

ONTARIO LABOUR RELATIONS BOARD

3033-09-U United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) on its own behalf and on behalf of its Local 6500 and its Local 6200, Applicant v. **Vale Inco Limited**, Responding Party.

BEFORE: Ian Anderson, Vice-Chair, and Board Members P. LeMay and C. Phillips.

APPEARANCES: Brian Shell, Chris Donovan, Estair Van Wagner, Myles Sullivan, John Fera and Rick Bertrand appeared on behalf of the applicant; Barry J. Brown, Mark Travers, Peter Brady appeared on behalf of the responding party.

DECISION OF THE BOARD: August 12, 2010

1. This is an application under section 96 of the *Labour Relations Act, 1995*. It arises from a legal strike engaged in by members of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (“USW”) against the operations of Vale Inco Limited (“Vale”). That strike was tentatively settled, conditional upon the following Letter of Agreement:

The parties to this Letter of Agreement (LOA) are Vale Inco Limited; the USW (in full) and its Locals 6500 and 6200.

1. The parties have reached tentative settlements, dated June 22, 2010, settling the terms of their new collective agreements and ending the strikes if they are ratified. The tentative settlements will be the subject of ratification votes at both Local Unions and by the Company on July 7 and 8, 2010. If the tentative settlements are ratified by both Locals and by the Company, (the “Settlements”) then the parties agree to the following. If the tentative settlements are not ratified by both Locals and by the Company, then this Letter of Agreement (LOA) is of no force or effect.
2. The Union’s Application and all filings in connection with that Application (OLRB File No. 3033-09-U) as modified and amended by this LOA shall be heard and determined by the Board commencing as now scheduled on July 9, 12 and 13, 2010. However, only the Union’s allegation that the Company’s refusal to agree to an arbitration process that could result in the reinstatement of any of the nine strikers discharged during the strike violates section 17 of the *Labour Relations Act* as alleged by the Union, shall be heard by the Board. The Union shall not proceed with all other allegations.
3. The parties may rely on the terms of the ratified Settlements and on the content of the entire negotiation process in the course of the hearing of the Union’s Application as amended by this LOA. Nothing precludes the Union from asserting to the Board that such evidence is not

relevant. Neither party will take the position that (1) the fact of the Settlements, or (2) the fact of the ratification of the Settlements, or (3) the fact of the end of the strikes shall be taken into consideration in any way by the Board or precludes the Board in any way from hearing and determining the Application, including making such orders as the Board may consider appropriate in the circumstances. The parties also agree that the Board shall not take into consideration (1), (2) or (3) above.

4. The decision of the Board with respect to the Union's amended Application shall not amend the parties' Settlements referred to above.
5. This LOA is conditional upon the Board's approval which is to be sought in a hearing teleconference on July 4, 2010 with the panel of the Board seized with this matter. At that time the parties shall file an executed copy of this LOA with the panel. In the event this LOA is not approved by the Board, then this LOA is of no force or effect.
6. In deciding this matter, the parties agree that the Board shall determine whether there has or has not been a violation of the *Act*, and if the former, that the Board shall issue such remedial order(s) as it considers appropriate.
7. The parties agree that this LOA and any decision of the Board does not restrict any rights that any party would otherwise have with respect to an appeal or judicial review of the decision of the Board, but the parties agree that by this LOA neither has agreed to a stay of implementation of any Order of the Board set forth in any decision of the Board.

DATED AT TORONTO, THIS 4th DAY OF JULY, 2010

("illegible signature")

For the Company

("illegible signature")

For the USW

("illegible signature")

For the USW Local 6500

("illegible signature")

For the USW Local 6200

2. On July 5, 2010, the Board approved the terms of the Letter of Agreement. The tentative settlements were executed by the parties and subsequently ratified. In accordance with the Letter of Agreement, the sole remaining issue for determination by the Board is the USW's allegation that Vale's refusal to agree to an arbitration process that could result in the reinstatement of any of the nine striking employees discharged during the strike violates section 17 of the Act.

3. This matter returned to the Board for hearing on July 9, 2010. The USW argued that there were no material facts in dispute and that the Board should direct the parties to proceed directly to final argument. The employer argued that it would be improper to proceed to final argument as it wished to lead evidence on, among other things, aspects of the negotiating history

between the parties, which it assumed would be in dispute. The union replied that such evidence was irrelevant. The Board then issued the following decision orally:

The sole issue remaining before the Board is the union's allegation that the company's refusal to agree to an arbitration process that could result in reinstatement of any of the nine strikers discharged during the strike violates section 17 of the *Labour Relations Act, 1995*.

Section 17 provides as follows:

The parties shall meet within 15 days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

The union alleges that the employer's refusal amounts to a failure to make every reasonable effort to make a collective agreement. The union expressly states that it does not allege that the employer's refusal amounts to a failure to bargain in good faith.

The union argues that any evidence with respect to the entire negotiating history is irrelevant to its allegation. It notes the need for expedition.

The employer accepts that need for expedition, but notes that is not a basis upon which either party's ability to lead evidence with respect to what ever it thinks it needs to prove its case can be trampled upon.

The relevance of evidence which the employer seeks to lead can only be assessed against the material facts upon which the union seeks to rely and the parties' respective theories of the case. The pleadings in this case have, understandably, not been able to keep pace with the rapidly changing set of circumstances. Relevance, however, is not an issue that can be decided in the abstract.

The onus of proof is upon the union. The union suggests that the material facts upon which it will seek to rely will not be in dispute. Having regard to desirability of expedition, we think it is appropriate to proceed as follows.

The union is to file a statement of all material facts upon which it seeks to rely in proving its allegation that the employer's refusal amounts to a failure to make every reasonable effort to make a collective agreement by noon on Monday, July 12, 2010.

