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Public Service Staff
Relations Act

Before the Public Service
Staff Relations Board

BETWEEN

**BARBARA GUEST, JASBIR HERAN,
ROSE CHAND AND PHIL BIRNIE**

Grievors

and

CANADA CUSTOMS AND REVENUE AGENCY

Employer

Before: Ian Mackenzie, Board Member

For the Grievors: Debra Seaboyer, Public Service Alliance of Canada

For the Employer: Neil McGraw, Counsel

Heard at Vancouver, British Columbia,
June 18 to 20, 2003.

DECISION

[1] These four grievances arose as a result of picket lines placed at both the Surrey Tax Centre (STC) and the Burnaby-Fraser Tax Services Office (BFTSO) on March 23, 1999. Revenue Canada (as it was then called) decided not to pay the day's salary for those in the Program and Administration Services group who did not cross the picket lines on that day. That decision is the subject of these grievances.

[2] The grievances were referred to adjudication on September 18, 2000. On September 13, 2000, the parties agreed not to request that the grievances be heard until similar grievances from the Jonquière Office of Revenue Canada were completed. The bargaining agent advised the Board on November 13, 2002, that the four grievances were now ready to be scheduled for adjudication.

[3] At the hearing, the parties tabled an "Agreed Statement of Facts" (Exhibit A-1) and a book of agreed exhibits (A-2 to A-11). I was advised at the hearing that the parties had reached an agreement that the decision on the two grievances from the BFTSO would apply to all outstanding grievances at that office (75 employees have grieved). Similarly, the decision on the two grievances from the STC would apply to all outstanding grievances at that office (558 employees have grieved). I was also advised that the four grievances referred to adjudication had been randomly selected for adjudication.

[4] One of the grievors, Phil Birnie, was not available to testify. Barbara Guest, Rose Chand and Jasbir Heran testified. Seven additional witnesses testified on behalf of the grievors. Counsel for the employer called six witnesses. The grievors' representative called one rebuttal witness. After the testimony of the rebuttal witness, counsel for the employer objected to the admissibility of the evidence and I reserved on the objection.

[5] An order excluding witnesses was requested and granted.

EVIDENCE

Background

[6] The Burnaby-Fraser Tax Services Office (BFTSO) and the Surrey Tax Centre (STC) are separate buildings, side by side (Exhibit A-11). There are separate entrances for each building, but employees of the BFTSO often use the entrance to the STC. The two offices are commonly referred to as the "campus".

[7] As of December 16, 1998, Table Two of the Public Service Alliance of Canada (PSAC) (Operational Services) was on strike. In the Pacific region, there were approximately 39 employees of Revenue Canada from Table Two (Agreed Statement of Facts, Exhibit A-1). At the campus, there were approximately three Table Two employees.

[8] In anticipation of strike activity in the Pacific region, a memorandum was issued by management to all employees of the BFTSO on December 14, 1998 (Exhibit A-4) and to the STC on December 15, 1998 (Exhibit A-3), and then re-issued to all STC employees on January 22, 1999, and to BFTSO employees on January 29, 1999. The employer guidelines for employees who faced a picket line were the same in both December memoranda:

[...]

1. *All employees who are **not** in a legal strike position are expected to report for work as scheduled, that is, employees are to be present at their place of work at the prescribed time, unless specifically excused or directed to report to another location at another time.*
2. *Picket lines are set up by striking employees for the purpose of communication and are not permitted to prevent any employee from reporting to work.*
3. *Employees encountering interference or harassment by pickets, which are of a sufficiently serious nature to arouse concern over their personal safety on entering or leaving their assigned work location, are required to contact a representative of the management monitoring team which is on duty at the site to monitor picketing activities. This person will then arrange to have management escort employees through the picket line or reassign employees to other work locations.*
4. *In areas where management monitoring teams are not available, employees are required to telephone their manager from the nearest available location. Arrangements will be made for the investigation of the situation on the picket line to determine if escorts or reassignments will be required.*
5. *Employees required or who elect to report for work, complying with these requirements will suffer no loss of pay as a result of time lost due to picket line interferences.*

6. *Employees failing to observe the foregoing instructions and who do not report for duty at picketed locations will be considered as being absent without authorized leave, not entitled to pay, and may be subject to disciplinary action.*

[...]

[9] The memorandum was re-issued to the STC employees in January and contained an additional recommendation that if employees encountered interference or harassment by a picket line, they should report to the West entrance in the underground parking area and await further instructions (Exhibit A-4).

[10] Prior to the strike, the Department brought in Department of Justice officials to provide training for management on injunctions and a Royal Canadian Mounted Police (RCMP) officer to talk to excluded managers about how to behave on the picket line.

[11] There were picket lines at both locations on February 15, 16 and March 1, 1999. After arriving for work in the morning, employees were advised to return to the premises at approximately 10:00 or 11:00 a.m. On each occasion, employees were sent home with pay as picketers were blocking the entrances to the workplace (Agreed Statement of Facts, Exhibit A-1).

