IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aheer Transportation Ltd. v. Office of the British Columbia Container Trucking Commissioner,* 2018 BCSC 484

Date: 20180326
Docket: S161081
Registry: Vancouver

Between:

Aheer Transportation Ltd., Bestlink Transport Services Inc., Burton Delivery Service Ltd., Gantry Trucking Ltd., Gur-ish Trucking Ltd., Indian River Transport Ltd., Roadstar Transport Company Ltd., Sunlover Holding Co. Ltd., Triangle Transportation Ltd., and T S D Holding Inc.

Petitioners

And

British Columbia Container Trucking Commissioner, The Attorney General of British Columbia and Unifor Local Union No. VCTA

Respondents

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Petitioners:	I. Chafetz, Q.C.
Counsel for the Respondent Unifor Local Union No. VCTA:	P.R. Shklanka
Written Submissions of the Petitioner:	July 18, 2017
Written Submissions of the Respondent:	August 17, 2017
Place and Date of Judgment:	Vancouver, B.C. March 26, 2018

1. INTRODUCTION

[1] On June 30, 2017, I dismissed a petition by Aheer Transportation Ltd. and other trucking companies that had sought a declaration that certain sections of the *Container Trucking Regulation*, B.C. Reg. 248/2014, were invalid because the legislation pursuant to which they were enacted, the *Container Trucking Act*, S.B.C. 2014, c. 28, did not authorize their purported retroactive effect. I also dismissed the petitioners' alternative application for a finding that the interpretation by the Commissioner of one of the defined terms in the *Regulation* was patently unreasonable. The neutral citation for my reasons for judgment is 2017 BCSC 1111.

[2] The Commissioner and the Attorney General did not seek costs against the petitioners, in keeping with the usual approach taken on behalf of administrative tribunals in applications of this kind. However, the respondent Unifor Local Union No. VCTA ("Unifor") seeks its costs of both the petition hearing and of its earlier application to be added as a party. The petitioners argue that this is one of those unusual situations in which Unifor, despite being a successful party, should not receive its costs.

2. BACKGROUND

[3] The *Act* and *Regulation* were put in place to address a longstanding dispute about the rates paid to truck drivers for the movement of containers to and from ports in the Vancouver area. The dispute had led to disruptive work stoppages.

[4] The petitioners are companies who carry out this work, employing mainly non-union drivers. Unifor represented drivers in two of the petitioner companies, although it has since been decertified in relation to them. At the point that the last work stoppage was resolved, in April of 2014, Unifor's members were in a legal strike position and were awaiting a new collective agreement.

[5] The mediators who had assisted in the creation of a joint action plan to end the last work stoppage then recommended the establishment of a provincial agency to set and enforce driver rates in the industry and a structure for driver compensation. The *Act* and *Regulation* came into force in December of 2014 to give effect to those recommendations.

[6] The contentious aspect of the *Regulation* for the petitioners is that it required the payment to drivers of new minimum rates established by the Commissioner, as well as fuel surcharges and wait time remuneration, on a retroactive basis, back to the point earlier that year that the drivers had ended their work stoppage.

[7] In addition, the Commissioner had interpreted the term “off-dock trip” in the *Regulation* in a manner that significantly increased the petitioners’ obligation to pay for trips between different container storage facilities that did not involve a return to a port. The Commissioner’s interpretation considered each movement of a container to be a separate trip.

[8] As I have said, the petitioners argued that the retroactive payments were outside the authority granted to the *Regulation* by the *Act* and that the Commissioner’s interpretation of “off-dock trip” was patently unreasonable, which is the standard for judicial review in this case.