The parties are to come prepared to fully argue the merits of the case on Tuesday July 13, 2010. The union will proceed first. In responding to the union's argument, the employer is directed to indicate the extent of its agreement and disagreement with the union's material facts and also to state any additional material facts upon which it would seek to rely. In replying to the employer's argument, the union is directed to indicate the extent of its agreement and disagreement with the employer's additional material facts. The Board may determine the merits of the matter on the basis of the submissions made by the parties. If, however, the Board determines that one or more disputed material fact is relevant to its determination of this matter, the parties will be provided with an opportunity to lead evidence with respect to those facts.

4. In accordance with the Board's direction, the USW filed the following Statement of Material Facts:

The Employer

1. Vale Limited (the "Employer") is the wholly-owned Canadian subsidiary of the multinational Brazilian-based corporation, Companhia Vale do Rio Doce (CVRD or Vale) (NYSE: RIO). The Employer is in the business of mining and smelting nickel, copper, cobalt and precious metals.
2. The Employer mines nickel and other metals, and operates mill and smelter operations, in and around Sudbury, Ontario. On its website at <http://www.inco.com/global/sudbury/>, the Employer states:

Vale Inco has been operating in Sudbury for more than 100 years. Located about 400 kilometres north of Toronto, Canada and surrounded by lakes and wilderness, the City of Greater Sudbury is the educational, medical, and retail centre of northeastern Ontario. Approximately 4,700 of its 157,857 residents are Vale Inco employees and more than 10,000 are Vale Inco pensioners.

Vale Inco's operations in Sudbury – which consist of six mines, a mill, a smelter and a refinery - are among the largest in the world.

(Book of Documents, TAB 1)

The Union

3. The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and its Locals 6500 (hereinafter "Local 6500" or collectively the "Union") is the exclusive bargaining agent for a production and maintenance bargaining unit totaling approximately 3000 production and maintenance employees of the Employer at its Sudbury premises.
4. The previous collective agreement between the Employer and USW and its Local 6500 expired on May 31, 2009, (the "Local 6500 Collective Agreement", Book of Documents, TAB 2) and was extended until the commencement of the strike.

Pre-Strike Bargaining, The Strike and the Termination of Nine Striking Employees

5. The Union and the Employer commenced collective bargaining for a renewal collective agreement in mid-April 2009, in accordance with s. 17 of the Ontario *Labour Relations Act*. The parties were unable to agree to a renewal collective agreement.
6. The Union commenced a legal strike on July 13, 2009, at 12:01 a.m.
7. During the course of the strike, the Employer discharged nine striking employees.
8. The nine discharged striking employees are Ron Breault, Mike Courchesne, Adam Cowie, Dan Labelle, John Landry, Brian Miller, Mike

French, Jason Patterson and Patrick Veinot. The letters of discharge sent by the Employer to the discharged employees are included in the Book of Documents at TABs 3-11.

9. With respect to all of the nine discharged striking employees, the Union disagrees with the Employer's discharge decisions and the Union denies that the striking discharged employees engaged in conduct that justifies discharge.

The Resumption of Bargaining

The February-March 2010 Sessions

10. In or about late January 2010, the lead negotiator for the Union, Wayne Fraser ("Fraser"), the lead negotiator for the Employer, Harvey Beresford ("Beresford"), and Mediator Kevin Burkett ("Mediator Burkett") met and scheduled dates for mediated collective bargaining discussions in Toronto commencing on February 25, 2010.

11. The issue of the discharged striking employees was discussed in the course of the February-March 2010, collective bargaining discussions.

12. The Union's expressed position was that all strikers, whether in receipt of disciplinary letters or discharged during the strike, should return to work at the conclusion of the strike.

13. The Union alternatively proposed that the renewal collective agreement be 'back dated' so as to avoid any 'hiatus' in service.

14. The Employer's position was that striking employees discharged during the strike would not be reinstated to employment at the conclusion of the strike. The Employer offered that discharged striking employees could pursue damages (presumably for wrongful dismissal) in civil court and that the Employer would not 'object' to such claims being dealt with by an Ontario court.

15. With respect to the effective date of the collective agreement, the Employer insisted that a renewal agreement must be dated as of the date of ratification.

16. In the latter days of the February-March 2010, round of discussions, the Employer presented the Union with an "Offer to Settle the Strike" (Book of Documents, TAB 12). No memorandum of settlement was concluded. The many issues that remained in dispute were reflected in the March 2010 Employer Offer. Included amongst those issues was the fact that the March Offer did not include reinstatement of the nine discharged striking employees or any provision whereby striking employees discharged during the strike would have access to any process by which their discharges and possible reinstatement could be determined by an independent arbitrator.

17. Following receipt of the March Offer, the Union put the Offer to a ratification vote of its members, which took place on March 11, 2010 in Sudbury. The March Offer was overwhelmingly rejected by the members in the production and maintenance bargaining unit in Sudbury.

18. On March 16, 2010, following the Union's rejection of the Employer's Offer, the Employer posted a message on its website, www.valeinonegotiations.com entitled "An open message to striking employees – March 16, 2010" (Book of Documents, TAB 13). With respect to the issue of the discharged striking employees, the March 16, 2010, message included the following:

Is the company prepared to bring back employees who had their employment terminated during the strike?

No. The union bargaining team is demanding that the company reinstate individuals terminated over the course of the strike as part of any settlement. Our position remains clear – this will not happen. Decisions to terminate employment are not made lightly. The facts of each case were reviewed in detail before any decisions were made. In the end, the actions of the individuals in question fail any test of acceptable behaviour – either in society or in the workplace. The USW leadership knows this.

May 2010 Mediated COLLECTIVE BARGAINING

19. In or about late April to early May 2010, Mediator Burkett invited the parties to resume mediated discussions. Discussions resumed in Toronto on May 3, 2010.

20. During the course of the May 2010 mediated collective bargaining, the parties again discussed the issue of the nine discharged striking employees.

21. The Employer held to its position that strikers discharged during the strike would not be reinstated to employment. The Employer repeated its proposal that the discharged striking employees could litigate their dismissals and seek damages in a civil court. The Employer also held to the position that it would only agree to an effective date for the renewal collective agreement as of the date of ratification.

