

**BRITISH COLUMBIA LABOUR RELATIONS BOARD**

ROGERS SUGAR LTD.

(the "Employer")

-and-

CANADIAN OFFICE AND PROFESSIONAL  
EMPLOYEES UNION, LOCAL 378

(the "Union")

-and-

RETAIL WHOLESALE UNION, LOCAL 517

(the "RWU")

PANEL: Michael J. Adam, Vice-Chair

APPEARANCES: Gavin Hume Q.C. and Mark E.  
Colavecchia, for the Employer  
Allan E. Black, Q.C. and Shanti P. Reda,  
for the Union  
Shawn Lakusta, for the RWU

CASE NO.: 57503

DATE OF HEARING: October 20, 2008

DATE OF ORAL DECISION: October 20, 2008

DATE OF WRITTEN REASONS: October 22, 2008

## Decision of the Board

The following oral reasons were rendered on October 20, 2008. Further to the Board's memorandum to the labour relations community on July 9, 1997 regarding oral decisions, at the time of rendering the decision I reserved the right to edit the decision. Except for reciting facts that are not in dispute the following is essentially a transcript of the oral reasons. There are no substantive differences between the oral and written reasons.

### ORAL REASONS

#### I. INTRODUCTION

1 This is an interim decision regarding an evidentiary and procedural matter.

#### II. POSITION OF PARTIES

2 The Union applies for an order prohibiting the Employer from introducing into evidence a number of documents contained in Volume IV of the Book of Documents ("Volume IV"). The Union does not dispute the potential probative value of these documents (except perhaps the document at Tab 146), but submits that the prejudicial effect of these documents outweighs their probative value. In essence, the Union argues that admission of these documents at this juncture of the proceeding would undermine the adjudicative process, and thereby have an adverse impact on the Panel's fact-finding process. If some or all of the documents are found to be admissible, the Union seeks an adjournment to properly prepare its case; the Employer does not oppose the granting of an adjournment for that purpose.

3 The Employer applies to recall Jennifer Jones, the Employer's Director of Human Resources. Jones was the Employer's first and only witness to date. Her testimony was given over the course of the first three days of hearing, which took place in August 2008. The Employer says that it is necessary to recall Jones to allow her the opportunity to correct inaccuracies in her evidence that she identified after she completed her testimony. In particular, the Employer seeks to have Jones introduce into evidence the document at Tab 146 of Volume IV, which contains a summary of disciplinary actions allegedly taken by the Employer's supervisors from 2004 through 2008. The Employer confirmed that the summary is intended to correct the inaccuracies in Jones' previous evidence. The Employer argues that this evidence is probative of the true facts necessary for the Panel to make its decision. In addition, the Employer seeks to introduce a number of other new reliance documents that it will introduce into evidence through one or more of its remaining five witnesses.

4 The Union opposes the recall of Jones. The Union relies on the decision in  
*Henry v. Zenith* [1991] B.C.J. No. 3850 (B.C.S.C.) (Hutchison J.) for the proposition that  
a litigant cannot recall a witness simply because the other party has succeeded in  
getting some adverse testimony from that witness in cross-examination. In that  
decision, the court disregarded the additional testimony of the witness who had been  
recalled on a provisional basis, commenting that the additional testimony was nothing  
more than repetition of her previous testimony. The Union argues that Jones would  
simply be covering ground that she already covered in her previous testimony, and that  
the Employer should be required to live with any inaccuracies.

5 In regards to the other documents, while the Union accepts that the subject  
matter of the documents could be introduced into evidence by other Employer  
witnesses without express reference to the documents themselves, the Union has been  
deprived of an opportunity to cross-examine Jones on those documents due to their late  
introduction into evidence. The Union does not seek to cross-examine Jones on those  
documents now if they are deemed admissible, expressing concern that she has now  
had an opportunity to prepare her testimony in response. Instead, the Union seeks to  
have the documents themselves excluded.

6 Finally, I note that the Employer has confirmed that with the exception of further  
documents it may wish to use to cross-examine the Union's witnesses, Volume IV is the  
final instalment of the Employer's reliance documents in relation to the substance of this  
proceeding.

