IN THE MATTER OF THE LABOUR RELATIONS CODE
OF BRITISH COLUMBIA RSBC 1966 c.244 (as amended)

- AND -

IN THE MATTER OF A STATUTORY EXPEDITED ARBITRATION

BETWEEN:

LIMO JET GOLD EXPRESS LTD.

(the Employer)

AND:

PUBLIC SERVICE ALLIANCE OF CANADA, LOCAL 05/21081

(the Local Union)

Employer Grievance
July 28, 2006
Claim for Damages

ARBITRATOR:	Dalton L. Larson
COUNSEL FOR THE EMPLOYER:	Murray Tevlin John Chesko
COUNSEL FOR PSAC:	Chris Buchanan
PLACE OF HEARINGS:	Vancouver, British Columbia
DATES OF HEARINGS:	April 16, 25 & 30, 2007 May 1, 2 & 3, 2007 June 18, 2007

AWARD

1. Introduction

This is a claim for damages by the Employer arising out of a work stoppage by members of the Local Union from July 21 to August 1, 2006. The grievance was filed on July 28, 2006 when the employees were still off work. More specifically, it alleges that the work stoppage constituted an illegal strike in the circumstances contrary to Article 9.02 of the collective agreement between the parties and Section 57(1) and Section 84(2) of the Labour Relations Code.

Article 9.02 of the agreement requires that all differences between the parties be resolved without stoppage or interruption of work. It has particular relevance to how the work stoppage originated in this case but it is also appropriate to observe that the provision is responsive, at least in part, to the mandate in Section 84(1) of the Labour Relations Code that requires that every collective agreement must contain a provision for final and conclusive settlement without stoppage of work, by the arbitration or other method agreed to by the parties, of all disputes between the persons bound by the agreement respecting its interpretation, application, operation or alleged violation, including a question as to whether a matter is arbitrable.

In passing, it should be noted that Article 9.02 implicitly prohibits the stoppage of work as a legitimate means of resolving disputes arising out of the collective agreement. It does not address, nor does Section 84(1) of the Code require that it address, whether any such work stoppage would be illegal within the meaning of Section 57(1) of the Code. It is important, in that respect, that Section 57(1) does not establish a blanket prohibition against all work stoppages but rather prohibits a strike during the term of the collective agreement, a matter that I shall discuss in greater detail later in this Award. A strike has been given a very specific meaning under the definitions set out in Section 1, which includes work stoppages by employees but specifies that such activities must be shown to be in combination or in concert with other employees and designed to restrict or limit production or services.

By contrast, the prohibition against a stoppage of work under Article 9.02 extends to single employees but can also include a stoppage of work by several employees acting in concert in precisely the same manner as would constitute a strike under the Code except that it arguably must be seen to have a purposive foundation. It probably cannot be construed to prohibit work stoppages that are not intended to compel or influence the resolution of a dispute. I say that because Article 9.02 is an integral part of the grievance and arbitration provision and by its terms, may be said to impose a singular condition on the resolution of all differences that arise between the Parties namely, that they must be resolved without a stoppage or interruption of work. What is clear from the entirety of Article 9 is that the Parties have elected to adopt arbitration as the only methodology to be used for resolving disputes. No other dispute resolution methodologies have been specified.

On the evidence available to me in this case, I do not have to decide the more expansive issue of interpretation whether Article 9.02 requires all species of disputes to be resolved by arbitration, without stoppage of work, or whether there may some types of disputes that are not arbitrable and would not be affected by the prohibition against work

stoppages because, as will be seen, the work stoppage in this case was initiated very specifically to resolve two disputes that address existing rights and obligations under the collective agreement: firstly, to reinstate a driver who had been denied driving privileges and secondly, to renegotiate certain provisions of a new collective agreement that had been concluded only a couple of months earlier.

2. Collective Agreement

The collective agreement between the parties has a uniquely distinctive feature, which is that the employees are nearly all dependent contractors who own their own limousines but who make them available to the Employer through a common dispatch system. The term, dependent contractors, is used interchangeably with owner operators throughout this award. Schedule 1 provides that the contractors are responsible for all costs relating to acquiring, operating and maintaining their vehicles and compensating persons who drive them. They are entitled to keep the entire fare paid by their passengers from which they must pay all of their operating expenses, including a monthly dispatch fee that must be paid to the Employer. The result is that the agreement does not include a wage schedule, as one finds under most collective agreements, but rather it is the reverse. It prescribes what the employees must pay the Employer in the form of dispatch fees.

The agreement contemplates that some persons may become directly employed by the Employer as limousine drivers but even in that event, no wage is prescribed that they must be paid but rather they are entitled to a commission which is expressed to be a percentage of the gross revenue generated by the driver.

Article 3.01 defines employee to mean as follows:

(i) dependent contractors who are also limousine drivers;

(ii) dependent contractors who, while not driving limousine themselves, have directly engaged or employed third parties to drive limousine for them; and

(iii) limousine drivers directly employed by the Company (as opposed to limousine drivers employed by the dependent contractors).

The remarkable consequence of (ii) is that an employee under this agreement may include someone who does not actually do any work for the Employer but only supplies a limousine and a driver. It is also of critical importance that Article 3.02 requires that any driver engaged or employed by a dependent contractor shall not be considered to be an employee and shall not be included within the certificate of bargaining authority issued to the Union by the Labour Relations Board. For greater certainty, Article 3.03 goes on to say that drivers employed by dependent contractors shall have no rights under the Agreement and there is no employment or contractual relationship between the Company and these drivers.

The Employer has the exclusive authority to provide limousine service to the Vancouver airport. Other forms of transportation are provided by different companies, such as taxis and buses, but LimoJet Gold Ltd. is the only carrier authorized to provide limousine service. On the evidence, it is the largest stretch limousine company in Canada. The majority of its revenues arise from services to and from the airport. Under its contract

with the airport authority, it is required to ensure that there are adequate cars available for the passengers who wish limousine service. However, it also has contracts to provide limousine and sedan service to other customers such as airlines, special events such as weddings and high school graduation, and cruise ships. Many of those customers have pre-paid tickets or vouchers by which service is arranged in advance.

3. Work Stoppage

The event that triggered the work stoppage, which is the subject of the dispute in this case, occurred on July 10, 2006. The Employer advised Rajwinder (Raj) Goraya, a dependent contractor, that the driving privileges of one of his drivers, Gagandeep Goraya were being withdrawn and that he would no longer be permitted to drive. As their names would suggest, they are related, being biological brothers. It is also important to note that not only did Rajwinder own and operate a limousine and employ another driver, he was the Vice President of the Local Union at the time.

A letter was sent to Rajwinder Goraya by Murray McCulloch, Director of Operations, explaining the reason for the action. The letter alleged that a few days earlier on July 8, 2006 Gagandeep Goraya verbally berated and threatened the dispatch staff. Mr. McCulloch went on to assert that previous warnings and disciplinary action for similar conduct had obviously not worked such that the Company had concluded that he was unable to conform to its prescribed standards of behaviour.

Initially, the Local Union responded appropriately, in conformity with the requirements of the collective agreement. It filed a grievance on July 20, 2006 in the form of a letter signed by Ranjit Aujla, the President of the Local Union, addressed to Herb Dhaliwal, President of the Company, claiming that the Employer had unlawfully disciplined and suspended our member without just and reasonable cause in contravention of Article 10. For that purpose, it is to be noted that Article 10 expressly gives the Employer the right to discipline, demote, suspend and/or discharge an employee for just and reasonable cause.

The problem faced by the Local Union, however, quite apart from whether the Employer had actual cause to do what it did, was that the collective agreement purports to exclude the drivers of dependent contractors from coverage, as we have seen. Article 3.03 in addition to expressly stating that such drivers have no rights under the collective agreement, goes on to give the reason for the hiatus in coverage, which is that there is no employment or contractual relationship between the Company and these drivers. I say that there is a hiatus, not to suggest that there is anything untoward in not including drivers employed by the dependent contractors, but to emphasize that the bargaining unit is unusual. Indeed, the collective agreement is entirely consistent with the certification issued by the Labour Relations Board in that respect which limits representation rights to limousine drivers who are employees, including dependent contractors but specifically excludes drivers engaged by dependent contractors. On the other hand, there are provisions in the collective agreement that appear to confer inferential benefits on such drivers, if only relating to due process. I refer, in particular to Article 10.08 which requires the Employer to make every reasonable effort to provide a dependent contractor with written notice prior to imposing discipline on any driver employed by the dependent contractor.

In fact, the inability of the Local Union to represent the drivers employed by dependent contractors almost certainly contributed to the events that were to unfold, even though the Local Union clearly agreed to the restrictions in the collective agreement. Of no less significance is that the boundaries of the bargaining unit were established by the Labour Relations Board effective March 2, 2000 at a time when the employees were represented by an entirely different union, the Professional Associated Limousine Services Association, prior to the Local Union being chartered by PSAC. Nor is there any evidence that it was ever an issue in negotiations with the Employer. The language of Article 3 of the current collective agreement, which defines the term employee has never changed from the time that it was put into the first agreement. The current agreement is the third agreement that was negotiated between the parties.

Steve Uppal, Vice President of Operations & Business Development testified that the Company had received prior complaints about the conduct of Gagandeep Goraya over the course of his employment, which eventually led to his suspension two years earlier, essentially for the same reason. He said that Rajwinder Goraya spoke to Mr. Dhaliwal about it at the time, and asked for a last chance for his brother, giving his commitment that Gagandeep would not again use threatening language with the dispatch staff. Mr. Uppal said that the staff were not happy with the decision and, only recently he found out that it happened again. On that occasion, the female dispatcher fled the office because she was genuinely afraid of him. Mr. Dhaliwal said they had to send people to her home that night to provide security and comfort to her. It was at that point that management decided that they could no longer allow him to work at the airport.