22. The Union proposed that employees discharged during the strike would have their discharges adjudicated by an independent arbitrator. The Employer responded that it would never agree to the Union's proposal as it could result in the reinstatement of discharged striking employees.

23. The May discussions ended on May 6, 2010. In addition to the issue of the discharged nine striking employees, a number of other tough "economic" issues remained unresolved.

Labour Board Decision, May 16, 2010

24. Following the breakdown of mediated collective bargaining on May 6, 2010, the Union requested an expedited hearing at the Board to deal with the issue of the Employer's refusal to agree to any process whereby employees discharged during the strike would have their discharges reviewed by an independent arbitrator.

25. The Board heard the parties' submissions on May 14, 2010.

26. On May 16, 2010 the Board chaired by Chair Kevin Whitaker, as he then was, now Mr. Justice Whitaker of the Ontario Superior Court of Justice, released its Decision which stated:

Accordingly, the Board directs the parties to return to the bargaining table to recommence negotiations, preferably with the assistance of Mr. Burkett. Further, the parties are directed to turn their attention to and bargain all of the issues which remain outstanding with the exception of the return to work protocol. Finally, the parties are only to deal with and address the return to work protocol when they have reached agreement with all other terms of a Memorandum of Settlement.

(Book of Documents, TAB 14)

June-July 2010 Discussions

27. In accordance with the Board's May 16, 2010, Decision, the Union and the Employer met with Mediator Burkett for further mediated collective bargaining. Discussions commenced on June 4, 2010, and ran until June 7, 2010, when the sessions were adjourned by Mediator Burkett. Discussions resumed on June 18, 2010.

28. On June 22, 2010, with the assistance of Mediator Burkett, the Union and the Employer reached agreement on all issues, including all return to work issues *except for* the issue of the nine discharged striking employees.

29. The Employer held to the position that it would not agree to any process by which the nine discharged striking employees would be able to have their discharges reviewed by an independent arbitrator.

30. The Union maintained its revised position that the employees discharged during the strike should have their discharges reviewed by an independent arbitrator.

31. On June 22, 2010, the parties agreed to refer the outstanding matter to the Board in a manner that would not further prolong the strike due to their disagreement on the single issue and in a manner that would not prejudice the Union's position before the Board by the fact that a collective agreement would have been concluded and ratified before returning to the Board.

32. The parties, through their counsel, attempted to negotiate the terms of a Letter of Agreement (LOA) beginning on June 22, 2010. The negotiations with respect to the terms of the LOA broke down on June 27, 2010.

33. On June 29, 2010, Mediator Burkett terminated his involvement in the mediation discussions between the Union and the Employer and issued a public press release:

I regret to announce that after extensive mediation between Vale and United Steelworkers the parties are deadlocked.

The Deadlock concerns the adjudicative avenues available to 8 of the 9 employees discharged from their employment during the course of the strike.

I have concluded that additional mediation efforts would not resolve this issue. Accordingly, I am terminating the mediation as of today.

(Book of Documents, TAB 15)

34. That same day, on June 29, 2010, the Ministry of Labour issued a press release stating:

After months of intense negotiations, talks between Vale and the United Steel Workers locals 6200 and 6500 have reached an impasse, mediator Kevin Burkett made public today.

The parties have been engaged in collective bargaining for more than 11 months. Through these efforts, the parties were able to resolve all outstanding issues except one regarding a process to review the dismissal of eight employees during the strike. On this issue, it is clear that the parties have reached a deadlock.

The Minister of Labour will be contacting the parties immediately, and they will be asked to give an account on their inability to find a solution to this one remaining issue.

(Book of Documents, TAB 16)

35. Also on June 29, 2010, a letter authored by John Pollesel, Vale's Vice-President, Production Services & Support – Canada/UK and GM, Ontario Operations, was posted on the Employer's website, www.valeincone negotiations.com:

I am writing to provide you with the latest news regarding our efforts to negotiate new collective agreements with USW Locals 6500 and 6200 and end the strikes.

We recognize that employees are anxious for information and are anxious to return to normal operations. Until now, both the union and the company have operated under a "communications blackout" imposed by independent mediator Kevin Burkett. As of moments ago, with Mr. Burkett terminating mediation, the blackout has now been lifted.

Unfortunately, the latest round of contract talks has failed to produce a tentative agreement – despite us having a deal at hand.

We had a deal on all issues early Tuesday morning (June 22), including submitting the matter of the discharged employees to the Ontario Labor Relations Board. Regrettably, in the days that followed, the parties could not agree on how this submission to the OLRB would take place. As far as we're concerned, all other matters remain agreed.

At this time, there are no further talks scheduled.

(Book of Documents, TAB 17)

36. On June 30, 2010, the Union's Bargaining Committee issued a letter to the Union's membership posted on USW Local 6500's website, www.uswlocal6500.ca stating the following:

We can now tell you that as of Tuesday, June 22nd, we had successfully negotiated an agreement with Vale. All items were agreed to, including a legal document that both parties were going to draft to send to the Labour Board. Unfortunately, by Friday afternoon, June 25th, Vale had still not submitted their document, and when they finally did respond to us, their document was worded in a way that had very little to do with what we, Local 6500 and Vale, had agreed to on Tuesday, June 22nd.

(Book of Documents, TAB 18)

37. On July 2, 2010, Union representatives and Employer representatives met separately with Ontario's Minister of Labour, The Honourable Peter Fonseca.

38. On July 3, 2010 the Union and the Employer resumed discussions with the assistance of Ministry of Labour Director of Mediation and Conciliation Services, Reg Pearson.

39. On July 4, 2010, the parties reached an agreed Letter of Agreement ("LOA") on terms for the Board to hear and determine the outstanding issue of the nine discharged striking employees (Book of Documents, TAB 19 H). Both parties signed the LOA on July 4, 2010. The Union did not execute the tentative settlements until the LOA was agreed to and signed off. The tentative settlements were executed by USW and its Local 6500 and the Employer on July 5, 2010 (Book of Documents, TAB 19 A-H). The content of the proposed collective agreements was the settlement the parties had reached on June 22, 2010.