[12] On March 3, 1999, an application was filed in the Supreme Court of British Columbia for an interlocutory injunction to restrain the picketers from “impeding, obstructing, or in any way interfering with any person gaining access to or egress from” the Departmental premises (Agreed Statement of Facts, Exhibit A-1). On March 5, the PSAC gave an undertaking to the court not to physically block or impede access to the premises of the Department (Exhibit A-6). An e-mail was received on March 5 from Jan Malinske, Manager, Human Resources, advising of the undertaking and that there would be no blocking or impeding of access to the buildings by staff or clients (Exhibit A-7). On the same day, Rita Barill, Acting Director at the STC, sent an e-mail to all employees of the STC advising of the undertaking and described its effect as follows:

This means that if the strike continues, the PSAC can put up information pickets but cannot block your entry to the workplace. (Exhibit A-7)

[13] In her e-mail, Ms. Barill also requested that managers provide this information to employees who did not have access to e-mail.

[14] In the week prior to March 23, 1999, the media reported that back-to-work legislation was being prepared for the following week. An e-mail from the Department's media spokesperson, Paula Shore (Exhibit G-2), summarized these developments. The e-mail also stated that the PSAC was reported to be increasing its protests in light of the impending legislation. Kay Sinclair, a steward at STC, a local union official, and also responsible for strike liaison, testified that the e-mail was widely distributed in the workplace.

Events of March 23, 1999

[15] At approximately 6:00 a.m., picketers were blocking the entrances to the parking lot beside the STC. The parking lot holds approximately 1,000 cars and is used by employees at both the STC and the BFTSO. Picketers only allowed excluded managers through the line to park their cars. Employees had to park their cars on side streets. A majority of the picketers were not employees of Revenue Canada. A number of witnesses for the grievors testified that the picketers were largely from either the grain elevators or Correctional Service Canada.

[16] The weather was described by some witnesses for the grievors as cool and rainy, and not comfortable for standing around. Shirley McPhee, the senior staff relations officer for both BFTSO and STC at the time, described the weather as cool, but indicated that a jacket was not required.

Surrey Tax Centre (STC)

[17] Initially, the picketers were on the edge of the property, widely dispersed. Sometime between 7:15 and 7:30 a.m., the picketers rushed to the entrance to the STC and stood there. The estimates of the number of picketers varied from 12 to 50. An affidavit prepared by Ms. Barill on March 24, 1999, for the enforcement of the undertaking estimated the number of picketers at 50 (Exhibit G-4).

[18] Ms. Barill and Ms. McPhee spoke to the picket captain at approximately 7:10 a.m. to advise him that the picket line was in contravention of the undertaking (Affidavit, Exhibit G-4). The picket captain told them that the picket was a legal one and there was no agreement. Ms. McPhee testified that she could get no commitment one way or

the other from the picket captain as to whether the picketers were going to let employees cross. Johann Ackermann, the Union of Taxation Employees (UTE) Local President, testified that Ms. Barill told him the picket was illegal, and he asked to see the undertaking and she showed it to him. Philip Grosvenor, an STC employee, testified that Mr. Ackermann, on behalf of the bargaining agent, had stated quite firmly that there was no injunction, while management representatives were equally adamant that there was one.

[19] At approximately 7:15 a.m., managers started advising employees that they were to report to work. Ms. Barill stated in her affidavit that some employees entered, but that most made no effort to enter. She further stated that Mr. Ackermann, as well as the picketers, told the employees to respect the picket line and not to listen to management. Ms. McPhee also testified that Mr. Ackermann had told employees not to listen to management. Mr. Ackermann testified that he told employees that it was their decision whether it was safe to cross the picket line but that he had never told them not to listen to management.

[20] The excluded managers circulated among the employees to advise them that they were expected to cross the picket line. Ms. McPhee testified that she and others would “talk into the middle of the crowd” and would then move to another spot. Ms. McPhee testified that excluded managers started to escort employees across the picket line at 7:30 a.m. Ms. Barill’s affidavit (Exhibit G-4) states that employees were again advised at 9:00 a.m. that they should report to work.

[21] Three or four excluded managers provided escorts. Several employees crossed the picket line with management escorts at that time and were verbally abused, shouted at, and called “scabs”. They were not prevented from entering the workplace. Ms. McPhee testified that it was difficult to get employees to come forward to be escorted; employees “meandered off”. She also testified that it took no more than 20 minutes to escort employees across the picket line. Mr. Grosvenor testified that he and other employees felt “general trepidation” about crossing the picket line. Employees had heard about incidents on the picket line at the BFTSO, including a rumour that someone’s jaw had been broken.

[22] Mr. Ackermann testified that managers warned employees of possible discipline, including being fired, if they did not cross the picket line. Employees were also told that if they did not cross the picket line they would not get paid. Mr. Ackermann

testified that he had no intention of crossing the picket line because of his position in the union. In cross-examination, Ms. Sinclair testified that she was supportive of the picketers and also had no intention of crossing.