The day after the grievance was filed, on July 21, 2006, the Company quickly became aware that something was amiss when none of the drivers booked into dispatch. By the late morning, it was obvious that most of them were not going to report for work. Mr. Uppal testified that he arrived at the office about 8:00 a.m. and was informed by Mr. McCulloch that they did not have enough drivers to operate the system. At first, Mr. Uppal felt that there was nothing to worry about because they were probably just talking amongst themselves. However, by 9:00 a.m. they started receiving groups of calls from three to five drivers at a time saying that they were booking off for the day, which was highly unusual. Within one hour, almost all of them had booked off, with the consequence that the Company had no vehicles available to provide service to fulfill its contractual commitments to the Vancouver Airport Authority or to its other customers.

They decided to start calling various people to see if they could find out what was going on. One of the dispatchers was able to contact several drivers all of whom told him that they were ordered to book off by the Local Union. Later in the morning, Mr. Uppal got a call from Ranjit Aujla saying that the drivers were going to be holding a barbecue later in the afternoon at Spanish Banks and that he and other Company officials were invited to come.

Sometime between 1130 a.m. to 1200 noon, Mr. Uppal called the Airport Authority to advise them that they were experiencing a work stoppage of some kind. The VIAA was already aware because they had received numerous complaints from customers. He also called the taxi companies to alert them that they would probably need more taxis than normal because limousines would not be available.

At 3:15 p.m. Mr. Uppal and Kinder Olak, the son of one of the owners of the Company, attended the barbecue. Mr. Uppal testified that there were half a dozen limousines there

at the time. They were serving both beer and soft drinks. Mr. Aujla greeted them and shook their hands. When Mr. Uppal asked what was going on, Mr. Aujla simply said that some of the drivers were taking the day off for a barbecue. He offered them a beer. James Little, a Regional Representative of PSAC, was also in attendance. He had a beer in his hand. Mr. Uppal had not previously met him but they were introduced and shook hands. Mr. Little told Mr. Uppal that he would get the drivers back to work.

In the course of the barbecue, around 5:00 p.m., Mr. Aujla asked Mr. Uppal if they could talk privately in one of the limousines. Five persons attended the meeting at the outset, including Kinder Olak and Mr. Little but Mr. Uppal could not recall who the fifth person was. They spoke in Punjabi. He said that Mr. Aujla commenced by referring to the termination of Gagandeep Goraya but before proceeding further, he asked Kinder Olak and the fifth person to get out of the car leaving only three of them to talk. He then told Mr. Uppal that the Local Union wanted him back at work.

With only a few exceptions, all of the then 32 dependent contractors in the bargaining unit remained off work, with their vehicles out of service until Tuesday afternoon, August 1, 2006 inclusive, a period of about 12 working days. During that time, a number of incidents occurred resulting in damage to various vehicles driven by certain dependent contractors who attempted to continue to work. Several received serious threats of physical harm to themselves and their families, both directly and indirectly, if they were to work, although there is no evidence that any were actually harmed, other than being jostled.

After the initial meeting, there was not much direct contact between the parties until the later stages of the work stoppage. Throughout the entire period, the Company consistently took the position that it would not discuss the issues until the drivers returned to work. On July 25, the Local Union made another attempt to resolve the work stoppage. Mr. Aujla called Mr. Uppal and asked if they could meet for lunch at the Richmond Holiday Inn. Mr. Uppal agreed.

When Mr. Aujla arrived, he was accompanied by Mr. Little who commenced the meeting by saying that the drivers wanted to get back to work but that they would first have to resolve the situation . Mr. Uppal replied by saying that it was an illegal strike and that they would not discuss anything until the drivers were back at work. Mr. Aujla said that he wanted to renegotiate the collective agreement. He explained that he had been in India when it was concluded and that he had not had an opportunity to participate. In addition, he said that Gagandeep Goraya would have to be reinstated. Mr. Little asked for a meeting with the owners. He expressed frustration that the Company was not doing more to get the drivers back to work. Mr. Uppal replied by saying that Mr. Dhaliwal would not reinstate Mr. Goraya under any circumstances because management was not prepared to tolerate threats and intimidation, but he agreed to see if he could arrange a meeting.

In fact, when Mr. Uppal spoke with the two owners, Mr. Dhaliwal told him that they would not meet with the Local Union until the drivers were back at work. Mr. Dhaliwal testified that at or about the same time, Mr. Little called him by telephone to tell him that he would have to reinstate Gagandeep Goraya if he wanted the strike to end. He said that he told Mr. Little that it was not possible and that he would tolerate intimidation and threats to any of his staff. He expressed disappointment to Mr. Little that the Union was seeking to get Mr. Goraya reinstated and that it was tantamount to condoning his behaviour.

When he then suggested to Mr. Little that the Union would want the Company to provide a safe work place for the employees, he said that Mr. Little replied that if Mr. Goraya was not reinstated, it would result in all out war. Mr. Dhaliwal admitted that the comment made him very angry. He replied by saying that it was an illegal strike; Mr. Goraya was not a union member; and that Mr. Little should be taking action to get the employees back to work.

For reasons that shall appear, I did not have the advantage of hearing from Mr. Little to give his perspective on the conversation. The above version of his involvement is limited to the evidence of the witnesses for the Employer. The Union did not call any evidence because PSAC was determined by the Labour Relations Board not to be a party to the collective agreement, as a result of which it withdrew from the proceedings. The Local Union never attended or participated in the proceedings independently of the involvement of PSAC.

4. Intimidation and Violence

On the same day as the meeting at the Holiday Inn, Daniel Moskovsky filed a report with the Richmond RCMP stating that he and a number of other drivers were being prevented from working by threats from some members of the PSAC Union. He subsequently sent an email to the reporting officer stating that upon leaving the RCMP office he was approached by Ranjit Aujla who demanded that he park his limousine at the Company office because anything could happen to you or your car . He said that he interpreted that comment as a threat on his life, to his car, and even to his wife.

Mr. Uppal testified that when the Company became aware that some drivers were beginning to experience threats and violence, they hired security guards to cover the night shift at the dispatch office. He said that they did whatever they could to make things safe for the employees but he said that their ability to protect the employees was limited. The cars being operated were largely owned by the drivers. They were not normally parked at the office when they were not in use. He said that a pattern developed where cars being driven were damaged by persons unknown. Windows were smashed, rear view mirrors were ripped off and other incidental damage was done to them, which I will describe in more detail shortly.

The next day, on July 26, three Union officials came into the Company office around lunchtime, including Mr. Aujla and Mr. Little. They asked to speak directly with Mr. Dhaliwal who refused to meet with them unless the employees went back to work. Mr. Uppal said that Mr. Aujla was visibly upset, and that he replied by saying that the members had rights but the Company was not giving them the opportunity to exercise their rights. He insisted that Gagandeep Goraya must be reinstated and that the collective agreement would have to be renegotiated, in particular, the dispatch fees.

Mr. Aujla concluded the meeting by handing Mr. Uppal a petition containing 25 signatures of owner operators. It explicitly identified the name of each individual, the number of the car(s) in the system followed by the signature The document does not indicate when the signatures were affixed but it states as follows:

> The undersigned owner/operator of the following cars are ready to QUIT by the end of this month dated July 30th, 06 if our demands are not met by Saturday morning July 29, 06.

Many officers of the Local Union signed the petition, including Ranjit Aujla, Rajwinder Goraya, Harvinder Mangat, Surjit Virk and Satnam Pawar. The latter signed twice but that apparently was because he owned two cars. Mr. Uppal said that Mr. Virk was not an official at the time of the work stoppage but he subsequently was elected Vice President to replace Rajwinder Goraya, a position that he held at the time of the hearing.

Mr. Dhaliwal testified that he took the threat very seriously because if all the owner operators quit, the Company would have no vehicles with which to service customers or to honour its contractual obligations. He said that he took the action to be the all out war that Mr. Little had threatened would occur if the Company did not accede to the Union demands.

At that point, the verbal intimidation that characterized the earlier stage of the work stoppage escalated to actual damage to vehicles. Allan Hughes reported that early in the morning on July 27, around 4:30 a.m. he received a call for a pickup at an address at Cambridge & Nanaimo in Vancouver. The written report indicates that he parked in front of the house but that a woman emerged and asked if he would help her with her luggage. He said that he reluctantly went inside only to find that all she had was a light sports bag. When they returned to the car he discovered that the front window had been smashed. He then carried her luggage back to the house. He said that the woman did not react visibly to the damage. He concluded that he had been set up and that the woman was in on it, but neither he nor the woman were called as witnesses.

5. Grievance

Upon receipt of the petition, Mr. Dhaliwal retained Don Percifield, a prominent Labour Relations Consultant, to advise them how best to deal with the work stoppage. He said that Mr. Percifield recommended that an application be made immediately to the Labour Relations Board for a cease and desist order but Mr. Dhaliwal felt that it would be seen to be too provocative at that stage of the dispute. What they decided to do was to do, at least as a first step, was to file a grievance. The backup plan was that if it did not work, they would make an application to the Labour Relations Board.