40. On July 5, 2010, the parties jointly requested that the Board approve the LOA, as set out in the LOA. During a teleconference with the parties on that date, the Board convened and approved the LOA which was before the Board. This approval was one of the preconditions for the implementation of the terms of the LOA respecting the matter of the nine discharged striking employees.

41. On July 7 & 8, 2010, the memberships of Local 6500 and Local 6200 voted on the June 22, 2010 proposal and the LOA as explained in ratification membership meetings preceding the ratification votes.

42. On July 8, 2010, the proposed collective agreements were ratified. Ratification of the proposed collective agreements was the other precondition for the implementation of the terms of the LOA respecting the matter of the nine discharged striking employees.

43. The new collective agreement came into force as of the date of ratification, July 8, 2010.

44. On July 9, 2010, the parties appeared before the Board. After deliberating, the Board issued an Oral Ruling in respect of the Union's motion about relevant material facts and evidentiary matters (Book of Documents, TAB 20).

The Parties' Arguments

5. The USW argues that section 17 has two legs. The first is the obligation to bargain in good faith. Breach of this obligation is to be assessed on a subjective standard: what did the party intend in adopting a position? The second is the obligation to make every reasonable effort to conclude a collective agreement. Breach of this obligation is to be assessed on an objective standard: is the position adopted objectively unreasonable, irrespective of intent? The USW recognizes that the Board has been reluctant to use section 17 to supervise the content of collective bargaining positions. It argues that historically the Board has been prepared to do so in two categories of cases. The first is through the application of the illegality doctrine: bargaining to impasse proposals with respect to certain issues, notably the scope of the bargaining unit, is illegal in the sense that it is, in and of itself, a violation of section 17 of the Act. The second is that the Board will exercise supervisory authority with respect to patently unreasonable contract proposals lacking any semblance of business justification. The USW argues that this doctrine first found voice in *Radio Shack*, 1979 CanLII 817 (ON L.R.B.). It argues that in that case the Board attempted to “mush together” the subjective and objective standards, which is why the Board linked the duty to bargain obligation with the obligation to make every reasonable effort to reach a collective agreement.

6. The USW argues that the Supreme Court of Canada in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1996] 1 S.C.R. 369 either revised the second category or added a third category of cases in which section 17 will be used to supervise the content of collective bargaining positions: bargaining a position to impasse will be found in violation of section 17 if the position is objectively unreasonable having regard to the comparable standards and practices within a particular industry. In doing so, the USW argues, the Court changed, or at least clarified, the interpretation of section 17 to make it clear that while a finding of subjective intent is required in order to find a breach of the duty to bargain in good faith, it is not required in order to find that a responding party has failed to make every reasonable effort to reach a collective agreement. Rather it is sufficient if the impugned conduct of the responding party does not, viewed objectively, constitute making every reasonable effort to reach a collective agreement, irrespective of the intent of the responding party.

7. The USW argues that, viewed objectively, the refusal of Vale to agree to an arbitration process that could result in reinstatement of any of the nine employees discharged during the strike does not constitute making every reasonable effort to reach a collective agreement. The USW asserts that Vale's intention in taking this position, and thus the associated negotiating history, is irrelevant. It argues *Royal Oak* provides that the determination of whether or not a party's position is objectively reasonable is to be made by reference to other cases with similar facts. The USW argues that the *Royal Oak* case itself, which also involved an employer and union in the mining industry, is sufficiently analogous to the instant matter to demonstrate that no reasonable union in the mining industry in Canada could accept a collective agreement which did not provide some sort of due process for employees dismissed during the strike.

8. The USW argues that this approach is consistent with an interpretation of section 17 informed by Charter values. It relies upon *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (“*BC Health Services*”), which held that collective bargaining was protected by the guarantee of freedom of association set out in section 2(d) of the Charter. It argues that application of the same analysis results in the conclusion that the right to strike is also protected by s. 2(d) of the Charter. The right to strike, it argues, is meaningless unless employees can go on strike without fear of losing their jobs as the result of decisions by their employer which cannot be challenged through an independent

arbitration procedure. It relies on academic commentary and international covenants to which Canada is a signatory in support of this interpretation.

9. In the result, the USW requests that the Board declare that Vale's refusal constitutes a breach of section 17 of the Act. It seeks an order directing the adjudication of the discharges on a just cause standard by an arbitrator. It seeks specific orders as to the conduct of that arbitration process.