[23] Barbara Guest, one of the grievors, testified that, at the time of the picket line, her hours of work were 9:00 a.m. to 2:30 p.m. She had her bicycle with her and stayed near the back of the crowd and described the scene as chaotic. She did not hear any instructions and was not offered an escort. She left at around 11:30 a.m. because there was a rumour that employees had been told to go home.

[24] Jasbir Heran, one of the grievors, testified that she arrived at work just before 7:00 a.m. She said that employees were told to go to the underground parking garage for attendance. She left at around 1:30 p.m., because there were no managers present to provide instructions.

[25] Ms. Barill's affidavit (Exhibit G-4) identifies one incident where the picketers blocked access to the STC building, as well as her concerns about an incident at the BFTSO, and the subsequent decision of management to stop providing escorts:

[...]

8. *I am advised by Frank Benoit, an excluded manager, and verily believe it to be true that, at approximately 12:30 p.m., he attempted to escort five employees across the picket line. The first four employees managed to enter the building, but then the picketers stood together tightly and would not allow the remaining staff member to enter. The remaining staff member was very frightened and Mr. Benoit decided not to attempt to force his way through.*

9. *I am advised by Shirley McPhee and verily believe it to be true that at this point the picketers congregated in a huge mass in front of the entrance and advised that nobody else was getting in.*

[...]

11. *At approximately 1:00 p.m., I advised excluded managers to cease efforts at escorting staff into the building. I had been informed by Shirley McPhee that picketers at the Burnaby-Fraser Tax Services Office, located in front of the Surrey Tax Centre, had closed ranks and a shoving match had occurred between members of the public and the picketers. I did not want to jeopardize the safety of staff in our attempts to gain access to the building.*

[26] Sometime between 11:00 a.m. and 12 noon, management left the area outside the building and went inside. Mr. Ackermann testified that a lot of employees had left by 11:00 a.m. Ms. McPhee testified that between 10:00 and 10:30 a.m., most employees had gone.

[27] Mr. Ackermann testified that when he left at about 12:30 p.m., most employees had already left. The picketers told him that they would be there until the evening. Ms. McPhee testified that there were only a handful of employees left outside when the picketers left at 1:30 p.m. In the Agreed Statement of Facts, the parties have established that the picketers left at approximately 1:30 p.m.

Burnaby-Fraser Tax Services Office (BFTSO)

[28] At approximately 7:00 a.m., picketers were along the sidewalk in front of the building, as well as at the front entrance. The employees congregated largely at the south end of the parking lot.

[29] Employees were told by excluded managers to go for coffee and come back at 9:00 a.m., for further instructions. Witnesses' estimates of the number of picketers varied from six to 100.

[30] When employees returned at 9:00 a.m., managers started moving through the crowd getting people organized for escorts. Linda White, a BFTSO employee and a local PSAC vice-president in 1999, testified that managers were picking people to be escorted. Managers did not pick her to be escorted and she waited for her turn. Penny Harris, a BFTSO employee, testified that Dennis Saretsky, a manager, approached the group she was standing with and said: "I don't suppose you guys really want to be escorted?" The group of employees said no, and he replied that he had not thought that they would, and laughed. Wolf Stockhecke, a BFTSO manager, testified that he escorted approximately five employees at a time across the picket line, for a total of between seven and ten times. Kasandra Sproson, a BFTSO manager, testified that some employees "did not accept to be escorted". William Douglas Mills, a manager at BFTSO, was moving through the crowd and organizing employees to be escorted. He testified that, initially, it was not difficult to find employees willing to cross but as the morning wore on, employees became more and more reluctant.

[31] Ms. White testified that employees told her managers were telling them that they would face disciplinary action if they did not cross the picket line. Ms. White and Linda Light, another BFTSO employee, also testified that Lucie Binet, the Acting Director for the BFTSO, was telling employees that the picket was illegal and everyone had to cross the line because it was illegal. Ms. Binet and a PSAC strike coordinator, Moe Ritchie, ended up in a face-to-face confrontation, yelling at each other, with Mr. Ritchie saying that there was no injunction. Mr. Mills testified that the picketers tried to convince the employees not to cross the picket line by telling them that they would be paid just as they had been on the other days. Ms. Light testified that there was general confusion among the gathered employees as to what to do; some were saying that they should cross, while others were saying that they should not.

[32] An RCMP officer stopped by early in the morning to ask a number of employees, including Ms. White, what was going on. At that point, Ms. White testified the picket line had not escalated and she could not have verbalized any concerns with regard to safety. The RCMP officer then left.

[33] At approximately 9:30 a.m., the local president of the Professional Institute of the Public Service of Canada (PIPSC) and another PIPSC executive member were escorted across the picket line. At this point, the noise level on the picket line increased significantly. According to Lorna Gray, a BFTSO manager, the picketers moved closer together at this point, although employees could still pass through.