Accordingly, on July 28, Mr. Percifield wrote to Mr. Little saying that he was filing a grievance on behalf of the Company alleging that the Local Union, through its members and representatives, had violated the collective agreement by the work stoppage, which constituted an illegal strike. He referred in particular to Article 9.02 of the collective agreement, which I discussed at the outset of this award. Mr. Percifield also referred to: Paragraph 2 of Schedule 1, which requires that the dependent contractors comply with all applicable laws and Company policies and standards, and to Section 57(1) and Section 84(2) of the Labour Relations Code, which prohibits strikes and lockouts during the term of the collective agreement and requires that all disputes arising out of the agreement be resolved by grievance and arbitration, respectively.

He concluded by setting out the remedy that the Company would be seeking as follows:

By way of remedy, the Company seeks redress in full such that Limo Jet Gold Express Ltd. is made whole as if the illegal work stoppage had never occurred. Without limiting the generality of the foregoing, the Company seeks payment for all economic losses and costs incurred by the Company because or arising out of the illegal strike, both actual and prospective. The Company further seeks such other remedies, including, but not limited to, aggravated, punitive and exemplary damages as may be appropriate under the circumstances. It is the position of the Company that all economic redress be made subject to interest in accordance with the Court Order Interest Act of British Columbia.

6. End of Work Stoppage

Throughout these events, the Company expressed particular concern about the role played by PSAC that it did not take a more aggressive position with the owner operators that the work stoppage was illegal to get them to return to work. In fact, rather than getting them back to work, the Company came to be convinced that PSAC was complicit in the action by the Local Union to reopen the collective agreement and to reinstate Gagadeep Goraya. In spite of statements by such officers as James Little that he would get them back to work, Mr. Dhaliwal concluded that their actions were contrived and insincere and that they were saying one thing and doing another. In support, one of the owner operators, Inderjit Sekhon, testified that he attended a meeting called by PSAC on July 26, or around that time, at McDonald Beach, where Mr. Little told the employees that the strike was illegal but that they should not go back to work for a few more days because the Company would likely give in to their demands. He said that the meeting ended when a number of the drivers got into a physical altercation, which Mr. Sekhon described as a big fight . He testified that Mr. Aujla attacked one of the drivers who expressed a desire to take a vote whether to return to work.

Eventually PSAC did take decisive public action. On July 31, Mr. Uppal received a copy of a letter written on behalf of Kay Sinclair, Regional Executive Vice President, B.C. of PSAC, with a note from Janet Routledge, BC Regional Coordinator, stating that the letter had been sent to members of the Local Union and asking him to post the letter on the employee bulletin board.

The actual letter is dated July 25, 2006. Because of its significance, I shall set it out in its entirety:

> Open Letter to Members of Directly Chartered Local 08/21081 (Limo Jet)
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> Re: Current Member Activities
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> Dear Member:
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> On the morning of July 21, 2006, some members of the Public Service Alliance of Canada (PSAC) Directly Chartered Local 05/21081, acting on their own withdrew from work activities.
>
> This action was taken against the expressed advice of the Public Service Alliance of Canada, Regional Representative. The PSAC advised the Local members to resume work activities as their actions may contravene the terms and conditions of a signed collective agreement.

> Meetings were held with the Employer on two separate occasions in an attempt to resolve the dispute.
>
> Please refrain from taking any further action which may contravene your collective agreement.

The next day, after the letter was received, August 1, 2006 the work stoppage ended. Mr. Uppal received a telephone call from Mr. Aujla around lunch time. He told Mr. Uppal that the members wanted to come back to work. He asked if the Company would permit them to come back and, if so, he would come into the office and broadcast a message to all the drivers over the dispatch radio. Mr. Uppal agreed and about one hour later Mr. Aujla came into the office and made the announcement that everyone should return to work. By about 4:00 p.m. that same afternoon, the majority of the cars were back on the road. The Company was then able to give notice to the Vancouver Airport Authority that all job action had ceased and that operations were returning to normal.

7. After the Work Stoppage

It is an unfortunate fact that, contrary to expectations, the violence, threats, and intimidation, particularly in the form of damage to automobiles, continued unabated for some considerable time after the work stoppage was brought to an end. It is difficult to understand the mindless mentality behind such activities except, perhaps as acts of frustration that nothing was achieved by the job action which, of course, compounds the seriousness of it. Instead of seeking recourse peacefully, through the legal processes that it had properly initiated immediately upon the dismissal of Gagandeep Goraya, the Local Union abandoned all rationality, and rather sought initially to force the Employer to bow to its will, not just through the illegal means of withdrawing the services of its members but also using serious threats, verbal abuse, and violence against those who exercised their right to work.

To a degree, one may recognize a vast difference between intimidation with the purpose of compelling a particular result, even if it is illegal, and the same action without any obvious purpose other than to take revenge, as happened in this case, after the Local Union itself agreed to end the work stoppage. Those actions can only be characterized as nothing short of venal, ruthless, and corrupt. Worse yet, the degree of violence escalated after the strike had ended to dramatic proportions, well beyond what had happened during the strike, all of which is well documented.

The damage was directed not just at the individuals who had worked during the strike but at their homes causing considerable anxiety to their spouses and families. In some cases, phone calls were made to the homes of workers. In one instance, Ranjit Aujila, the most senior Local Union official, is reported to have made an actual death threat to anyone who refused to do his bidding. Even the damage done to vehicles was calculated to cause maximum disruption by taking them out of service for as long as possible. Not content to damage things that could be fixed relatively easily, a substantial portion of it took the form of smashed windshields which could only be replaced through a special order requiring 30 to 40 calendar days.

To a degree, the intimidation was successful. One may properly conclude that some owner operators would have worked but for the threats and violence that occurred. All

were vulnerable, precisely because of the way in which the Employer operated its business. The vehicles belonged to the employees and could not conveniently be parked at premises that could be protected by the Employer with fences, security cameras and guards. All the Employer could do was to ask them to report all incidents to the RCMP, which some did, but there is no evidence that the police did anything. No arrests have ever been made or charges laid.

Having received a number of reports of violence, on August 10, 2006 Mr. Uppal wrote to Kay Sinclair at the local offices of the Public Service Alliance of Canada saying that he had just learned that eight more vehicles had their windows smashed, some at the homes of the owners. He asserted that numerous dependent contractors were refusing to work out of fear for their personal safety and that of their vehicles. He urged that PSAC take action to stop the violence and intimidation:

> We are asking you to take the strongest possible measures within your proper authority to ensure that any and all violent and/or intimidating conduct by any of your members in our employ stops immediately. At a minimum, we expect that you will conduct a thorough internal investigation and take appropriate action against any of your members who have engaged in the violence and/or intimidation that we have described. We are confident that as a union you cannot in good conscience condone such conduct by any of your members.

Mr. Uppal advised Ms. Sinclair that the Company would be conducting its own investigation, which it did. Murray McCulloch, Director of Operations, was directed to conduct interviews with the owner operators to determine the scope and source of the problem. He prepared standardized questions in advance in order to achieve a degree of consistency in the process. The following is a summary of those investigations:

> (a) Mahub Wali said that he attended a Local Union meeting in late July. He said that he asked for a vote on who wished to work or not but was threatened by Ranjit Aujla and other executive members and subjected to verbal abuse. The report, however, does not give any details as to what was actually said. Nevertheless, what is clear is that it caused him sufficient concern for his well-being that he left the area. He was the owner of the car being driven by Alan Hughes when the windshield was smashed on July 27.
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> (b) John Adam reported that he was a witness to the threat made by Ranjit Aujla on Dan Moskovsky that he should park his car or he would not be able to guarantee what might happen to his car or to him personally. He said that it was common knowledge amongst the drivers that a group of unidentified drivers had made a list of the limousines that continued to work during the strike with the intention of doing damage to the units as retaliation.
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> (c) Dan Moskovsky confirmed that he had tried to work during the strike but quit working due to intimidation. He said that Ranjit Aujla threatened any driver who continued to work. He reported the incident to the RCMP.
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> (e) Harcharan Jhutee told Mr. McCulloch that the windshield of his unit had been smashed while it was parked in the Limo Jet Gold parking lot on July 22 which resulted in 19 days of down time to get it fixed. He requested a reimbursement of his dispatch fees for the period, which he estimated at $1425.He said that he also

received phone calls from persons unknown who warned him not to work but it did it anyway. However, he refused to sign his statement because he was afraid.

(f) Tommy Eskilson said that he had not been personally subjected to any threats or violence during or after the strike but that he was aware that Ranjit Aujla had threatened to kill anyone who refused to go along with and support his marching orders. It is clear, however, that Mr. Eskilson was not a witness to the alleged threat. Nor did he testify in these proceedings. It would appear that he was referring to the Local Union meeting on July 26 where others confirmed that Mr. Aujla had made threats but none said that the threats extended to killing anyone.

8. Cancellation of the PSAC Charter

The evidence is that Ms. Sinclair did not respond to the letter of Mr. Uppal dated August 10 requesting that PSAC take the strongest possible measures to stop the violence and intimidation that continued after the strike ended. On August 17, 2006 it convened a Step 2 grievance meeting on the claim by the Employer for damages arising out of the strike. The only union representative who attended throughout the meeting was Joanna Schultz, a PSAC Regional Representative. A Local Union representative arrived near the end of the meeting. During the meeting, a Company official outlined its claims but nothing was resolved, partly because the estimates of damage given by the Company at that time were tentative. One significant development, however, was that Ms. Schultz conceded that the strike had been illegal.