10. USW cites the following authorities: *R. v. Conway*, [2010] S.C.J. 22; *Hills v. Canada* (Attorney General), [1988] 1 S.C.R. 513; *Nova Scotia (Workers Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; *Royal Oak Mines Inc. v. Canada* (Labour Relations Board), [1996] 1 S.C.R. 369; *R. v. Nasogaluak*, [2010] 1 S.C.R. 206; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391; *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392 (Div. Ct.); *Dunmore v. Ontario* (Attorney General), [2001] 3 S.C.R. 1016; *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313; *International Brotherhood of Electrical Workers, Local 213, complainant, and Rogers Cable T.V. British Columbia Ltd., Vancouver Division, and Rogers Cable T.V. (British Columbia) Ltd, Fraser Division, respondents*, 69 di 17; Judy Fudge, "The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of Health Services and Support case in Canada and Beyond" (2008) 37 *Indus. L.J.* 25; Brian Etherington, "The BC Health Services and Support Decision – The Constitutionalization of a Right to Bargain Collectively in Canada: Where did it Come from and Where Will it Lead?" (2008) 30 *Comp. Lab. Law & Policy* 715; Jamie Cameron, "The Labour Trilogy's Last Rites: B.C. Health and a Constitutional Right to Strike. (2010) 15 *C.L.E.L.J.* 297; Judy Fudge and Eric Tucker, "The Freedom to Strike in Canada: A Brief Legal History" (2010) 15 *C.L.E.L.J.* 333.; Geoffrey England, "The Legal Response to Striking at the Individual Level in the Common Law Jurisdiction in Canada" (1977) 3 *Dalhousie L.J.* 440; *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3.; *ILO, Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 68 U.N.T.S. 17; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171; *ILO, Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth, Revised ed. (ILO, Geneva: 2006) (selection from); *ILO, Freedom of Association and Collective Bargaining. General Survey of the reports on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Report III (Part 4B), Part I, Chapter V, International Labour Conference, 81st Session, 1994. Geneva.*; *Complaint Against the Government of the United Kingdom presented by the National Union of Seamen (NUS), CFA, 277th Report, Case No. 1540 (United Kingdom); Concluding Observations of the Human Rights Committee Canada, U.N. Doc. CCPR/C/79/Add.105 (1999) and U.N. Doc. CCPR/CAN/CO/5 (2006).*; Bernard Gernigon, Alberto Otero and Horacio Guido, "ILO principles concerning the right to strike" 137 *Intern'l Lab. Rev.* 441 (1998); *Ontario Public Service Employees Union v. Municipal Property Assessment Corporation*, 2010 CanLII 26713 (ON); Donald D. Carter, "The Duty to Bargain in Good Faith: Does it Affect the Content of Bargaining?" in Kenneth P. Swan & Katherine E. Swinton ed., *Studies in Labour Law* (Toronto: Butterworths, 1983) 35; *United Steelworkers of America v. Fotomat Canada Limited*, 1981 CanLII 799 (ON L.R.B.); *United Brotherhood of Carpenters & Joiners of America Employer Bargaining Agency v. United Brotherhood of Carpenters & Joiners of America*, 1978 CanLII 434 (ON L.R.B.); *Ontario Public Service Employees Union v. Cybermedix Limited*, 1981 CanLII 865 (ON L.R.B.); *United Steelworkers of America v. Radio Shack*, 1979 CanLII 817 (ON L.R.B.); *Royal Oak Mines Inc., 94 CLLC 16,026; Saskatchewan (Re)*, [1999] S.L.R.B.D. No. 30.; and *Caressant Care Nursing Home of Canada, Ltd., [1996] OLRB Rep. September/October 748.*

11. While not agreeing with all of the facts pled by the USW, including disputing some on the basis of, in Vale's view, selectivity, Vale argues the facts pled by USW fail to make out a prima facie case. If the Board were to conclude that the facts pled by the USW give rise to a prima facie case, then Vale would seek to rely on a number of additional facts which it filed at the hearing.

12. Vale argues that USW's position would render the refusal by an employer to accede to a demand that the discharge of an employee while on strike be remitted to arbitration "per se" illegal, i.e. contrary to section 17. While certain actions have been treated as "per se" illegal, they are few: e.g. failure to provide information necessary for rational discussion; failure to disclose information which would have a significant impact on the bargaining unit; bargaining amendments to the bargaining unit description to impasse. The Board has been very leery of expanding the list of such items because the Board is reluctant to be involved in the content of collective bargaining, rather than its process, in complaints under section 17.

13. When the Board has looked at the actual content of the proposals, it has generally been because the proposal itself is so outrageous that, in the absence of any conceivable justification, it gives rise to the inference that it was advanced in order to thwart collective bargaining.

14. Vale argues that *Royal Oak* did not adopt an objective test in relation to the second leg of section 17, rather on a careful reading it is clear that the Court applied a qualified objective test: if a responding party has not made objectively reasonable efforts to conclude a collective agreement, then its intention not to conclude a collective agreement will be inferred. This, Vale argues, does not represent a change in the interpretation of section 17. Evidence of Vale's intent in taking its position, including the bargaining history, is thus relevant.

15. Vale argues that finding a refusal to agree to arbitration of employees discharged during a strike is illegal per se is inconsistent with past Board jurisprudence on the very issue and inconsistent with the more recent legislative history of the Act.

16. Vale argues that no material facts have been pled by USW which could result in the conclusion that Vale's refusal was objectively unreasonable. *Royal Oak* does not support the proposition that this determination may be made solely by reference to decided cases.

17. Vale also rejects USW's arguments with respect to the implications of *BC Health Services*. The recognition of collective bargaining as an activity protected by section 2(d) of the Charter does not necessarily mean that the right to strike will be recognized as a protected activity. Further, recognition of the right to strike as a protected activity would not necessarily mean that the right to arbitration for misconduct during a strike would be guaranteed. Just cause provisions are a product of contract, not the Act. They are not necessarily available to all employees, for example the contract may not extend just cause protection to probationary employees. Conversely, the Act contains a number of other provisions which protect employees from discipline by the employer because the employees have exercised their legal right to strike. The record before the Board is simply insufficient to permit consideration of whether the absence of just cause protection for employees on strike would constitute substantial interference with respect to any constitutionally protected right to strike.

18. In any event, USW's position cannot be considered merely an attempt to interpret section 17 in a manner that is consistent with Charter values. Rather, USW's position amounts to an argument that the Act is contrary to the Charter unless amended to include a right to arbitration

on a just cause standard of discharged employees. In order for such an argument to be before the Board, a Notice of Constitutional Question must have been properly served upon the Attorneys General for Ontario and Canada. As this was not done, the Board is without jurisdiction to consider USW's Charter arguments.

19. Vale cites the following additional authorities: *Shaw-Almex Industries Limited*, [1986] OLRB Rep. Dec. 1800; *Formula Plastics Inc.*, [1986] OLRB Rep. July 954; *John T. Hepburn, Limited*, [1985] OLRB Rep. Jan. 75; *Radio Shack*, [1985] OLRB Rep. June 901; *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316; *Service Employees International Union Local 204 v. Leisureworld Nursing Homes*, April 14, 1997 (Ont. Div Ct), affirmed December 1, 1997 (O.C.A.); *Labour Relations Act*, R.S.O. 1990, CHAPTER L.2 (*Bill 40* version); *Dover Corporation (Canada) Ltd.*, [1997] OLRB Rep. March/April 396; *Re Commemorative Services of Ontario and Service Employees International Union, Local 204* (1997), 69 L.A.C. (4th) 11 (Brandt); *Re Precious Plate Ltd. and Communications & Electrical Workers of Canada* (1987), 27 L.A.C. (3rd) 330 (O'Shea); Excerpt from *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, as amended, s. 80; *Mini-Skool Ltd.*, [1983] OLRB Rep. Sept. 151; Excerpt from *Canada Labour Code*, R.S.C. 1985, c. L-2, as amended, Division XIV; *Radio Shack*, [1985] OLRB Rep. Dec. 1789; *Brantford Expositor*, [1988] OLRB Rep. July 653; *Cybermedix Ltd.*, [1981] OLRB Rep. Jan. 13; and *T. Eaton Company Limited*, [1985] OLRB Rep. Mar. 491.