[34] Stewart Campbell testified that at about 10:30 a.m., Ms. Sproson, his manager, started “cornering” people to take them across the picket line. He testified that she threatened a group of employees that there would be “consequences” if they did not cross the picket line. Ms. Sproson testified that she did say that employees would be “toast” if they did not cross, but quickly retracted her words, saying to the employees that it sounded worse than what she had intended. Mr. Campbell testified that he asked her if she could guarantee his safety, and she said yes. He asked her how she could guarantee his safety, given the size of the picketers, and told her he would not cross the line with her. He testified that she then told him that if he was not going to cross, he might as well go home. Ms. Sproson denied that she told him he could go home. Ms. Sproson testified that she was not concerned for her own safety and tried to assure employees that it was safe to cross the picket line. She also testified that she offered employees the option of being escorted by a male manager.

[35] The picket line became more heated as the morning progressed. Ms. White testified that there was yelling and name calling on the picket line. Although there was no shoving, people were touching. She also heard one picketer say, “there could be bloodshed”.

[36] At around 11:00 or 11:30 a.m., a car driven by a client of Revenue Canada hit a picketer. The picketer had not noticed the car and was limping after being hit. Ms. Harris testified that this event made the picketers angrier, and they talked about calling the police. Ms. McPhee testified that a taxpayer who had tried to cross the picket line had called the police. The media arrived at approximately 11:30 a.m., with television cameras.

[37] Rose Chand, an employee at the BFTSO and one of the grievors, testified that she was very scared by the activity on the picket line and described it as a very tense situation. She testified in cross-examination that she felt that it did not look safe to cross the picket line. She observed some shoving by the picketers. In the 1980 public service strike, she had dislocated her shoulder as a result of picket line violence and was therefore wary of crossing this picket line.

[38] At approximately 11:30 a.m., Mr. Stockhecke was pulled down to the ground from behind while escorting employees across the picket line. He testified that he was not injured, but was surprised. The fall was observed by a number of witnesses, and news of the action moved through the crowd. Mr. Stockhecke then proceeded through the picket line and entered the building. Ms. White testified that the managers were observed inside the building discussing the situation. Mr. Stockhecke described the incident as an isolated one, but also testified that the incident was a “clear indication of the potential for violence.” Ms. Barill testified that at the managers’ meeting, the decision was made to no longer try to get employees across the picket line.

[39] At approximately 12 noon, the managers announced to the employees in front of the building that escorts would no longer be provided. After this announcement, employees started dispersing by about 1:00 p.m. Ms. Light testified that at this time there were about 100 employees left standing outside the building. Ms. White stated that there seemed little point in staying around after management announced that employees would no longer be escorted across the line. Ms. White and Ms. Harris testified that earlier instructions from the employer indicated that if they were sent

home, they would be called to return if the picket line went down. Employees therefore left, assuming that if the picket line went down they would be called back.

[40] Ms. Chand left the worksite at close to noon. She testified that after she left, she phoned her manager, Len Lindbergh, as well as the rest of her colleagues to find out if the picket line was down. She could not reach anyone. Ms. Harris testified that she did not have any numbers to phone.

[41] In the Agreed Statement of Facts, the parties have established that the picketers left the campus at approximately 1:30 p.m.

Events Post March 23, 1999

[42] Ms. McPhee testified that there was a financial impact of about a million dollars a day in lost interest as a result of the failure of employees to cross the picket lines. In an affidavit prepared on March 2, 1999 (Exhibit G-3), Ms. Barill stated that cash remittances to the STC normally total between four and seven million per day, and that an average of 5,000 individual tax returns and 800 corporate returns are normally processed each day.

[43] Sometime prior to April 6, two memoranda were issued to managers in order to have a consistent approach throughout the Pacific region with regard to the events of March 23, 1999 (Exhibit A-8), and on April 6, Ms. McPhee issued a revised approach that had been agreed to by local management (Exhibit A-9). Any employee who came into the workplace at any time during the day was to be paid for the entire day. This included those employees who may have entered the building after the picket lines were down (by 1:30 p.m.). Employees who did not cross the picket line or did not come to work that day were to be docked a full day's pay. Employees at the BFTSO who did not cross the picket line were to be paid up until 9:00 a.m. and docked pay for the balance of hours. The reason given for the payment of hours up until 9:00 a.m. was that the BFTSO employees had been told by management to return at 9:00 a.m.

[44] A memorandum was sent to all managers by Ms. McPhee, with standard language for letters to go to all employees who were not being paid for March 23, 1999 (Exhibit A-10):

Management recognizes that it has been a difficult period of labour disruptions over the last several months. Given the mitigating circumstances on March 23, 1999, no disciplinary

action will be taken for those employees who did not come into work that day. However the principle of no work, no pay still applies for March 23, 1999.

This decision is without prejudice to the position that may be taken in future similar circumstances.