In point of fact, her position was subsequently confirmed one week later on August 24 when John Gordon, National President served a notice of motion in writing on the National Board of Directors proposing that the Charter of the Local be suspended with immediate effect pursuant to Section 10(2) of the PSAC Constitution. He outlined two reasons for the motion:

(1) the relationship with the Local Union had been strained almost since the time of certification, and

(2) the relationship had deteriorated to the point where members of the Local Union, including the Local Executive, had consistently and continually ignored advice, direction and counsel from PSAC and its legal counsel with regard to serious issues that are the subject of arbitration and may result in court and/or labour board action against the Local and/or the PSAC.

It does not take much imagination to understand that the assertion in the second reason for the motion related to the Employer s claim for damages for what PSAC clearly saw as an illegal strike. Implicit in the motion was a concern by Mr. Gordon that the actions of the Local Union exposed PSAC to possible liability, it being the parent organization. I am in no position to comment on the assertion that the Local Union consistently ignored advice because no evidence was provided on what advice was given but quite apart from the frustration that the motion expresses, the objective was clearly to immunize PSAC from liability to the extent possible.

The very next day, the National Board passed the motion. It was followed by a letter the same day addressed to the Local Union Executive signed by both Patty Ducharme, National Executive Vice President, and Kay Sinclair to advise them that their charter had been rescinded. As they said, it meant that the Local Union would no longer have any affiliation with PSAC and that all rights and duties between them were terminated. They went on to elaborate the reason for those actions, consistently with the motion that had been passed by the National Board:

> The Public Service Alliance of Canada (PSAC) has rescinded the local s charter, as the local, and in particular its executive, have ignored the PSAC s advice, direction and counsel. In particular, against the advice, direction, and counsel of the PSAC, the members and executive of the local participated in an **unlawful strike** (emphasis added).

A copy of the letter was sent to the Company but three days later, on August 28, Kay Sinclair sent another letter to officially advise them that the Local Union was no longer affiliated with PSAC because, as she said, the charter had been rescinded. In addition, she went on to explain the consequences of the change to the Company that PSAC would no longer provide any assistance to the Local Union with respect to the representation of the members, including but not limited to, collective bargaining or grievance handling. They asked the Employer to thereafter deal directly with the Local Union involving the bargaining unit employees and not to forward any further dues to PSAC.

What became in issue in these proceedings, however, was whether the rescission of the charter was effective to preclude any responsibility by PSAC for grievances and other actions taken by the Local Union which occurred prior to the cancellation, the issue to which I now turn.

9. PSAC Participation

At first, PSAC resisted any participation in the arbitration proceedings for the reason that Kay Sinclair gave in her letter of August 28, 2006 that the rescission of the charter must be seen to have relieved PSAC from any further responsibility for the activities of the Local Union, including things that occurred prior to August 25, 2006 notwithstanding that both the Constitution and a Service Agreement signed by PSAC and the Local Union assigned exclusive responsibility for representation at arbitration or adjudication to PSAC and equally, purported to deny that authority to the Local Union. For example, Section 10(5) of the Constitution assigns responsibility for processing appeals and grievances involving members to directly chartered locals but not including grievances against a collective agreement at the adjudication level. It is not disputed that the Local Union was a directly chartered local. Similarly, Regulation 20 requires that the preparation and presentation of grievances are the responsibility of the local or provincial union except the decision to proceed to arbitration is the responsibility of the PSAC Regional Executive Vice President and it is the PSAC Center that is responsible for the representation of members at arbitration or adjudication. And if that were not enough, a Service Agreement signed by PSAC and the Local Union provided that the PSAC Headquarters would be responsible for representing members at arbitration or adjudication.

The conundrum faced by the Local Union in the circumstances, although there is no evidence that it even thought about it, was that it was effectively being sued by the Employer for damages in arbitration proceedings in which it was not entitled under the PSAC Constitution and the Service Agreement to represent itself. Nor would it necessarily be a problem in ordinary practical terms except that, as we have seen in this case, PSAC declined to take responsibility even for existing grievances on the grounds that the Charter of the Local Union had been cancelled. Obviously, it was of the view that its rescission action had a retroactive effect.

What happened is that when Ms. Sinclair declined responsibility for continuing to represent the Local Union, Mr. Percifield immediately wrote to Joanna Schultz to advise PSAC that the Company would be proceeding directly to arbitration. On September 8, 2006 he applied to the Director of the Collective Agreement Arbitration Board under Section 104 of the Labour Relations Code for the appointment of an arbitrator, which is how I came to be appointed. The first problem that I faced, was an application by Mr. Percifield to join PSAC as a party, which potentially had the effect of converting the proceedings from a situation where the claim by the Employer was no longer merely that PSAC had a duty to represent the Local Union, to a claim directly against PSAC that it was jointly and severally liable for the damages suffered by the Employer from the illegal strike conducted by the Local Union.

Preliminary hearings were conducted on October 6 & 10 on the issue whether PSAC was a proper party to the proceedings. In an award dated December 20, 2006 I held that under the particular language of the Labour Relations Code in this province, while a collective agreement is valid only if it is signed by a local or provincial union, an international union has sufficient legal status to join as a party to the agreement once it has been brought into legal existence by the proper execution of it by an employer and a local or provincial union. Having made that determination, I found that in the peculiar circumstances of this case, PSAC had subscribed to the collective agreement in its own right, not just as a representative of the Local Union and, therefore, was automatically a party to the arbitration proceedings.

Quite apart from the interpretive issue whether PSAC was a party to the collective agreement, Mr. Buchanan conceded in the course of the preliminary hearings that PSAC was under a contractual commitment through the Constitution, By-laws and Service Agreement signed by PSAC and the Local Union, to represent the Local Union in arbitration. I have already referred to those provisions. The verbal commitment was followed by a letter dated November 7, 2006 in which Mr. Buchanan stated:

> The Public Service Alliance of Canada (the PSAC) is prepared to agree to represent the Local in these arbitration proceedings, on a without prejudice basis.
>
> The PSAC has had discussions with representatives of the Local and the Local has agreed to the PSAC representing it in these proceedings, again on a without prejudice basis.

Shortly after the award was issued, PSAC made an application to the Labour Relations Board under Section 99 of the Code on or about January 10, 2007 to set aside my award, a matter that I shall discuss momentarily. In the meantime, the parties agreed that it would be appropriate to commence hearings on the substantive claim for damages by the Employer, pending the decision of the LRB on whether PSAC was a proper party.

Several issues became the subject of preliminary motions, including a last minute application to adjourn by Mr. Buchanan, which was refused. Hearings were then held on the days indicated on the title page of this award on April 30, May 1, 2 & 3, 2007 where witnesses were examined and cross examined.

In that respect, it is important to observe that in the appeal proceedings before the Labour Relations Board, the Local Union had apparently elected for separate representation by different Counsel, Mr. Derrill Thompson. In an earlier letter dated March 23, 2007 I had been notified by Mr. Buchanan that Mr. Thompson had been retained to represent its interests as follows:

> Previously, the PSAC and the Local had voluntarily agreed that the PSAC would act on behalf of the Local in the upcoming arbitration proceedings. However, there has been a change in leadership at the Local. The Local has declined to have PSAC continue to act on its behalf in the arbitration proceedings.
>
> Consequently, it appears that the Local will act on its own behalf in these proceedings, as its right.
>
> We will forward the contact information for the Local to your office as soon as we have been provided with that information. (Mr. Goraya, an executive member who was previously representing the Local, no longer has any authority.) We hope to be provided the contact information from Mr. Derrill Thompson, Counsel for the Local in the proceedings before the [Labour Relations] Board.

As it turned out, no one appeared on behalf of the Local Union at the hearings on the substantive issue. I had been advised in advance by Mr. Thompson that he had resigned as Counsel and that he would not appear at the hearings. Nevertheless, he provided me with the contact information of the new Local Union executive who were separately served with the notice of hearings. Not only was a copy of the notice sent by courier to Ranjit Aujla but the notice was served personally on Mr. Anil Dutt, who confirmed that he is Secretary Treasurer of the Local Union.

On June 4, 2007, the Labour Relations Board issued its decision on the appeal of my preliminary award. It set the award aside and denied the Employer s application to add PSAC as a party to the arbitration proceedings. It held that only an employer and a local or provincial organization of employees has the legal capacity to sign a collective agreement in this province. Accordingly, Mr. Buchanan withdrew from the hearings as Counsel for PSAC with the consequence that only the Employer continued to be represented. No one appeared at any time on behalf of the Local Union. No further evidence was taken. I then heard argument from Counsel for the Employer on its claim for damages.

10. Liability

As was suggested earlier, there is an argument that Article 9.02 of the current collective agreement does not actually prohibit strikes, which by definition requires a cessation of work or a slowdown in concert with other employees. The purpose of Article 9.02 is not to prohibit work stoppages but to provide a dispute resolution mechanism consistently with Section 84(2) of the Labour Relations Code, which is to say a final and conclusive settlement by arbitration or some other means that does not involve a work stoppage. In

those terms, the reference in Article 9.02 to a work stoppage is descriptive and not operative. It is intended to describe the type of grievance and arbitration system that the parties adopted which is that all disputes must be resolved without a stoppage of work but it does not operate to prohibit it.

However, my view is that any such notion is not sustainable. It is implicit in Article 9 that work stoppages are prohibited if one of the purposes of the stoppage is to resolve a dispute concerning the alleged violation or the interpretation, application or administration of the collective agreement, including whether a matter is arbitrable. The issue whether Gagandeep Goraya was properly dismissed arises under this collective agreement because Article 10.01 reserves a right in the Employer to discipline, demote, suspend or discharge an employee for just and reasonable cause. Therefore, the Local Union and the employees covered by the agreement were under an obligation to resolve the dispute by arbitration and not to engage in a work stoppage. Article 9 includes a standard three step grievance procedure which requires that if a dispute is not resolved at step three, either party may refer the matter to arbitration.