### 7 III. ANALYSIS AND DECISION

7 I will address the admissibility of the documents at each Tab of Volume IV in turn.  
Given that I am preparing these reasons during a brief 2-1/2 hour adjournment, I do not  
propose to canvass the parties' submissions in detail. Furthermore, in order to provide  
an expeditious decision, I have not attempted to review Jones' evidence in reaching my  
decision, except insofar as the parties specifically referred to her earlier testimony in  
their submissions.

8 The Union's argument rests on a claim of prejudice. I find that there are  
essentially two potential sources of prejudice: (1) the late introduction of the documents  
generally, leaving the Union with inadequate time to prepare its case; and (2) the loss of  
an opportunity to cross-examine Jones regarding the substance of the documents.

9 I find that the first basis for the claim of prejudice can be addressed by granting  
an adjournment to allow the Union additional time to prepare. As stated above, the  
Employer does not oppose an adjournment for that purpose.

10 I find that the second basis for the claim of prejudice is not as easily rectified, at  
least in respect of documents where Jones appears to have had a key role in relation to  
the specific subject matter addressed by the documents in issue.

11 I have considered each Tab of disputed documents with those factors in mind. I  
note that the Union also argues that it is not sufficient that it be permitted to cross-  
examine Jones further on the additional documents, as she has now had an opportunity  
to prepare her response to the Union's cross-examination. I accept the Union's  
argument. I find that recalling Jones for further cross-examination on the additional  
documents at this stage would not sufficiently protect the Union's right of cross-  
examination.

12 I will now address the documents at each Tab in turn.

13 Tabs 131 and 132

13 These documents are attendance records for training sessions conducted by the  
Employer and attended by the supervisors. Jones' name appears on the attendance list  
at Tab 131, but not on the attendance list at Tab 132. The Union argues that  
introduction of these documents is prejudicial, and that it would have cross-examined  
Jones regarding the attendance lists. Had the Union been aware Jones attended the  
training sessions, the Union says it would have cross-examined Jones on the substance  
on the training session itself. The Employer says that it intends to introduce these  
documents into evidence through John Symons, who is responsible for training, and  
that they are his documents. I note that excerpts from those training sessions have  
been included in evidence at Tabs 87, 88 and 89.

14 I find these documents are admissible. I find that the probative value of the  
documents outweighs any prejudicial effect from their late introduction into evidence,  
and that any prejudice can be rectified by an adjournment. Many of the Union's  
potential witnesses attended the training sessions and could provide evidence regarding  
the content of that training and their attendance at the sessions. The Union will also  
have an opportunity to cross-examine Symons directly regarding the content of the  
sessions; Symons is clearly the Employer witness in the best position to give evidence  
regarding these sessions. Finally, the Union was aware of the sessions themselves and  
could have asked Jones if she attended, then elicited evidence regarding the content of  
the sessions.

15 Tab 133

15 The document at Tab 133 completes the e-mail chain that was introduced into  
evidence at Tab 122. The additional e-mail is dated April 20, 2007 (10:50 AM). The  
Union says that Jones did give evidence about the e-mail at Tab 122, and that these e-  
mails relate to the critical issue of the degree of direction given to supervisors by  
superintendents in regards to discipline. Despite having given some evidence, Jones is  
not referred to in the e-mail or included in the distribution of the e-mail. The Employer  
says these documents will be part of Symons' testimony, when he testifies.

16 I find these documents to be admissible. Given that Jones is not a part of these  
communications in a direct sense, I find there is little prejudice to the Union in not  
having had an opportunity to cross-examine Jones on the new e-mail. I find the

probative value in respect of Symons' evidence outweighs the prejudicial effect, and any prejudice can be rectified by an adjournment.

Tab 134

17 Tab 134 completes the e-mail string appearing earlier in the proceeding at Tab 60. It relates to Bill Avey's involvement. The Union acknowledges that Jones was not cross-examined on these documents, but says that she was cross-examined on the general underlying issues. Jones was copied on the March 10, 2008 e-mail that forms part of Tab 60; her name appears on the document. Jones' name also appears on the additional March 11, 2008 e-mail at Tab 134 now included to complete the e-mail string.