[45] Ms. Barill testified that discipline for those who did not cross the picket line was discussed with the Assistant Commissioner but in the end it was decided not to impose any discipline. Ms. Barill said that it had been “a traumatic experience all round” and that the Department wanted closure on this issue.

Admissibility of Rebuttal Evidence

[46] Counsel for the employer objected to evidence introduced on rebuttal by the grievors’ representative. The rebuttal witness testified at the end of the second day of the hearing, and counsel for the employer objected at the commencement of the hearing on the following morning. I reserved on the objection and indicated that I would rule on the admissibility of the evidence in my decision.

[47] The rebuttal, or reply, evidence was that of Earla MacLean, an employee of the BFTSO, who testified about a conversation she had with Ms. Sproson. Counsel for the employer submitted that the testimony was not an appropriate use of rebuttal evidence and was contrary to the rule in *Brown v. Dunn*, [1894] 6 R. 67. Counsel submitted that the testimony was not in response to a new fact raised by the employer, but simply reiterated a point already made by the bargaining agent. The evidence was designed to attack the credibility of Ms. Sproson, and the allegations of Ms. MacLean had not been put to Ms. Sproson on cross-examination. Mr. McGraw also referred me to *Avey* (Board file 166-18-27611) and Sopinka and Lederman, *Law of Evidence*, Butterworths, first edition.

[48] The grievors’ representative submitted that counsel for the employer should have raised this objection at the time that the evidence was introduced or shortly thereafter. Ms. Sproson did introduce a new issue, when she testified that she offered employees the option of having a male manager escort them across the picket line. The evidence of Ms. MacLean contradicted this evidence. Furthermore, in cross-examination, Ms. Sproson had been asked if any employees had told her that they feared for their safety and she had said no one had. The evidence of Ms. MacLean also contradicted this assertion. The grievors’ representative also stated that the evidence

of Ms. MacLean had only come to light the previous morning, when another witness, Ms. Sinclair, had told her how the case was going.

[49] Counsel for the employer submitted that Ms. MacLean was waiting outside while Ms. Sproson was testifying; therefore, the grievors' representative could have put the allegations to Ms. Sproson. Furthermore, it was inappropriate to bring in a witness to testify after the conclusion of the grievors' case.

[50] I have decided that Ms. MacLean's evidence should not be admitted on the basis that it was not appropriate rebuttal evidence. Rebuttal, or reply, evidence is used for a very narrow range of circumstances. In the circumstances here, it cannot be said that the evidence was required to contradict a line of evidence presented by the employer that took the grievors' representative by surprise. It was within the contemplation of the grievors' representative that the employer would deny that employees had expressed concern about their safety. I also found troubling the fact that the evidence came to light after a discussion of the evidence before this hearing with Ms. MacLean, which is a clear breach of the order for the exclusion of witnesses.

[51] The rule in *Brown and Dunn (supra)* boils down to a simple question of fairness and, as such, is not a rule that should be applied slavishly. Essentially, the "rule" is that when an individual is alleged to have said or done something, it is only fair to put those questions directly to that witness. An overly technical application of the rule is not appropriate in adjudication hearings. However, allegations that go to the heart of the issues in dispute, or that directly challenge the credibility of the witness, should be put to the witness in cross-examination. In this case, Ms. MacLean's testimony goes to the heart of one of the issues in this case - whether employees expressed concerns about their safety. The testimony also questioned the credibility of Ms. Sproson by directly contradicting her testimony on the escorts offered to employees. I would not have admitted Ms. MacLean's testimony on this basis, either.

ARGUMENTS

For the Grievors

[52] The issue in this adjudication is whether or not the grievors should have been paid when they could not get into the building in which they worked. Related to this issue is whether or not the grievors had concerns for their safety. Another issue to address is the difference in the treatment of employees at the STC and at the BFTSO.

[53] The collective agreement between the parties in force at the relevant time (between Treasury Board and the PSAC, expiry date June 20, 1999), in particular, clause 64.02, provides that employees are to be paid for services rendered. Employees can be entitled to wages for time not spent rendering services.

[54] The facts were undisputed that the employees of Table Two were in a legal strike position and that employees had been sent home and paid for a full day of work in the past. The testimony of the witnesses for the grievors concerning the events of March 23, 1999, was essentially consistent when viewed collectively. However, the employer's first two witnesses directly contradicted each other. Furthermore, the evidence of Ms. Sproson was directly challenged by the testimony of Mr. Stewart. Almost all the witnesses for the grievors testified that they feared for their safety and if and when asked by management, they told management exactly that. The witnesses testified that the atmosphere at both locations was chaotic, that they were receiving conflicting messages, that there were rumours flying around the crowd, and that they feared for their safety.

[55] The fears of the grievors must be viewed with regard to what actually happened on that day and the perceptions of those employees at the time. Both work locations have a strong union presence and the employees come from a working class community with strong union ties. These employees had been on picket lines themselves in the past and had experienced picket lines of other unions. The picket line has significance for these employees and they do not make the decision to cross lightly. This does not mean, however, that they will refuse to cross in every circumstance.