In fact, as we have seen, the Local Union filed a grievance on July 20, 2006 by which it is alleges that Rajwinder Goraya [Driver No. 45] had been unlawfully disciplined without just and reasonable cause. Gagandeep Goraya is not named in the grievance. I am unable to determine whether that was a deliberate attempt to sweep Gagandeep into the dispute through Rajwinder and to avoid the apparent problem inherent in Article 3.02 that the term employee does not include drivers employed by dependent contractors. No evidence was submitted on that point but the grievance goes on cast the dispute as one raising broad general issues of policy, whether the Employer instituted an unreasonable policy or standard by refusing to permit drivers employed or engaged by members to operate their vehicles without sufficient justification.

In a rather perverse manner, however, if Gagandeep is not an employee within the meaning of the collective agreement it is arguable that the work stoppage generated over a dispute about him was not prohibited by Article 9.02. The prohibition against work stoppages only extends to differences under the collective agreement, presumably because they can be effectively arbitrated. On that argument, if Gagandeep Goraya was not an employee and not covered by the agreement, the prohibition against work stoppages to resolve the dispute would not apply. Article 9.02 only prohibits work stoppages to resolve collective agreement disputes.

There is also another similar but related issue that arises from the unique nature of this agreement, which is that other than Article 8.01, there are no scheduling provisions in the collective agreement that require that drivers make themselves or their cars available to the Company at any particular time. Article 8.01 merely permits the Employer to set the normal hours of work and to modify them from time to time according to the demands of the business. But there is no provision, as there is under most agreements, by which the Employer may schedule employees to work. It is not unimportant because a work schedule is the usual mechanism used to compel employees to work without which they cannot be disciplined if they fail to do so. The argument is that if they are not under an obligation to work, how can it be said that they have engaged in a work stoppage if they do chose not work? They are simply doing what they are entitled to do.

The evidence on that point was that employees book on and off the dispatch system at will. They do not have to obtain the permission of a supervisor if they decide for any

reason not to drive on a particular day. Presumably, the requirement to pay a fairly substantial dispatch fee monthly in advance was seen as an adequate incentive for the dependent contractors to make their cars and drivers available without negotiating a right in the Employer to schedule them to work. In fact, the work stoppage which is the subject of this dispute, commenced by the employees booking off work in the manner they would ordinarily do it, by simply calling the dispatcher to say that they would not be available for dispatch. On the evidence, management didn t think anything of it initially because it happens routinely and it only became an issue when it became obvious that they were acting in concert. Even then, management never sought to discipline any of the employees who engaged in the work stoppage, which could emanate from a perceived difficulty in establishing that they were under an obligation to work.

It seems to me, however, that the answer to both issues is that while I accept that the employees have a discretion to book off work, they have no right to do it where their purpose is to compel the Employer to accept new or changed terms or conditions of employment, which is precisely what happened in this case. The Local Union agreed to Article 3.02 to exclude drivers engaged or employed by dependent contractors but when Gagadeep Goraya was refused dispatch privileges, the Union took the position that he should be entitled to the just and reasonable cause protection provided by Article 10.01, which only applies to employees. In addition, it sought to renegotiate the dispatch charges after having ratified the agreement only a few months earlier. It is precisely that kind of activity that is prohibited, that having accepted the collective agreement, the Union cannot then turn around and seek new terms and conditions through coercive job action. If those terms are inadequate to provide a remedy by arbitration, it does not mean that the Union can mount a work stoppage to achieve indirectly what it could not achieve directly. In effect, while the employees individually may be entitled to choose not to work, they cannot do it for the purpose of compelling the Employer to accept new or changed terms or conditions of employment.

Essentially the same generic issue arose in *Board of School Trustees, School District No. 45 (West Vancouver)* BCLRB No. B260/2001 where the school board initiated a full time kindergarten program which would be partially funded through private user fees. The British Columbia Teachers Federation actively opposed the program because it philosophically objected to the user fees with the consequence that when the program started, no one applied for any of the teaching positions. The School Board took the position that it constituted an illegal strike but the Union argued that under the collective agreement individual employees were entitled to determine for themselves whether to apply for posted positions and, in any event, it was not an education program that the School Board was entitled to assign to teachers.

The Labour Relations Board held that it did not matter because a concerted refusal to work can constitute strike activity for purposes of the Code. It referred to the many cases relating to the imposition of overtime bans where an individual acting alone is entitled to decline work but that a concerted refusal may transform the otherwise justifiable conduct into a prohibited strike. It went on to say that there may be categories of work that employees cannot be required to perform either by statute, such as work that is unsafe or unhealthy, or by the express terms of the collective agreement and a refusal to perform to perform those tasks would not amount to a strike even though it may be conduct that in all other respects satisfies the Code definition of a strike but even then, the entitlement of the employees to refuse to work is subject to the work now, grieve

later principle, which is a clear endorsement of the statutory requirement to arbitrate such issues without a work stoppage:

> Accordingly, we find that the arbitration process is capable of providing an adequate remedy to the CHILD program work dispute. Thus, the present case falls to be determined in accordance with the approach set out in the Fletcher Challenge Reconsideration Decision:
>
> The original panel in Fletcher Challenge Canada Limited, supra, concluded in order to fall within the exceptions to the work now grieve later rule, a refusal to work must be justified on the clear language of the agreement. The panel in Skeena Cellulose Inc., supra, articulated the test to be applied in determining the clarity of the necessary language. The employer must establish the work requested was of a nature and kind normally performed by its employees. The onus then shifts to the union to establish the collective agreement clearly and unambiguously exempted the employees from performing the work. If the union cannot establish this, the activity in question will fall within the definition of a strike. [p.34]

The definition of a strike under the Labour Relations Code is as follows:

> strike includes a cessation of work, a refusal to work or to continue to work by employees in combination or concert or in accordance with a common understanding, or a slowdown or other concerted activity on the part of employees that is designed to or does restrict or limit production or services.

There are two specific exceptions set out in the definition but neither applies in the circumstances of this case.

Section 57(1) then goes on to prohibit strikes during the term of a collective agreement:

> An employee bound by a collective agreement entered into before or after the coming into force of this Code must not strike during the term of the collective agreement, and a person must not declare or authorize a strike of those employees during that term.

What that must be taken to mean is that, not only can employees not act together to cease to work but, in addition, no person, which would include a union, shall authorize a strike of employees during the term of a collective agreement.

It is further to be noted that the Labour Relations Code also makes provision for filling a hiatus in a collective agreement that does not adequately prohibit strikes. Section 58 requires that every collective agreement provide that there will be no strikes or lockouts so long as a collective agreement continues to operate and, if a collective agreement does not contain such a provision, it is deemed to contain the following:

> There must be no strikes or lockouts so long as this agreement continues to operate.

Therefore, this collective agreement must be deemed to contain such a provision by reference, assuming that Article 9.02 does not fully operate to prohibit strikes. In that

manner, the work stoppage that occurred from July 21 to August 1, 2006 constituted a strike, not only contrary to Section 57(1) of the Labour Relations Code but also contrary to the collective agreement. It was a work stoppage that met the definition of a strike as being in combination or in concert according to a common understanding on the part of most of the employees that had the effect of severely limiting the services provided by the Employer to the public. Moreover, it was work that the employees usually and ordinarily performed and did not fall within any exemption. It was work that the Employer had a right to assign to them. Even though each employee acting alone was entitled under the collective agreement to book off work, even for extended periods of time, they were not entitled to do it in concert.

That does not mean that the Local Union is necessarily liable. A finding that employees initiated and participated in an illegal strike would give the employer a right of remedy against the employees but not against their union, which has a separate legal identity. In this case, the Employer has elected to neither discipline the employees who participated in the strike nor to seek damages against them. When it comes to attaching liability to a union there is no principle of absolute liability by which it can be held liable for the actions of its members. In order for the union to be held liable, it must be demonstrated that it either declared or authorized an illegal strike or did something in its own right in furtherance of the illegal strike, by acting through its duly appointed table officers or other officials such that it could be said that the union effectively assumed responsibility for the strike. The liability may be direct where some official action is taken as, for example, where a motion is passed to withdraw services as in *Waterloo (City)* (1995) 50 LAC (4th) 197 (Williamson) or it may be vicarious where a union official is shown to have taken a lead to advance the strike in some material particular. In *Riverside Forest Products* [1977] 70 LAC (4th) 441(Taylor) the arbitrator found that the union had encouraged an illegal strike when union officials simply joined employees engaged in the work stoppage.

Some cases have gone so far as to hold a union directly liable where a union official merely refuses to permit the membership to vote whether to return to work: *Direct Winters Transport Ltd.* (1962) 12 LAC 283 (Anderson) and, of course, that is precisely what happened in this case. Inderjit Sekhon described a situation where at a Local Union meeting at McDonald Beach on July 26, 2006 an owner operator, Mahbub Wali asked for such a vote. Not only was the vote refused but Ranjit Aujla, the President of the Local Union, berated him in an angry voice and threatened him with physical violence such that he felt he was in danger to the point that he felt compelled to leave the area. Mr. Wali confirmed the evidence of Mr. Sekhon in a written statement dated August 15, 2006.