18 I find these documents are admissible. The additional e-mail of March 11, 2008 does not materially alter the earlier e-mail exchanges. The Union did not cross-examine Jones on the earlier e-mail exchange, despite the fact that her name appeared in the March 10, 2008 e-mail that formed part of Tab 60. I find there to be nothing in the additional e-mail of March 11, 2008 that would have changed the Union's decision in that regard, had it been included in Tab 60. While the probative value of the additional e-mail appears to be limited, that probative value is not outweighed by any prejudicial effect caused by the Union's inability to cross-examine Jones regarding its contents. Any other prejudice from its late introduction into evidence can be rectified by granting an adjournment.

Tabs 135, 136, 138 and 139

19 The Union argues that these documents all relate to discipline, and that Jones was cross-examined extensively on disciplinary issues, including the critical issue of who directs the disciplinary process and thus exercises effective determination. The Union argues that these documents were available to the Employer in its files, and that their introduction at this stage amounts to cherry-picking by the Employer in respect of production of documents.

Tab 135

20 Tab 135 adds to the two documents at Tabs 37 and 70, and includes: the discipline memorandum issued to the employee in question; a WCB's Smoking Regulations Notice; an e-mail to Mike Fletcher (Jones' predecessor in Human Resources) expanding on an e-mail already in evidence at Tab 70; a Second Stage Grievance Meeting record; a Company Report of Grievance Meeting; and a letter from the RWU withdrawing the grievance. The documents were clearly available to the Human Resources Department prior to Jones' testimony, but not all were contained in the personnel files examined by the Union.

21 I find Tab 135 inadmissible. The additional documents have an obvious connection to the Human Resources Department and thus to Jones. I find that had the documents been included as part of Tab 37 and/or 70, the Union might have conducted its cross-examination differently. In particular, the new documents include the discipline

memorandum, which is developed in conjunction with Human Resources. Also, the new documents include a September 5, 2000 e-mail copied to Jones that incorporates the e-mail at Tab 70. This new e-mail establishes a link between the subject matter of the documents and Jones, and may have had an impact of the Union's cross-examination. Consequently, I find the probative value of these documents to be outweighed by their prejudicial effect.

Tab 136

22 Tab 136 adds to the documents at Tab 41 and 104. The Union argues that Jones gave extensive testimony regarding these documents in direct and cross-examination. The Union referred to aspects of the testimony in its submission to exclude these documents. The new documents relate to discipline and grievance meetings. They do not explicitly refer to Jones, nor does it appear Jones had any direct involvement in these earlier steps in the process. Those involved include Don Ryan, Avey and Richard Bathhurst. The Employer intends to call Ryan and Avey; the Union intends to call Bathhurst.

23 I find Tab 136 admissible. While the Union might have cross-examined Jones regarding these documents, and certainly did cross-examine her regarding Tabs 41 and 104, it's not clear any prejudice will arise from the lack of opportunity to cross-examine her on the additional documents, as she appears to have had no involvement in the earlier stages. The probative value of these documents outweighs their prejudicial effect, and any prejudice that may arise can be rectified by cross-examination of those more directly involved, namely Ryan and Avey. Any prejudice caused by the late introduction of these documents into evidence can be rectified by an adjournment.

Tab 138

24 Tab 138 is an entirely new document. The Employer says it is part of Avey's testimony. There is nothing to suggest Jones had any direct involvement in the matters addressed by these documents, except perhaps in relation to the discipline memorandum, which was copied to Human Resources and likely prepared by Human Resources.

25 I find Tab 138 admissible. The documents relate primarily to Avey's testimony. It's not clear Jones had any significant part in this matter. Any prejudice due to their late introduction can be rectified by granting an adjournment.

Tab 139

26 Tab 139 is also an entirely new document. Tab 139 was not included previously as part of the Employer's document disclosure as it was contained in the file of an employee who had retired, Martin Cleave. The disclosure process had focused on active employees files. The Employer intends to introduce these documents through Avey. The Union will have an opportunity to cross-examine Avey. Human Resources'

involvement was limited to the discipline memorandum; Jones does not appear to have had any other involvement.

27 I find Tab 139 to be admissible. The documents relate to Avey's testimony, and any prejudice from their late introduction can be addressed by an adjournment. I find that their probative value outweighs any prejudicial effect arising from the Union's lack of opportunity to cross-examine Jones regarding these documents.