[56] The majority of the workers at both locations are women, and 35 to 40 percent of these employees were term employees. The employees were not familiar with the picketers, as most of them came from either the grain elevators or the prisons. Employees were also aware that back-to-work legislation was coming and that the PSAC had vowed to step up the job action. Previously, when faced with pickets, employees had gathered at assigned places and management ultimately decided to send employees home and paid them even though no services were rendered.

[57] On March 23, 1999, the situation was quite different from before. This time, employees were prevented from parking in the parking lot by a significant number of pickets. When they walked back to the work location, they found the picketers

blocking access and the employees gathered waiting for instructions. This was according to the instructions provided by management and previous practice. At the beginning of the day at the STC, no escorts were offered and no management representatives were outside of the picket line. The employees at the BFTSO were sent away for coffee, while the employees at the STC were not. This discrepancy caused confusion in employees' minds. The employer did not call as a witness any of the excluded managers who moved through the crowd talking to employees. The witnesses who testified did not observe what they did and they cannot testify what was said or done by these excluded managers.

[58] There was testimony that employees were told that they would not be paid if they did not cross the line and that they would face discipline - this was a very real threat to term employees. Management was yelling at people; the situation was chaotic and very disorganized. Management was fixated on the undertaking by the bargaining agent and was demanding that people cross, without regard to the circumstances. At the STC, the number of picketers (20 to 30), in a space that is no more than 10 to 15 feet wide, made it difficult for people to walk in unimpeded. Witnesses testified that they observed jostling. The picketers refused to respond to management's question as to whether they would let people through or not. It is hard to believe that they would let employees through. Twenty to 30 picketers yelling and chanting was a physically intimidating sight. The witnesses testified that they were not personally approached and offered an escort. These employees were simply concerned for their safety. Around the normal time when they had been sent home in the past, the employees were cold and uncomfortable and saw that the situation was not changing; therefore they left. Ms. Barill testified that the events of the day were "traumatic", which is a view more in keeping with the grievors' witnesses' recollection.

[59] At the BFTSO, the employees thought, "here we go again". As before, they were sent away for coffee until 9:00 a.m. Ms. Sproson's credibility is challenged by the testimony of Mr. Campbell, who testified that she told him to go home. She also denied that employees expressed concerns about their safety, when the evidence showed he raised the issue of safety with her. Ms. Harris testified that management jokingly asked if people wanted to be escorted across and created the impression among employees that management was not really serious. There were rumours and contradictory messages.

[60] Furthermore, there were at least four incidents on the picket line: the car hitting a picketer, a taxpayer trying to break through the line, the PIPSC local president being challenged by picketers, and the incident involving Mr. Stockhecke. The witnesses testified that there was jostling and the picketers were a physically intimidating presence. The picketers became louder and more boisterous as the day progressed. After the incident with Mr. Stockhecke, managers stopped taking people across the line. Although Mr. Stockhecke testified that he did not fear for his safety after the incident, he was not put in a position where he would have cause to. Not all employees were being selected for escorting. Were they expected to stand there until the end of their shift? There was also evidence that witnesses were comforting employees who were crying and scared.

[61] If the employer was so concerned about the PSAC undertaking, why did it not take steps to enforce it? Why did it not seek legal advice that day? Why did it not call the RCMP? With the announcement of back-to-work legislation, the employer did not issue new instructions, even though the instructions did change. Employees relied on past practice, to their detriment.

[62] The *Bailey and others* decision (Board files 166-34-30039 to 30043) involved the grievances of five PIPSC members on March 23, 1999, at the BFTSO. The adjudicator concluded that the grievors were under the direction of management up until the time that they left for home and were entitled to pay up until that time. At the very least, the grievors in this case should be treated the same. In *Morneau and others* (Board files 166-2-10080, 10103, 10104, 10122 and 10127) the adjudicator reached a similar conclusion. In this case, the grievors should be paid until such time as they made an absolute decision to leave.

[63] In conclusion, the remedies sought by the bargaining agent are for payment for the full day of work, as had been done on previous occasions, including benefits and interest. In the alternative, the grievors should be paid for their time at work, up to the time that they left for the day. Ms. Seaboyer submitted that I should not choose the simpler solution simply because of the difficulty in determining when each employee left. She also submitted that I should remain seized of this matter after rendering my decision.

For the Employer

[64] All of the witnesses, save one, had trouble remembering specific events. It is hard to believe that with an event that was so traumatic, witnesses would have trouble remembering details. Details such as to whom they spoke and what they were told were vague. There were significant inconsistencies in the testimony of the witnesses for the grievors; for example, one witness testified that there were four picketers, and another testified that there were 100. The evidence was consistent about the messages communicated to employees and the decisions made concerning the employees. What was also consistent was that employees were escorted across the lines. A substantial portion of the testimony of the grievors' witnesses was largely hearsay and should not be considered in this decision as proof that the events mentioned occurred.