Similarly, a union may be held to be vicariously liable, not only where union officials are shown to have participated in the strike, but where they fail in their duty to take prompt and affirmative action to get the members back to work, a principle of long vintage that can be traced as far back as *Canadian General Electric Co.* (1951) 2 LAC 608 (Laskin) and has stood the test of time. The actions expected to be taken by union officials to avoid liability for a legal strike by members is summarized in *Canadian Labour Arbitration,* Brown & Beatty (4th) at pp.9-27 as follows:

> Precisely what they must do depends on the circumstances of each case but, in general, arbitrators have insisted that a union must ensure that all union officials withdraw from and show no support for any unlawful activities and must advise

> any employees participating in the strike of the unlawfulness of their conduct and tell them to return to work.

In this case, the evidence is overwhelming that not only did the Local Union officials actively participate in the illegal strike but they coerced and intimidated employees who wished to work from doing so. Not only did they fail to take prompt and decisive action to bring the strike to an end but rather themselves instigated and encouraged the strike; they effectively forced the employees to strike, many against their will. According to Mr. Sekhon, and I have no reason to doubt him, even when the Local Union officials acknowledged to the members that the strike was illegal, they told them that they should hold off going back to work for a few more days because they were sure that the Company would give into their demands. The petition that was presented to Steve Uppal on July 26 by which the signatories threatened to quit on July 30 if their demands were not met, was signed by several officers of the Local Union, including the President and Vice President and two stewards: Ranjit Aujla, Rajwinder Goraya, Surjit Virk, Harvinder Mangat and Satnam Pawar. Worse yet, the strike included vicious acts of violence, intimidation and vandalism of limousines owned by members.

In the circumstances, the evidence of complicity and outright participation of the Local Union in the illegal strike is overwhelming for which it is liable in damages, the issue to which I now turn. I make no finding of liability or damages against PSAC.

11. Damages

I do not intend to extensively review the jurisprudence relating to the assessment of damages. It is sufficient for my purposes to refer to the summary in *Canadian Labour Arbitration, Brown & Beatty* @ 9-29 as follows:

> Essentially, in applying the basic contract principle of attempting to return the innocent party to the same position it would have been in but for the breach of the agreement, arbitrators have held unions liable to the company for those proven losses that were occasioned by, and attributable to, the unlawful strike for which the union was found to have been responsible.

Part of the problem here derives, not from the principle that the Local Union may be liable for the Employer s losses that are attributable to the illegal strike, but from the fact that the peculiar structure of this particular enterprise where the Employer does not own the vehicles that provide the service, means that its direct provable damages were relatively modest. No claim has been made in these proceedings by any dependent contractor or driver against the Union for losses suffered by them as a consequence of the strike either for lost revenue, estimated on average to amount to between $600 and $800/day, or for actual damage to their vehicles. There is no evidence that any property owned by the Employer suffered any damage in the strike. No individual employee who attempted to work during the strike sought to be joined as a party in these proceedings to obtain damages against those who refused to work.

On the other hand, the coercion that was exerted from the vandalism, threats and other violence was clearly intended to provide cohesion to the collective action of the employees who engaged in the strike by compelling the other employees to support them and indirectly to put pressure on the Employer to reinstate Gagandeep Goraya and to renegotiate the dispatch fees. But the effect of the claim made by the Employer is that

even though the intimidation and violence was suffered by the dependent contractors, because it was the ultimate target of the coercive activity, it may arguably be used to support its claim for aggravated and punitive damages based on the principle that the action undermined the arbitration process, a claim that I shall deal with shortly.

Another difficulty is that unlike most illegal strikes where a claim is typically made for damages incurred by the Employer primarily during the strike, in this case the actual losses incurred by the Employer over the ten days of the strike were relatively modest, as will be explained, but it claims a significant loss of revenue in the months following the strike which raises a significant issue of causation. Quite apart from the difficulty of proving that damages that occur after a strike is over result directly from the strike, even if the losses occur, they may become barred by mitigation where the employer fails to take timely and decisive action to prevent the losses. *Hamilton Terminal Operators Ltd.* (1966) 17 LAC 262 (Arthurs). For example, without deciding the issue, at this point, the Company in this case at no time made an application to the Labour Relations Board for a cease and desist order to require the employees to return to work.

(1) Compensatory Damages

Where a union engages in an unlawful strike, the basic purpose of an award of damages must be to put the employer back in the same position that it would have been in had there been no breach of the collective agreement. Arbitrators have consistently held that the real compensable losses in those circumstances are typically limited to two categories of claims: lost profits as in *Celgar Pulp Co.* (1990) 18 LAC (4th) 77 (Kinzie) and fixed or overhead expenses: *Babine Forest Products Ltd.* (2007) 160 LAC (4th) 53 (Munroe); *West Fraser Mills Ltd.* (2007) 159 LAC (4th) 206 (Germaine).

In Celgar, the union engaged in a three day strike as a consequence of which the employer claimed damages against the union for losses from business interruption. The union initially resisted the claim based on an issue of principle that if the employer suffered damage, the union s liability ought to be reduced by 50% for three reasons: the employer had provoked the work stoppage; the employer failed to facilitate the union in getting the employees back to work; and it failed to discharge its duty to mitigate. The arbitration board rejected all of those arguments and then turned to the issue of lost profits. On that issue, the union argued that the employer did not suffer any lost sales. It took the position that any lost production could have been made up from inventory to meet any sales orders. The arbitrator held that on the peculiar facts of that case the inventory was already committed to customers and for that reason was not available to make up lost sales. In any event, the argument misconceived the nature of inventory, which was not to make up for losses in production but to facilitate an orderly sale of the product.

It is also an issue that has arisen in cases involving claims for fixed or overhead expenses where the union has typically argued that the employer made up for the loss of profits from increased production in the period following a strike. What the courts have held is that profits must be generally calculated by accounting for revenues and expenses in a specific period of time. Therefore, overhead losses in one period can be generally recovered as damages even if there is an increase in production in a subsequent period, probably based on the assumption that the increase might have occurred without the strike. If that is a correct assumption, it follows that if the union can

prove that the increase resulted directly from and would not have occurred but for the strike, it may be entitled to a set-off.

In *Canadian Kenworth Company v. CAIMAW Local 14* (1982) 35 BCLR 1 the BC Court of Appeal overturned an arbitration award which held that the employer had failed to prove damages because it had made up lost time after the union s unlawful strike. The court held that if the union caused a loss in one period it could not automatically claim the benefit of increased production in a later period because the revenues and fixed expenses of one period may not relate to the other. This principle was elaborated by the court at p.6 as follows:

> The fixed factory burden for the 6th and 7th of December [the days of the unlawful strike] were expenses which could only be recovered from revenues in the future. That meant that either additional revenue through extra hours worked or extra shifts scheduled or the use of what would otherwise be profit to cover the fixed factory burden. In my opinion, when the company proved that there were fixed costs attributable to the 6th and 7th December, it has established a prima facie loss. The onus was then on the trade union to show that the overhead charges were not wasted.

The Babine Forest and West Fraser cases provide a good summary of the legal principles that apply to the recovery of claims for fixed or overhead losses sustained due to an illegal strike. For my purposes, I do not find it necessary to review all of those principles since many involve heads of claim not made in this case. However, specifically on the issue of compensation for overhead expenses I think it would be appropriate to quote Arbitrator Germaine in the West Fraser Mills case at p.212 who explains the theory of such a claim:

> An important element of a claim for continuing overhead costs is not explicitly identified in *Canadian General Electric*. It was approached more directly ten years later in *Re Husband Transport Co. and Teamsters, Chauffeurs, Warehousemen & Helpers, Loc. 880* (1962) 13 LAC 266 (Laskin) which elaborated on the basis for recovery:
>
> where workmen are involved in a manufacturing or service industry and the labour element in the operation is joined to other organized elements of the operation to produce the product or render the service, it is quite reasonable to charge the defecting workers with the value of the wasted overhead charges which cannot be halted and which would have been returned in the revenue that would have resulted had the labour force continued to work under its contract commitment.
>
> It is not sufficient for an employer to prove that overhead costs continued through the work stoppage. These costs are not a loss attributable to the work stoppage unless they would have been covered by revenues the employer would have derived from the production prevented by the work stoppage.

I now turn to the specific claims of loss made by the Employer in this case.

(a) Lost Commission

This claim is based upon the fact that the dispatch fee required to be paid by each dependant contractor is made up of two components: firstly, a flat fee of $2,200/month for sedans and stretch limousines with a capacity of 6 to 9 passengers, and secondly, 5% of gross revenue, which I refer to in this Award as a commission . For smaller vehicles, called Formal Vehicles , which means 1 to 4 passengers, set out in Section 3(b) of Schedule 1 to the collective agreement, there is only a flat rate dispatch fee specified of $2500/per month. There is no percentage commission applicable to the smaller vehicles.

The manner in which the Employer calculated its loss of gross commission revenue was to simply take the revenues for the same period in 2005 compared to the period of the strike in 2006 and calculate the difference. The problem is that its financial records were insufficient to isolate the revenues to the same ten days period such that it was compelled to compare the entire July revenue in each year. Using that methodology, revenues were down $150,290 for the period so the loss was projected at 5% of those lost revenues or $7,514.50.

Clearly that is not ideal because one must assume that none of the losses occurred in the early part of the month, which is not demonstrable using the financial records put into evidence, and that the entire loss occurred in the period July 21 to August 1 in each year. Moreover, the numbers include revenue from the smaller Formal Vehicles which are not contractually obligated to pay a commission. Nevertheless, I accept that the important element in the comparison is consistency. Since the 2005 numbers also included the smaller vehicles they would not distort the comparison.