28 Tabs 140 and 145

28 These documents are attendance summaries prepared by Human Resources. The Employer intends to introduce these documents through Linda Jense. Tab 140 is an e-mail to Bathhurst. Tab 145 is a similar document provided to a number of individuals, dated October 9, 2008.

29 I find both Tab 140 and 145 inadmissible, except for the purposes of cross-examination of the Union's witnesses. Given the evidence tendered to date of the Human Resources Department's key role in administering the Employer's attendance management program, I find that the probative value of these documents is outweighed by the prejudice to the Union from the denial of an opportunity to cross-examine Jones on their contents. Given Jones' role within Human Resources, the Union would likely have addressed these documents during its cross-examination of Jones had they been introduced in a timely manner.

30 Tab 140 remains admissible for the limited purpose of cross-examination of Bathhurst, as he is a recipient of that document. If the Union calls any witnesses to whom the document at Tab 145 was distributed, that witness may be cross-examined on Tab 145.

31 Tab 141

31 Tab 141 is an excerpt from a lockout and confined space entry training session. The Employer confirmed that Symons will introduce the document into evidence, and that the document will be used to cross-examine the supervisors called by the Union to testify. Jones does not appear to have had any involvement or connection to the document.

32 Tab 141 is admissible. Its probative value outweighs any prejudicial effect caused by its late introduction into evidence, and any such prejudice can be rectified by an adjournment. The inability to cross-examine Jones on this document appears to be inconsequential. If the Employer has attendance records in respect of this training session (such as those found at Tabs 131 and 132), those records must be produced to the Union as soon as possible.

33 Tab 142

33 Tab 142 contains a number of signed Overtime Confirmation memoranda, issued to various employees by Gary Mustvedt.

34 The documents at Tab 142 are not admissible. These documents were copied to  
Jones and it is likely the Union would have cross-examined her regarding the  
documents. Their probative value is outweighed by the prejudice to the Union of not  
having the opportunity to cross-examine Jones. The documents are, however,  
admissible for the purpose of cross-examination of Gary Mustvedt, if the Union calls him  
to testify.

Tabs 143 and 144

35 The parties agree that these documents are admissible.

Tab 146

36 I have discretion to permit the Employer to recall Jones to testify regarding Tab  
146 in order to rectify inaccuracies in her earlier testimony. In exercising my discretion,  
the question I must ask is whether granting the Employer's request to recall Jones is  
consistent with my statutory obligation to ensure a fair hearing, one that furthers the  
cause of ascertaining the truth while protecting the adjudicative process, which is  
adversarial in nature.

37 In exercising that discretion, I have decided to decline the Employer's request to  
recall Jones. Hence, Tab 146 is inadmissible as it is a document prepared by Jones  
subsequent to her earlier testimony; it is her document. In reaching this conclusion, I  
am persuaded by the reasoning in *Henry v. Zenith, supra* as cited above.

38 Jones has identified inaccuracies in her earlier testimony, presumably elicited  
during cross-examination by the Union, and wishes to correct those inaccuracies.  
Hence, she would inevitably be giving further evidence about matters she previously  
testified about. As the Union points out, she has now had the opportunity to prepare her  
testimony, having regard for the Union's cross-examination. While I accept the  
Employer's submission that the purpose of the adjudicative process is to ascertain the  
truth, we also rely on the adversarial nature of the process to help us achieve that  
outcome, and in particular, cross-examination. In my view, to allow Jones to revisit her  
earlier testimony at this stage would undermine the Union's right of cross-examination  
regarding a critical subject matter in these proceedings—namely the disciplinary  
authority exercised by supervisors—and potentially result in a denial of a fair hearing.

39 That said, nothing will preclude the Employer from leading evidence of the  
underlying facts contained in Tab 146 through other witnesses as part of their  
testimony.

Tabs 147 and 148

40 The parties agree that these documents are admissible.

IV. CONCLUSION

41

In summary: Tabs 131, 132, 133, 134, 136, 138, 139, 141, 143, 144, 147 and 148 are admissible; Tabs 135, 140, 142, 145 and 146 are inadmissible. The Union's request for an adjournment is granted.

LABOUR RELATIONS BOARD

A handwritten signature in black ink, appearing to read "Mike Adam", written in a cursive style.

MICHAEL J. ADAM  
VICE-CHAIR