Analysis and Decision

20. The issues raised by this case are significant. We wish to express our appreciation to both counsel for their careful, considered arguments.

21. The proceedings to this point raise three issues for determination. First, does the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike in and of itself give rise to a breach of the duty to bargain? If not, then, second, has the USW pled a prima facie case that Vale has breached its duty to bargain? If so, then, third, is the evidence which Vale seeks to lead with respect to the reasons it maintained its position to impasse relevant and admissible evidence?

Does maintaining to impasse a position of refusing to agree to just cause arbitration for employees discharged during the strike *per se* constitute a breach of the duty to bargain?

22. The Board's approach to the scope of the duty to bargain is well explained in the following statement from *Governing Council of the University of Toronto (Royal Conservatory of Music)*, [1985] OLRB Rep. Nov. 1652, 1985 CanLII 1085 (ON L.R.B.) (adopted as well in *Formula Plastics* at paragraph 9):

30. The scope of the duty to bargain imposed under section 15 [now 17] of the Act is squarely raised on the instant facts and has not been dealt with quite so directly by the Board previously. It is useful to refer first to the classic exposition of the duty in *De Vilbiss (Canada) Limited, supra*, at paragraph 13:

The section imposes an obligation upon both employers and trade unions to enter into serious discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to

ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective—that of entering into a collective agreement and section 14 [now 17] is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

31. Given that "voluntarism" is the touchstone, it is implicit that the Board's role pursuant to section 15 [now 17] of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled. This role stands in sharp contrast with the American approach embodied in the "mandatory-directory" classification of proposals and the different consequences for bargaining of classification as a "mandatory" or "directory" item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme: see *Consolidated Bathurst, supra*; *Pulp and Paper Industries, supra*; *Westinghouse Canada Limited, supra*.

32. This does not mean that the Board is totally distanced from the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. The Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer "tailor-made for rejection": see *Radio Shack*, [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Ltd., supra*; *Irwin Toy Ltd.*, [1983] OLRB Rep. July 1064. Further, the Board may review the content of proposals to assess whether any items are "illegal". For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme: see *United Brotherhood of Carpenters & Joiners of America, supra*; *Toronto Star Newspapers Ltd.*, [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811. See also: *Croven Limited*, [1977] OLRB Rep. Mar. 162; *A.N. Shaw Restorations Ltd.*, [1976] OLRB Rep. Sept. 504; *T. Barlisen & Sons*, [1960] OLRB Rep. May 80; *Canada Cement LaFarge Ltd.*, [1980] OLRB Rep. Nov. 1583; *Treco Machine Tool Ltd.*, [1982] OLRB Rep. Dec. 1954. The Board notes that, although two examples of demands which have been found to be "illegal" are mentioned and other examples are contained in the cases referred to, the appropriate scope of the concept of "illegality" is not before the Board in this case.

33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to *agree* that any matter may become part of their collective agreement, it is implicit that

each party must be free to *table* that matter for discussion. While this is perhaps the bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse, supra*; *Sunnycrest Nursing Homes, supra*; *Consolidated Bathurst, supra*; *Canadian Industries Limited, supra*. In the instant case, then, the respondent may not refuse to discuss the "9 point programme". The respondent characterized the 9 point programme as intruding on areas reserved to management. Quite simply, the parties are bargaining about what is reserved to management; the 9 points are not subjects *a priori* "off-limits" for discussion. The definition of a collective agreement in section 1(1)(e) of the Act is expansive; apart from illegal matters, the Board should not seek to restrict the scope of clauses which may be incorporated by agreement of the parties in *their* collective agreement. For the Board to accept the respondent's arguments would inevitably draw the Board into the mandatory-directory analysis of the duty to bargain. This, the Board will not do. Nor does the Board accept the respondent's asserted distinction between the union acting on behalf of the employees in the bargaining unit and acting on behalf of the Conservatory as an institution' as relevant to the duty imposed by section 15 [now 17] of the Act. The union is the exclusive bargaining agent for employees in the bargaining unit - no more and no less. But as exclusive bargaining agent, the union is entitled to present its proposals for a collective agreement. The union may be seeking to occupy the "high ground" in an attempt to broaden its support or to introduce novel clauses in a collective agreement or be acting from other motives. Provided the motive is not the avoidance of a collective agreement, the Board will not question the wisdom of the priorities established or proposals formulated by the parties.

23. A finding of *per se* illegality must be grounded in the provisions of the Act or some other law. The Board has repeatedly found that nothing in the Act requires an employer to agree to arbitration with respect to discharged striking employees: *John T. Hepburn Limited*, [1985] OLRB Rep. Jan. 75 at paragraph 16; *Radio Shack*, [1985] OLRB Rep. Jun. 901 at paragraph 32; *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316 at paragraph 37. (See also: *Shaw-Almex* (employer's position that striking employees would only be recalled to fill vacancies in the workforce of replacement workers was not *per se* illegal); *Formula Plastics* (employer's insistence on a clause permitting it to discharge without just cause, provided that severance pay was paid, was not *per se* illegal, notwithstanding the fact that the Board recognized that "a "just cause for discharge" clause is the foundation of most negotiated collective agreements"); and *Mini-Skool* (employer's position that striking employees would not have the right to displace non-striking employees not *per se* illegal).) The USW has advanced no argument that the Act itself requires the conclusion that maintaining to impasse a position of refusing to agree to just cause arbitration is *per se* a breach of the duty to bargain. Rather, the USW relies primarily upon the Supreme Court of Canada's decision in *Royal Oak*.