The calculation of damages can often be imprecise but that has been held not to constitute an impediment to an award where the court is satisfied that a loss has occurred.. In *B&A Bobcat and Excavating Ltd. v. Sangha* 1999 BCCA 0049 the British Columbia Court of Appeal upheld an award by the trial judge who had concluded that the plaintiff s losses were not realistically calculable by the court. It held that where the court is convinced that a loss has been suffered it must do the best it can to estimate the amount of the loss even if it cannot be determined with mathematical certainty.

In this instance, I am satisfied that the calculation is reasonably accurate and reflects the loss of commission revenue during the strike. I find the damages under this head to be $7,514.50.

(b) Dispatch Fee

This head of damage is equally problematic in that it is not disputed that the Employer did not suffer any actual loss of dispatch fees during the period of the strike. That is because the employee must pay the fee on the first day of each month in advance. The consequence is that the fees were already paid for all the drivers in the system in July, 2006 when the strike occurred. The strike ended on August 1 and, therefore they would have had to pay their fees at that point for that month to enable them to get back onto the dispatch system.

The manner in which the Employer calculated its damages under this head was based solely on the premise that three dependent contractors withdrew from the dispatch

system as a direct result of the strike. What Counsel did was to project a loss of the dispatch fees for each of the employees over a period of five months on the assumption that it took that long to find replacement drivers. While there is some inconsistency in the notices given by the owner operators, such as Reza Rahman/ M. Humaria, the owners of car no. 82 who gave three different dates when they wanted to withdraw: July 28, August 28 and August 15, I accept that each of the three cars were taken out of service effective the end of July. The revenue statements submitted by the Employer do not show any trip fare revenue from those cars after July 2006.

The financial records put into evidence for 2005 and 2006 are difficult to compare because 2005 only shows total trip fares while 2006 shows the trip fares but also breaks out the actual revenue sources to the Employer: dispatch fees, credit card charges, commission, and a tourism charge. Some of the revenue sources in 2006 were introduced into the new collective agreement. While the agreement shows that it came into effect retroactively on January 1, 2006 the actual negotiations did not start until sometime in February. The agreement was concluded on March 31. Another variable was the introduction of a substantial number of additional company vehicles. In 2005 there were five company vehicles but by December 2006 they had increased to ten company vehicles. The number of dependent contractors fell from 33 in July 2006 to only 18 in December. Total trip fares fell from $4,064,058 in 2005 to $3,625,262, a decrease of in excess of $438,000. These numbers are slightly different from a summary provided to me by the Employer but my calculations are taken directly from the financial exhibits.

Prior to withdrawing from the proceedings, Mr. Buchanan argued that the decrease in revenues could not be attributed to the strike but rather it was a direct result of a requirement by the Vancouver International Airport Authority to convert all of the older cars in the fleet to 2003 models or newer by October. Certainly, the financial records show a substantial drop in trip fares in that month. In October 2005 the total trip fares were $262,428 but in the same month in 2006 they fell to $139,022. At the very least, it is clear that the decrease in that month could not be entirely attributable to the strike, if at all. In November 2006 there continued to be a deficit of in excess of $20,000 over the previous year but by December it had almost recovered. The difference in that month was less than $6000.

On that evidence, I am not convinced that the decrease in revenues commencing in August 2006 can be attributed to the strike. It is true that there was a substantial decrease in revenue in the same month over the previous year, a drop in excess of $100,000.00 but the decrease is equally consistent with the requirement to replace the older cars as it is with employees withdrawing to avoid future trouble. In fact, I consider it to be more logical that the employees would have been pleased to go back to work after the strike but for the looming cost of replacing the older cars. Moreover, the financial condition of the Company was uncertain. During the negotiations it had given notice that it was going to cease operations effective March 31, 2006 and while a new collective agreement was successfully concluded the Company continues to carry a substantial debt to the VIAA. For all those reasons, it would have been natural for the owner operators to decide that the risk did not justify the expense.

In response to an observation by Mr. Buchanan that September was a dramatic month in that almost the entire fleet left, Mr. Uppal said in cross examination that some left because they had been intimidated and some left on their own accord. While he said that there continued to be occasional damage to vehicles after August 15, he could not

say whether it related to the strike. He was unable to name any driver who quit in August or September because they felt intimidated.

With one exception, I do not accept that three drivers who withdrew from the system in July did so as a direct result of the strike. Two of them, Seyed J. Hosseini [Car No. 42] and Reza Rahman/ M. Humaria [Car No. 82] gave notice that they would be leaving a couple of weeks before the strike began. Since the strike was spontaneous, they could not have known that there was going to be a strike when they served notice. Only Rahman Mahmmed [Car No. 53] gave less than 30 days notice. He gave notice during the strike because, as Mr. Uppal testified in cross-examination, he was emotionally upset. I accept that he quit because of the strike.

In the result, I set the damages under this head calculated as follows: 1 x $2500 x 4 mos. = $10,000.

(c) Hiring Cost of Replacement Owner Operators

Counsel takes the position that this loss derives from the cost of advertising for replacement owner operators. The problem is that the reason why the owner operators had to be replaced was because they refused to upgrade their vehicles. There is evidence of only one driver quitting because of the strike and there is no basis by which one might link any of the advertising to that driver. Therefore, I reject this claim for damages in its entirety.

(d) Security

This loss is the cost incurred by the Employer for security services during the work stoppage. I set the damages under this head based on invoices from the Imperial Security Group and Shadow Investigations Ltd. at $1427.98.

(e) Substitute Limousine Service

These are costs incurred by the Employer for other limousine companies for services to customers to whom it was obligated by contract. Based on the invoice from Ultimate Limo 4 You, I set these damages at $116.60.

(f) Loss of Contract

This contract with FedEx had been concluded only a short time before the strike commenced. It had a term of two years from June 21, 2006 to June 30, 2008 and was designed to provide ground transportation services for crewmembers on scheduled layovers from the terminal to the hotel and return. Each pickup would be paid at the rate of $36.04. The Company sent out one invoice in a total amount of $1654.00 covering a period of one month from June 27 to July 27 but within just a few days FedEx cancelled the contract.

The issue of fact is whether the cancellation occurred because of the strike. The problem for the Employer is that there is no actual correspondence by which it was cancelled or that would otherwise indicate why FedEx decided to cancel it. Apparently, it was done verbally but none of the witnesses who testified had any direct knowledge of it. There is a termination clause in the contract but it requires 30 days prior written notice except that

if either party shall default in the performance of its obligations under this Agreement, the non-defaulting party may terminate this Agreement in whole or in part immediately upon notice, and pursue any remedy available in law or equity.

Mr. Uppal testified in cross-examination that in the period covered by the invoice, which included about one week of the strike, as far as he was aware, no crewmember had been left stranded. Everyone had been picked up without any problem such that it is arguable that FedEx could not have claimed that there had been a default. The FedEx contract was not cancelled until after July 27 and services were normal until that time.

Nevertheless, I consider that the fact that no written notice was given by FedEx is a clear indication that the cancellation was effected as a consequence of a perceived default. The only possible default was the strike. After the first week, it is logical that it appeared that it might go on for some time. It is the only reasonable explanation for the cancellation in the circumstances. Nor is there a force majeure clause in the agreement which could have operated to temporarily suspend the operation of the contract.

The Employer claims damages equivalent to the income it would have earned under the contract for full two years based on two trips each day [2 trips x $36.04 x (2 x 365) = $52,618.40]. I have no difficulty with the formula used by which to arrive at the total lost revenue except that the contract itself does not specify the number of trips per day and the only evidence that we have of use is the one invoice which indicates that there were many days in the month when no trips were made and on some days only one trip. The average over the period was 1.37 trips which may properly be rounded up to 1.4 trips. Using that number, the gross projected revenue over the period of the contract is only $36,835.80. That correlates more closely with a projection of the actual invoice amount multiplied by 24 months, which equals $39,696. It is that number that I intend to use.

The Employer calculated the number of car months required to derive that revenue by dividing by 12,000 which it says was the average revenue of each car in the fleet at the time. In fact, that number is conservative using the gross revenues in the month preceding the strike so I do not consider it inappropriate. Using the gross projected revenue of $39,696, the car months required to earn that revenue is 3.31 car months. Therefore, the lost dispatch fees for the Employer was 3.31 x 2200 = $7,282.00. The lost commission revenue was $39,696 x 5% = $1,984.80.

Therefore, I set the damages for the loss of the FedEx contract at $9,266.80.

(g) Lauri Fraser Wedding Planner

This is a rather strange claim by the Employer because it had no contract to provide services to them. Nor did it do any business with this person prior to the strike. The claim was based on the fact that negotiations for a contract were at an advanced stage at the time of the strike when they collapsed. Mr. Uppal was of the opinion that they collapsed because of the strike but there was no evidence to corroborate it. Mr. Uppal said that the negotiations had been conducted by Cindy Wang, an employee of the Company. She estimated that potential business from this source could be $35,000 over the course of a year and that the dispatch fees and commissions on that amount would provide $8,174 in revenue to the Company.

In my view, quite apart from the fact that there is no basis by which to conclude that the projection would have been a reliable estimate of revenues, the existence of a contract is a prerequisite to an award of damages for a claim of interference with contractual relations. In any event, I am not persuaded that the negotiations collapsed because of the strike. Therefore, I reject this claim in its entirety.