[65] It was very clear that Ms. McPhee's memory was crystal clear and there is no question of gaps in her memory. Her testimony should be considered as very strong and credible.

[66] Both prior to and on March 23, 1999, the employees were made aware of their obligations. It is also clear that on March 23, they were never told that they would be sent home. The one clear message to employees was that they were responsible for reporting to work and for following instructions of management. If there is a "practice" with regard to the presence of picket lines, it is that employees go home only when instructed by management to do so. On March 23, 1999, the instructions from management were clear. At the STC, employees were able to enter the building and were instructed to enter. Most chose not to. At the BFTSO, employees were instructed to leave and come back. It was not up to the discretion of employees that they were only to follow instructions if they were told to leave.

[67] There was testimony that the situation at both locations was chaotic, but the only confusion was the confusion caused by picketers or by non-management employees. The grievors' representative did not call any picketers or strike captains to clarify what the picketers said. Employees were told by union officials not to listen to management. Mr. Grosvenor testified that Mr. Ackermann was yelling instructions to employees, and this was corroborated by Ms. McPhee and Ms. Barill. This would cause confusion among employees. However, the message from management was consistent. Management cannot be faulted for the confusion created by others. The witnesses

chose not to approach anyone from management for clarification. The employees stood well back from the picket line.

[68] Those employees who, it was asserted, were told to go home did not testify. The grievors have not met the burden of proof in this case. Counsel argued that if I am to accept that individual employees were told to go home, it should be regarded as an isolated incident. The message to employees as a whole was to go into work.

[69] A large part of this case revolves around the choices that the grievors made. Some of the witnesses indicated that they had no intention of crossing the picket lines. It is logical to conclude that these employees wished to support their fellow union members. Why did they not make an attempt to cross the picket lines? Why did they make no attempt to obtain instructions? Why did they not approach the picket lines? There was plenty of opportunity to cross the lines, and escorts were available until approximately noon, which is five hours. At the BFTSO, there was also plenty of opportunity, and escorts were offered from 9:00 a.m. until noon.

[70] The *Morneau and others* decision (*supra*) sets out the obligations of both employees and the employer when faced with picket lines. The obligation is on the employees to make reasonable efforts to cross the picket line. None of the testimony demonstrated a reasonable effort to cross. The obligation of the employer to ensure the safe crossing was met, through obtaining the undertaking, providing clear instructions, and providing escorts. The picket line was not violent; therefore, there was no right of employees to refuse to cross. There is no need to provide a police escort. It is also not unreasonable to expect employees to stay at the worksite until the end of their shift.

[71] There is no obligation on the part of the employer to pay those employees who chose not to cross the picket line. The evidence showed the financial impact of the failure to cross the picket line, as well as the impact on service to Canadians. There is no obligation to pay employees up until the time they chose to leave. It is impossible to know who left or when. By the time the escorts had stopped, the evidence was that most of the employees had left. If the grievances are granted, it would send a clear message that management has no authority to manage the workplace when picketers are present. It was not unreasonable to require employees to stay outside, given that the weather was not extreme.

[72] The fear of violence or safety must be objectively present. The subjective view of employees is not the test that should be applied. Verbal abuse is not sufficient to constitute a real threat of violence.

[73] The findings in *Bailey and others (supra)* are not binding on this adjudicator, including the conclusions. Counsel stated that I am free to come to a different conclusion from the adjudicator in *Bailey and others*. The key finding in that case is that employees were initially following management directions. In this case, employees who did not enter the premises did not follow instructions.

[74] The decision not to pay the grievors was an administrative decision and one that was entirely reasonable. The difference in treatment between the BFTSO and the STC employees was not arbitrary or discriminatory because in both cases the employees were paid when they followed management instructions; in the case of BFTSO, employees were instructed to leave and come back. This was not the case at STC.

Reply

[75] In terms of hearsay, there was an agreement by the parties to use only two grievances from each work site in order to avoid having an endless parade of witnesses. With regard to the choice of witnesses, no real conclusions can be drawn.

DECISION

[76] The picket line at the BFTSO on March 23, 1999, was the subject of an adjudication involving a different bargaining agent (*Bailey and others*). This decision is not binding on me. The evidence in that decision relates to different grievors and therefore is not relevant to these grievances.

[77] Picket lines are not pleasant, and the picket lines at both the BFTSO and the STC were no exception. From the evidence, it is clear that tensions were high and that striking employees on the picket lines were angry and frustrated.

[78] In situations where there are picket lines, the employer and employees who are not in a legal strike position both have obligations:

.... these obligations entail, in the employer's case, making every reasonable effort to guarantee the employees access to the work place, and in the employees' case, making every reasonable effort to report for work. (*Morneau and others (supra)*).

Employer Obligations

[79] The test is whether the employer made a reasonable effort to protect the employees' health and safety (*Morneau and others (supra)*). In *Morneau and others*, the adjudicator outlined some of the measures taken by the employer which showed that the employer had made reasonable efforts:

- prior to the strike, the employer established procedures to be followed in the event of a dispute;
- meeting places were designated where employees could receive orders; and
- protection for those crossing the picket line was guaranteed.