24. The USW's interpretation of *Royal Oak* would mean that it would be a breach of the duty to bargain for a party to maintain an objectively unreasonable position to impasse, regardless of the party's motivation for doing so. In addition, the USW argues that the determination of whether a position is objectively unreasonable is to be made by reference to other decided cases, without any evidence at all. The effect would be to render a finding in some cases into a rule of law applicable to all other cases. In the result, the USW's position would effectively render "illegal *per se*" that which neither any specific provision nor the scheme of the Act as a whole makes illegal.

25. We agree with Vale that this is "very heavy lifting" to assign to *Royal Oak*. The issue before the Supreme Court of Canada in *Royal Oak* was whether the decision of what was then the

Canada Labour Relations Board (“CLRB”), including the remedy which it ordered, was patently unreasonable, the then applicable standard of review. In its decision, the CLRB stated that it was “usual ... where a strike is settled and a new collective agreement made, to provide, explicitly or implicitly a procedure for determining claims that the exercise of such disciplinary powers during the strike was not for just cause”. In the case before it, the company had taken the position that it would not agree to such a provision. The CLRB did not, however, conclude that this was a breach of the duty to bargain *per se*. Rather, the CLRB, which the Supreme Court of Canada observed had gained “intimate knowledge of the course of negotiations between the parties” through four other decisions it had already rendered during the dispute, first considered, and rejected, the reasons advanced by the company for taking this position, before concluding that in maintaining its position to impasse the company was in breach of the duty to bargain. This was the conclusion that the Supreme Court of Canada held was not patently unreasonable. We do not accept that in doing so the Court meant to overturn, without even addressing, the overall approach of this Board’s jurisprudence on the proper interpretation and application of the duty to bargain.

26. The USW’s argument that *Royal Oak* makes maintaining an objectively unreasonable position to impasse a *per se* breach of the duty to bargain is also not supported by *BC Health Services*. In paragraphs 99 to 106 of that decision, the Supreme Court of Canada describes the nature of the duty to bargain. While the Court specifically referred to *Royal Oak*, there is no suggestion that the nature of the duty to bargain had been revised in the manner suggested by the USW.

27. We also note that in *Dover Corporation (Canada) Ltd. Industrial Division*, [1997] OLRB Rep. Mar./Apr. 396 at para 37, the Board rejected an argument that *Royal Oak* had changed the manner in which the duty to bargain was to be applied to the case at hand.

28. Finally, we note that the specific conclusion which USW urges upon us, that it is *per se* a breach of the duty to bargain for an employer to maintain to impasse a position of refusing to agree to just cause arbitration for employees discharged during a strike, is inconsistent with the legislative history of the Act. On November 5, 1992, the *Labour Relations and Employment Statute Law Amendment Act*, 1992, S.O. 1992, c. 21 (commonly known as “Bill 40”) was passed. Section 21 of Bill 40 amended the *Labour Relations Act* to provide employees on strike with the right not to be discharged or disciplined only for just cause, enforceable through arbitration. That protection, however, was repealed by the passage of the present Act (commonly known as “Bill 7”) on November 10, 1995.

29. The USW’s reliance on the Charter in its argument causes us to make the following additional comment for the purposes of clarity. The USW has not argued that the Act’s failure to make it a *per se* breach for an employer to maintain to impasse a position of refusing to agree to just cause arbitration for employees discharged during a strike impermissibly infringes the right of freedom of association guaranteed by section 2(d) of the Charter. Such a challenge to the constitutionality of the Act could only be considered by the Board after proper notice to the Attorneys General for Ontario and Canada, and on the basis of a full evidentiary record. The USW has not mounted such a challenge in this case and we express no opinion on the merits of such an argument.

30. We conclude, therefore, that the fact that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike is not sufficient in and of itself to give rise to a breach of the duty to bargain.

Has the USW pled a prima facie case that Vale has breached its duty to bargain?

31. We turn now to Vale's argument that the USW has failed to plead a prima facie case that Vale breached its duty to bargain.

32. The essence of the USW's pleading is that Vale maintained to impasse its position of refusing to agree to just cause arbitration for employees discharged during the strike. As noted in the excerpt from *Royal Conservatory* set out above, while the Board's primary focus is on the process of collective bargaining, the Board may have regard to the content of positions tabled. In doing so, the Board's concern is not limited to positions that are illegal *per se*. Rather, even maintenance of positions to impasse that are not illegal *per se* will constitute a breach of the duty to bargain if they support the inference that a party does not intend to enter into a collective agreement or that the employer is seeking to undermine the union as exclusive bargaining agent. Such an inference is subject to rebuttal by the other party leading evidence justifying why it took the position in question. The question is what kind of proposal attracts such an inference.

33. It could be argued that *Royal Oak* suggests that maintaining to impasse a position which is merely objectively unreasonable is capable of supporting an inference of a breach of the duty to bargain, absent competing evidence of justification for the position. Such a conclusion is not to be lightly reached. It could have the unintended consequence of diverting the attention of the parties from concluding a collective agreement at the bargaining table to developing a case for prosecution at the Board. This is the concern first expressed by the Board in *Radio Shack*, [1979] OLRB Rep. Dec. 1220, 1979 CanLII 817 (ON L.R.B), as follows:

69. In order to make necessary but sensitive assessments of bargaining conduct the Board must assess the totality of a collective bargaining relationship. For example, the occurrence of flagrant employer unfair labour practices at the same time the parties are engaged in collective bargaining may belie an employer's claim that a negotiating position is merely hard bargaining with a trade union unwilling to accept its lack of negotiating "clout." Or patently unreasonable contract proposals lacking any semblance of business justification may suggest an employer's desire to embarrass the union and encourage its abandonment by the employees. The legislation requires the parties to make every reasonable effort to make a collective agreement, a duty which patently unreasonable proposals fly in the face of. On the other hand, this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement — a commitment which is more and more self-evident as parties proceed together beyond their first collective bargaining agreement. Too penetrating a review by this Board will only insert it as a third party in the bargaining arena to be tactically used by the negotiators, diverting their attention from the principal task at hand. This is the sense of the note of caution registered by the British Columbia Labour Relations Board in its touchstone *Noranda* case, *supra* at page 160:

