hotel continued to be operated by the Receiver-Manager until the property was sold. In March 2011, the property was purchased by ECN Holdings Ltd.
4. The Pub was run by Bill Murphy who leased the pub space from the Hotel, as contemplated in Article 2.04 of the Collective Agreement. At the end of September 2011, the Hotel ended its lease relationship with Bill Murphy.
5. On or about September 30, 2011, the Hotel laid-off all Pub employees effective September 30, 2011. The stated reason for the layoffs was the closure of the Pub. The Hotel did not lay-off employees working in the Lounge.
6. The Union was not provided with any written notice, under s. 54 of the *Labour Relations Code* or otherwise, concerning the closure of the Pub and the layoffs. Pub employees were not properly provided with written notice by the Hotel concerning the closure of the Pub and the layoffs.
7. The Hotel continues to operate the Pub or the space formerly known as "Murph's Pub". Services and events are continually offered and advertised at the Pub for guests, including the service of liquor and other beverages. Off-track course betting, events and dances requiring services formerly performed by Pub employees also continue to take place. Guests and patrons continue to attend the Pub space without employee supervision and consume liquor and beverages provided by the Lounge.
8. Services such as the provision of beverages to guests and patrons are now provided by Lounge employees, which were formerly performed by Pub employees. All but one of these Lounge employees has less seniority than many, if not all, of the Pub employees who were laid-off by the Hotel. It is the Union's position that Pub employees' positions at the Hotel have been, in effect, replaced by less senior Lounge employees.

9. It is also the Union's position that the Hotel continues to have available work for the Pub employees. Although the Hotel continues to provide services and events at the Pub, none of the Pub employees, except for one or two employees on a limited part-time basis, have been recalled for work.
10. Overall, the Union's position is that the Hotel has improperly closed Murph's Pub and improperly laid off Pub employees. The continued provision of services and events at the Pub and Pub space requires the recall of the affected employees.

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Union Particulars Provided May 6, 2012

I'm writing further to Ms. Sabet-Rasekh's letter to you of April 20, 2012, and further to paragraph 2 of that letter, to advise you of additional particulars I've just been made aware of this afternoon, during the second interviews of our witnesses. We intend to raise this evidence during the hearing.

The day before the first decertification vote (which I believe was on June 23, 2011), a manager approached Jamie Ayotte. He told her that while he could not tell her how to vote, he could tell her that if the union wasn't voted out, the pub would close. We will argue this is an unfair labour practice in these circumstances, and a violation of sections 6(1), 6(3)(a), 6(d), and 9. We will rely on section 14(7), the reverse onus provisions.

We will also argue that conduct and the subsequent lay-off constitute an illegal lock-out and a violation of section 57(2). We will also rely on the reverse onus provisions in section 63(2).

In addition, we have learned that the employer hired Cecilia Aldea to organize and file the two decertification petitions. The employer frequently met with her to manage her in that illegal objective. That conduct was in violation of section 6(1) and 6(3)(d) of the Code.

As part of this scheme, Ms. Aldea openly conducted a mock vote of the employees on company time just before the actual vote was held. She communicated the results, which favoured decertification, to management.

Finally, we will call evidence that on April 20, 2011, the employer told the employees that if the union persisted in efforts to collect severance pay, as well as unpaid benefit payments that had been deducted from the employees, but not paid over to the appropriate trusts, they would close the hotel on April 25, 2011. As a result, the employees signed a petition instructing the union to discontinue efforts to collect these amounts.

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Union Particulars Provided May 14, 2012 Further to Arbitrator's Order

Further to Arbitrator Dorsey's Order of May 7, 2012 I have set out the particulars that I have been able to obtain to this point and time. We continue to seek further information and interview other potential witnesses. If we come into possession of further

information that would provide the basis for evidence, we will add to our particulars. Otherwise, please consider these as the particulars that were ordered by the Arbitrator.

1. On or about Thursday, June 23, 2011 during working hours, just prior to the first vote, Bill Murphy area [sic] came up to Jaimie Ayotte in the pub and told her that if the Union did not get voted out in the hotel, the hotel would close. While Mr. Murphy was the lessee and the manager of the pub he was speaking on behalf of the owners of the hotel itself and referred to the hotel closing if the Union was not voted out.

Ms. Ayotte is uncertain of the date but knows it was a Thursday, and around the time of the actual vote, but before the vote was held. Ms. Ayotte then told the other workers of what she had been told by Mr. Murphy.

2. A woman named Trish had worked for a number of years at the restaurant. She was fired and rehired just before the first decertification vote in June 2012 [sic]. During working hours and at the request of management, she went around with a piece of paper and asked other workers to sign it indicating their opposition to the Union. She was seen doing this on at least several occasions on the days leading up to the decertification.

3. Melanie Evans, an employee and a member of the bargaining unit, repeatedly questioned employees as to how they were going to vote. She did this at management's request. She would regularly report the results back to management. This occurred during the time of the lead up to the second vote on October 24, 2011, on the partial decertification for the pub.

4. At the time of the second vote, there were at least five individuals present at the pub who regular pub employees had never seen before. These were added by the employer for the purpose of insuring a vote against the Union.

5. Shannon Dickson was employed in housekeeping. She was told at the time when she was hired that she was hired as a no-voter and also hired to report back on the existing staff's view of the union. There were often three front desk staff on duty when only one was needed. On occasion they told her that they had been hired to sway the vote against the union.