[9] Unifor had previously successfully applied before Justice G.P. Weatherill to be added as a party to the petition: 2016 BCSC 898. The decision to add it was based on the following considerations:

- There was a related labour arbitration between Unifor and the two petitioner companies whose employees it had previously represented, in which Unifor was seeking to enforce the provision in the collective agreement that provided for increased driver rates, in accordance with the joint action plan that had ended the work stoppage. The arbitration had been adjourned at the request of one of those petitioner companies on the basis that the grievance could be moot if the petition was successful. According to G.P. Weatherill J., “Therefore, an issue exists between Unifor and the petitioners that is intimately connected with the subject matter and the relief claimed in the petition.” (at para. 44.) On this basis alone he would have added it as a party;

- Unifor took the position that the two petitioner companies were barred from participating in the petition by the terms of the collective agreements, which committed them not to engage in legal challenges of the *Act* or *Regulation*; and

- If the petition were successful, there was a possibility that the petitioners could seek reimbursement of retroactive fees that had already been paid to truckers, including those (previously) represented by Unifor.

[10] Like the government respondents, during the petition hearing Unifor sought to uphold the validity of the retroactive payments and the reasonableness of the Commissioner's interpretation. Its counsel made full submissions that, despite its common position with the government respondents, did not simply echo their submissions but rested on an independent analysis.

[11] I concluded that the requirements of retroactive pay and fuel surcharges in the *Regulation* were validly empowered by the *Act* and that the requirement to pay wait time remuneration, properly interpreted, did not involve a retroactive application. I also concluded that it was not appropriate to embark on a judicial review of the Commissioner's interpretation of "off-dock trip" in the absence of an actual decision by him on that point, and that at best the petitioners' proposed interpretation of that term was simply another reasonable one, which did not displace the reasonableness of the Commissioner's.

3. POSITIONS

a. The Petitioners

[12] The petitioners provide several reasons why Unifor should not receive its costs:

- The petitioners never named Unifor as a party to the petition or did anything to involve it in the proceedings;

- Unifor had no direct interest in the outcome of the petition – it was no longer the bargaining agent for any of the petitioners' employees at the time it sought party status; it did not speak on behalf of the other trade unions who have representation rights in this industry (none of whom chose to participate); and it consistently took the position that its collective agreement was not affected by the outcome of the petition, to the extent that its arbitration with two of the petitioners went ahead before the outcome of the petition was known;

- After being granted party status in part to pursue the issue of whether the two petitioners with whom its collective agreements had expired were barred from participating in the petition, it did not make that argument at the hearing. According to the petitioners, this was the only issue in which it has a direct interest.

[13] In short, the petitioners argue that Unifor's participation should be characterized as arising from the exercise of its own discretion and its "unilateral desire to intervene". These are considerations that they say they should not be burdened with on the question of costs.

b. Unifor

[14] Unifor's position is that there are no exceptional circumstances present here that would justify departing from the usual rule that a successful party will receive its costs of an application, as provided in Rule 14-1(9) of the *Supreme Court Civil Rules*. It characterizes the petitioners' submissions as an attempt to re-litigate the decision to grant it party status.

[15] It points out that the petitioner companies whose members it previously represented have not established that its subsequent decertification eliminates its ability to seek to enforce the rights and duties under the collective agreements. Nor did G.P. Weatherill J. consider that a factor weighing against adding it as a party.

[16] The fact that other unions did not seek to participate in the petition is not a relevant consideration, it submits. Further, Unifor was not purporting to speak for other unions or to participate on that basis, although it advanced a position that was generally supportive of the rights of all drivers.

[17] The two petitioner companies whose employees it represented were arguing that the invalidity of the *Regulation* would in turn invalidate the contractual language in the collective agreements about pay increases. G.P. Weatherill J. recognized the significant interest that this potential outcome conferred on Unifor in his decision to grant it party status. In other words, while Unifor took the position that the obligations under the collective agreement exist independently from the requirements in the *Regulation*, it still had an interest in upholding the *Regulation*

in order to resist the petitioner companies' position that a declaration of invalidity ended their obligation.

[18] The argument that Unifor should be deprived of its costs because it did not make the argument at the petition hearing that the two petitioner companies were barred by their collective agreements from participating in it is similarly misplaced, it submits. G.P. Weatherill J. could have limited Unifor's standing to challenging the right of those two companies to participate in the petition if that had been his view of the extent of its interest. In any event, as a matter of jurisdiction, this Court cannot grant remedies in relation to findings of breaches of collective agreements, and Unifor's position in the petition hearing was that those matters had to be addressed by an arbitrator first, which they had not yet been when the petition was argued.