"Collective bargaining is not a process carried on in accordance with the Marquess of Queensbury rules, and that is especially the case when a lengthy strike is going on. Archibald Cox has warned of the long-range consequences of too close scrutiny by the Board of the tactics of negotiators:

"There is also danger that the regulation of collective bargaining procedures may cause negotiators to bargain with a view toward making

the strongest record for NLRB scrutiny. The report of the Truitt negotiations bears ample evidence of the jockeying of lawyers. Hammering out a labour agreement requires all the negotiators' skill and attention. To divert them from the main task by putting a value on building up or defeating an unfair labour practice case diminishes the likelihood that the negotiations will be successful.'

Accordingly, while we interpret s. 6 as requiring adherence to certain fundamental principles of reasonable bargaining procedure, we also consider that this Board must exercise considerable restraint in intervening in negotiations between parties who are committed to reaching a collective agreement."

These principles are of fundamental significance to the facts at hand.

34. Further, it can be argued that a determination by the Board as to whether or not a position is objectively reasonable would of necessity require the Board to impose its own normative standards upon the parties, a role which appears to be at odds with the value of free collective bargaining. This concern is well described in *Canada Trustco Mortgage Company*, [1984] OLRB Rep. Oct. 1356, at paragraphs 30 and 31, adopted in *Radio Shack*, [1985] OLRB Rep. Jun. 901, 1985 CanLII 988 (ON L.R.B.) at paragraph 31:

30. In recent years the Board has been scrupulous to protect the framework of collective bargaining: the independence of the union, the integrity of its role as the employees' exclusive bargaining agent, and the right to information necessary for it to properly perform its statutory role. But the Board has been equally clear that it will not act as interest arbitrator, or prescribe the precise contents of the parties' collective agreement - even in the face of an "egregious" breach of the duty to bargain in good faith (see *Radio Shack, supra*). The content of the agreement is for the parties to determine, in accordance with their own perceived needs and relative bargaining strengths. The legislation enables employees to combine together to bargain collectively and compels the employer to recognize their bargaining agent. It further provides a framework within which there can be an exploration of the parties' differences and a sincere effort to reach some accommodation. Despite the adversarial aspects of collective bargaining, there are substantial areas of mutual interest between employers and employees which informed discussion may reveal. But the statute does not *require* any particular concessions, nor does it stipulate the content of a collective agreement, or even that a collective agreement always must be the necessary outcome of the parties' bargaining.

31. One cannot quarrel with the proposition that the "duty to bargain in good faith" must encompass an obligation to engage in informed and rational discussion, and in exceptional circumstances an employer's position at the bargaining table may be so patently unreasonable or devoid of apparent business justification as to evidence a desire to avoid any collective agreement altogether. So may an unexplained retreat from a previous agreed position, or the untimely insertion of new issues into the bargaining process. However, the Board must be careful that in adjudicating disputes and giving a reasoned elaboration for its decisions, it does not impose its own model of decision-making as the normative standard for the collective bargaining process. Collective bargaining is not simply a matter of presenting proofs and reasoned arguments in an effort to achieve a favourable outcome, nor is that outcome necessarily arrived at, or explained, by a logical development

from given and accepted premises. It is a process in which reason plays a part - but not the only part. There may be a range of potential outcomes or solutions and the ultimate result may have more to do with economic strength than abstract logic. In particular collective bargaining situations there simply may not be any commonly accepted principles or criteria and, in consequence, no objective basis for distinguishing a "claim of right" from a "naked demand". Reason and self-interest are inextricably intertwined. Ultimately the parties may reach agreement only because of a realistic appraisal of the value of their objectives in relation to their ability to obtain them, including the costs they are able to inflict on one another. It may have little to do with what some outsider might consider a "fair" settlement, or a just allocation of rewards to capital and labour.

35. To this it might be argued in reply that the Board is required to assume this normative function when the parties are at the point of impasse, at least with respect to positions which would otherwise substantially interfere with Charter values. The USW contends, and Vale disputes, that an employer maintaining to impasse a refusal to agree to some form of just cause arbitration for employees discharged while on strike is one such position.

36. For the purposes of determining whether or not the USW has pled a prima facie case, it is neither necessary nor appropriate for us decide these issues at this time. It is sufficient that we conclude that a reasonable argument can be made on the basis of USW's pleadings which would result in the conclusion that Vale breached its duty to bargain.

37. USW has pled that Vale maintained to impasse a position of refusing to agree to just cause arbitration. Maintaining such a position to impasse is unusual and *Royal Oak* provides a basis for arguing that it is objectively unreasonable. For the reasons stated above, it is arguable that absent justification this constitutes a breach of the duty to bargain. Accordingly, in our view USW has pled a prima facie case.

Is the evidence which Vale seeks to lead with respect to the reasons it maintained its position to impasse relevant and admissible evidence?

38. The answer to this question is found in our reasons answering the second question. Determination of whether Vale maintaining to impasse its position of refusing to agree to just cause arbitration for employees discharged while on strike was patently unreasonable or even objectively unreasonable requires consideration of any justification offered by Vale for taking this position. The evidence which Vale seeks to lead is thus relevant and admissible.

Direction

39. In its submissions, Vale indicated that it agreed with many of the material facts pled by the USW. A hearing will be held at which the USW will be entitled to call evidence to prove the facts with which Vale did not agree. Vale will be entitled to call evidence in response and to lead evidence as to the reasons why it took the position that it did. The USW will be entitled to call evidence in reply.

40. This matter is referred to the Registrar.

“Ian Anderson”
for the Board