[80] The level of effort required of the employer is dependent on the facts of each case. At both the BFTSO and the STC, the employer issued directives prior to the dispute and re-issued those directives after the dispute had commenced. Although a meeting place had been designated for employees at the STC, on the day in question this meeting location was not accessible. However, employees were able to receive instructions in the area outside the workplace. Employees were provided with escorts across the picket line during most of the morning. However, escorts stopped late in the morning because of concerns about employee safety at both locations.

Employees' Obligations

[81] In terms of the employees' obligations, the evidence must show that the employees had cause to fear that by crossing the picket lines they would be endangering their health and safety. It is also an employee's obligation to wait for instructions from management representatives.

[82] At BFTSO, the situation was volatile. Management determined that the safety of employees required escorts. Managers were selecting employees to be escorted. At approximately noon, after the incident with Mr. Stockhecke, escorts were stopped. Employees should not be expected to cross the picket line without an escort, if it has been determined by management that escorts are required. The grievors should

therefore receive pay up until the time that they chose to leave the worksite. When the grievors left, they did so on their own initiative and not in response to management's direction. It was not reasonable for the employees to expect to be phoned when the picket line went down unless they had been instructed to leave.

[83] Ms. Chand's grievance is therefore partially allowed. She should be paid for the period from 9:00 a.m. up until the time she left the workplace. She testified that she left at approximately 12:00 (noon) and is therefore entitled to pay for those three hours. (BFTSO employees have already been paid for the period from their regular starting time up until 9:00 a.m.)

[84] Mr. Birnie's grievance was randomly chosen for referral to adjudication in 1999. For undisclosed reasons, he was not able to testify at this hearing. As a result, there was no evidence presented on when he left the worksite. If I had heard evidence on his time of departure, I would have concluded that he should have been paid up until that time. I will retain jurisdiction on this grievance in the event that the parties cannot reach an agreement on the time of his departure from the worksite.

[85] Mr. Campbell testified that Ms. Sproson told him to go home, and Ms. Sproson denies that she said this. Since Mr. Campbell's grievance is not before me, I do not need to come to a conclusion on this matter. If she did tell him to go home, it was an isolated incident, and the comments were not made to the grievors.

[86] At the STC, there was less volatility on the picket line, but a great deal of confusion as to what was expected. The union officials present, and in particular Johann Ackermann, contributed to the confusion.

[87] The passage of time can have a significant impact on memories. For this reason, Ms. Barill's affidavit, sworn the day after the events in question, is of particular value. The affidavit provides evidence that at approximately 12:30 p.m., picketers prevented employees from crossing the line. At 1:00 p.m., Ms. Barill told her managers to cease escorting staff into the building, as she was concerned about the safety of employees. There was no evidence presented on what management told employees after 1:00 p.m. There was evidence that many employees had already left by this time. Escorts were needed for employees to cross the line safely, and the employer decided to no longer provide such escorts. Employees who were then not able to get across should not be penalized for failing to cross the line while it was not safe to do so. I have concluded,

therefore, that the grievors should receive compensation up until the time that they left for the day.

[88] Ms. Guest testified that she left by approximately 11:30 a.m. She should have been paid from her regular start time up until 11:30 a.m. Accordingly, her grievance is partially allowed.

[89] Ms. Heran's testimony showed that she was confused about the events of March 23, 1999, mixing them up with events on earlier dates. For example, she remembered meeting in the underground parking garage, which occurred on an earlier occasion. However, she did testify that she left around 1:30 p.m., and I accept this as an accurate recollection, because when employees were sent home on previous occasions it was prior to noon. Accordingly, she should be paid up until 1:30 p.m., and her grievance is therefore partially allowed.

[90] The difference in treatment between employees at BFTSO and STC is not relevant. Each picket line is different and sometimes requires different responses from management. In this case, the decision of management at STC not to send employees away until 9:00 a.m., as had been done at BFTSO, was not unreasonable.

[91] The grievors' representative also sought payment of benefits and interest. There was no evidence of lost benefits. There was no argument presented on the jurisdiction of the Board to order the payment of interest. However, the jurisprudence is clear that, in the absence of statutory authority, the Board has no jurisdiction to award the payment of interest: *Eaton v. The Queen* [1972] F.C. 185; *Dahl* (Board file 166-2-25535).

[92] In conclusion, the grievances of Barbara Guest, Jasbir Heran, and Rose Chand are partially allowed, to the extent indicated. The grievance of Phil Birnie is also partially allowed, and I will remain seized if the parties are not able to come to an agreement on the time of his departure from the worksite. I will remain seized of all of these grievances for a period of 90 days from the date of this decision to resolve any issues in the implementation of this decision.

**Ian Mackenzie,
Board Member**

OTTAWA, October 7, 2003.