4. DISCUSSION

[19] First, I agree with Unifor that to the extent the petitioners' arguments here are inconsistent with the issues that were determined in the course of granting it party status, it is not appropriate to revisit them at the costs stage. Once a court concludes that a party should be added, the fact that a petitioner or plaintiff did not originally see fit to involve that party is not a fairness consideration when assessing costs. Party status carries with it the right to seek costs in the event of success. The fact that no other unions sought to involve themselves as parties is also not a relevant factor in the analysis.

[20] I also think the petitioners' argument that the decertification ended Unifor's interest was resolved by G.P. Weatherill J.'s finding that the petitioner companies intended to argue in the arbitration that Unifor's grievance to enforce the driver pay increases would be moot if the *Regulation* was found to be invalid, which was the basis on which one of the companies had requested to adjourn the arbitration. In finding that this alone granted Unifor an interest worthy of its participation, he clearly concluded that its decertification was not a bar.

[21] With respect to the argument that Unifor did not argue the only issue in which it had an interest, I accept Unifor's position that this Court could not have resolved, as part of the petition proceedings, the issue of whether the two petitioner companies were barred from participating in those proceedings because

of the provisions in the collective agreement that they would not challenge the *Act* or Legislation.

[22] However, Unifor's notice of application on the party application contained the following paragraph:

> 7. Unifor has a direct interest in ensuring Aheer and Sunlover are not permitted to continue as Petitioners given that their participation, in Unifor's view, violates paragraph 7 of the Aheer MOA and Sunlover MOA. Proceedings to determine that issue are ongoing.

[23] In the context of the application that was then being made this language is somewhat confusing, and G.P. Weatherill J. may not have had the benefit of the distinction that Unifor now draws about what was within the Court's jurisdiction when he was giving weight to the point:

> [45] Secondly, Unifor argues that bringing the petition violates agreements between itself and two of the petitioners (Sunlover and Aheer). The collective agreements executed on November 28, 2015, committed Sunlover and Aheer not to engage in any legal challenges to the *Act* and/or its regulations. I understand that counsel for the petitioners takes the position that this clause was agreed to in bad faith and has brought a complaint to the BCLRB to have it declared unenforceable. The complaint was dismissed in *Sunlover Holding Co. Ltd. and Unifor, Local Union No. VCTA*, [2016] BCLRB No B53/2016. However, Sunlover has applied for reconsideration of that decision. <u>This is an issue that may have an impact on Sunlover's and Aheer's ability to challenge the *Regulation* and Unifor should have the ability to argue the point at the hearing of the petition.</u> [Emphasis added.]

[24] I was informed during submissions in the petition hearing of the existence of that contractual language, as part of the general factual background, but no remedy, such as a denial to those companies of standing, was sought based on it. Nor could it have been, it appears, given the jurisdictional issue.

[25] In light of that, I am frankly unable to grasp what it was about this issue that in itself would have given Unifor an interest in the petition proceedings, if all it could do was inform the Court about the existence of that contractual language. This would hardly be "argu[ing] the point", as G.P. Weatherill J. envisioned, and in hindsight it may not have been a reason on which to base the granting of party status. But given that what he considered to be a stand-alone basis for granting party status went on to form the thrust of Unifor's submissions at the petition hearing, I cannot say that the apparent weakness of this second ground, based on

a retrospective analysis, would have affected the outcome of the application for party status, or that it resulted from any misconduct by Unifor that should have a cost consequence now. And in any event, the petitioners are certainly incorrect in asserting that this was the “only” issue in which Unifor had a direct interest, which was what the alleged impropriety of not arguing it at the petition hearing rested on.

[26] In short I can identify no considerations that would justify departing from the usual outcome of a matter of this kind and so Unifor will receive its costs of the application to be added as a party and of the petition, at the usual scale of difficulty.

The Honourable Mr. Justice T.A. Schultes