(h) Loss of Business

Counsel calculates the loss of business due to the strike as the difference between actual 2005 revenues and projected 2006 revenues which include an increase of 1.6% based on a month to month increase in that amount in the months preceding the strike. Using that assumption, since the gross revenues from fares was $4,064,934 in 2005, the projected income in 2006 should have grown by 1.6% to $4,129,972. Although my calculations for the actual gross revenue in 2006 are slightly different, Counsel calculates it as $3,625,265 leaving a deficiency of $504,707 which he says results from the strike. Using the average monthly income per car of $12,000 divided into the deficiency means that the Company lost 42.06 months of actual income represented by dispatch fees which the drivers must pay. Therefore, 42.06 x $2200 = $92,532.00. In addition, they would have received a 5% commission calculated on the deficiency amount which equals $25,235.37. The total projected loss to December 2006, he says, is therefore, $117,767.37. Without the projected increase in gross revenue, he says that the actual loss was $102,589.32.

There are a number of problems with that calculation but the major one is that I am not prepared to accept any difference in gross revenue as representing the actual loss. Some account must be had of, at least the fixed expenses by which to derive a net revenue number. None of those were put into evidence.

As I said earlier, the fact is that there was no loss of actual revenue during the strike because the dispatch fees of all the drivers were paid in advance. Moreover, the 5% commission is not payable on the revenue from all cars, only the stretch limousines. Finally, it would appear that the dependent contractors who did not sign into dispatch after July, did so primarily because they did not wish to incur the expense of upgrading their vehicles and not because of the strike. In September just prior to the date set for the changeover, only six cars met the 2003 standard and two of those were company cars. Only five dependent contractors signed onto dispatch that month, all of which resulted from the reluctance of the existing owner operators to upgrade and not from the strike. The few that worked in October realized total trip fares well in excess of the average monthly car revenue. Mr. Uppal admitted in cross examination that demand was strong in November and December. He said that gross revenues would have been much higher in those months if they had had more cars. In fact, he said they would have been able to do more business in the entire period from August to December 2006 had they had more cars.

Certainly, I accept that some general loss of business occurred as a result of the strike in the months following the agreement to return to work. There is evidence of vandalism continuing to occur for some considerable time after the strike ended. Some may have occurred as a result of customers refusing to use the limousine service because of uncertainty or antipathy resulting from the strike.

In the result, this is one of those instances where the adjudicator must fix damages based upon a best estimate of the loss which I fix at 25% of the actual deficiency or $25,647.25. It should be noted that there is an issue whether an award for loss of business generally overlaps with the special damages awarded for loss of commission and dispatch fees. On that point, I should make it clear that my assessment of general damages for loss of business has taken that into account.

(i) Consulting Fees

The claim under this head was based on an invoice submitted by Power Labour Relations representing consulting fees by Don Percival arising out of the strike in the amount of $68,380.63. Counsel agreed that the Arbitrator should decide whether the Local Union is liable for the costs and reserve on the amount.

There can be no issue whether consulting costs generally are compensable damages. It cannot legitimately be argued that such costs may not be awarded by an arbitrator provided only that causation can be demonstrated, that the costs were incurred as a direct result of actions by one party that amounted to a breach of contract. There is also one other condition which is that the costs cannot be attributable directly to representation by the consultant in arbitration proceedings.

The exception for arbitral proceedings arises out of Section 90(1) of the Labour Relations Code which requires the parties to bear their own fees, expenses and costs of an arbitration under section 84, 85, 104 or 105 and to share equally the fees and expenses of the chair of the arbitration board. This arbitration is being done under Section 104. Mr. Percival made a request to the Collective Agreement Arbitration Bureau for the appointment of an arbitrator which resulted in my appointment by the Director, Mark Clark on September 20, 2006 under Case No. 55386/06R.

Therefore, to the extent that Mr. Percival incurred expenses to prepare for arbitration proceedings or to represent the Employer in such proceedings, relating to the grievance filed by the Employer, those costs cannot be awarded against the unsuccessful party. Unlike court proceedings, where costs normally follow the event, the legislature has seen fit to require the parties to arbitration proceedings to bear their own costs, regardless of the outcome.

On the other hand, any costs incurred by Mr. Percival that are otherwise attributable to general consulting activities relating to advising the Employer on such things as the lawfulness of the strike activities undertaken by the Local Union or on the strategies that ought to be undertaken in response to those activities, including initiating discipline against the striking employees or proceedings before the Labour Relations Board, are compensable as damages because they are not restricted by the Code.

The matter of the amount of damages to be borne by the Local Union under this head is referred back to the parties to resolve except that I reserve jurisdiction to determine the issue summarily upon the application of either party in the event they cannot agree.

(j) Loss of Goodwill and Reputation

The Employer claims $100,000 under this head which it attributes to several factors including: loss of good will and business reputation; possible loss of a FedEx extension

or expanded contract; loss of other unknown contracts and a possible loss in the future of the YVR contract. It does not explain how it calculated or arrived at such an amount, which is a problem in and of itself, because it demonstrates that they are so remote that no credence can be given to them. Probably for that reason, it has been held that a claim in damages for loss of goodwill are not recoverable: *Bennett & Wright Contractors Ltd.* (1969) 20 LAC 187 (Godin).

(2) Aggravated and Punitive Damages

Counsel argues that the real substance of the matters in dispute in this case relates to the integrity of the grievance and arbitration system under the collective agreement and the rule of law. He says that the actions of the Union have been about circumventing the rule of law and undermining the system. He asserts that the Local Union engaged in a protracted illegal strike in the middle of the busiest time of year for the Employer. The Union officials then refused to bring the employees back to work unless it gave into their demands to reinstate a driver who had no status under the agreement and to reopen the agreement only months after it had been settled. When the Employer refused and indicated that it might apply to the BC Labour Relations Board for a cease and desist order, the same officials threatened the very survival of the Company by presenting a petition by which they pledged that all the drivers would quit if it did not accede to their demands. They instigated and participated actively in the strike. Throughout the strike and for some time after the employees returned to work there was violence and intimidation against those who continued to work, in some cases carried out by the Union officials, including the President.

Having precipitated the grievance by the Employer, Counsel says that the Union then took the ultimate step of flaunting the authority of this arbitration board by refusing to appear for the hearings which, he says, amounts to contempt and a serious abuse of process: *Steve Walters and United Steelworkers of America Local 2952 and L-M Equipment Co. (1981) Ltd.* [2006] BCLRB No. B242/2006.

While at one time arbitrators were considered to have jurisdiction only to award compensatory damages, it is now settled that they can award aggravated and punitive damages in appropriate cases: *Seneca College* [2004] 133 LAC (4th) 193 (Ont. SCJ). In that case, the court adopted the test laid down by the Supreme Court of Canada in Weber v. Ontario Hydro dealing with the jurisdiction of arbitrators generally, including claims in tort, that if the essential character of the issue of aggravated or punitive damages arises out of the collective agreement, the arbitration board has exclusive jurisdiction to deal with it. It held that it is well established that labour arbitrators have broad remedial power, including the power to award damages which must necessarily include the jurisdiction to award aggravated and punitive damages.

When can such damages be awarded? Firstly, it is important to understand that aggravated damages differ from punitive damages in that they are regarded as compensatory in nature. Therefore, they are general damages that have been aggravated in some material particular by the conduct of the wrongdoer that is regarded as oppressive or high-handed. This was explained by the Supreme Court of Canada in *Hill v. Church of Scientology of Toronto* [1995] 2 SCR 1130 at para 188 to 190:

> Aggravated damages may be awarded in circumstances where the defendants' conduct has been particularly high-handed or oppressive, thereby increasing the

plaintiff's humiliation and anxiety arising from the libelous statement. The nature of these damages was aptly described by Robins JA in Walker v. CFTO Ltd., supra, in these words at p.111:

> Where the defendant is guilty of insulting, high handed, spiteful, malicious or oppressive conduct which increases the mental distress – the humiliation, indignation, anxiety, grief, fear and the like – suffered by the plaintiff as a result of being defamed, the plaintiff may be entitled to what has come to be known as aggravated damages.

These damages take into account the additional harm caused to the plaintiff's feelings by the defendant's outrageous and malicious conduct. Like general or special damages, they are compensatory in nature. Their assessment requires consideration by the jury of the entire conduct of the defendant prior to the publication of the libel and continuing through the conclusion of the trial. They represent the expression of natural indignation of right-thinking people arising from the malicious conduct of the defendant.

If aggravated damages are to be awarded, there must be a finding that the defendant was motivated by actual malice, which increased the injury to the plaintiff, either by spreading further afield the damages to the reputation of the plaintiff, or by increasing the mental distress and humiliation of the plaintiff. See, for example, Walker v. CFTO Ltd., supra, at p.111; Vogel, supra, at p.178; Kerr v. Conlogue (1992) 65 BCLR (2d) 70 (SC) at p.93; and Cassell & Co. v. Broome, supra, at pp.825-26. The malice may be established by intrinsic evidence derived from the libelous statement itself and the circumstances of its publication, or by extrinsic evidence pertaining to the surrounding circumstances, which demonstrate that the defendant was motivated by an unjustifiable intention to injure the plaintiff. See Taylor v. Despard, supra, at p.975.

Of course, this case does not involve a libel but rather an unlawful strike in which the Local Union incited the employees to stop work for an improper purpose, which is to say to resolve disputes that ought to have been referred to arbitration. But aggravated damages are not limited to defamation cases. They may be awarded, even in cases of breach of contract, provided that the requisite element of malice is present which aggravates or increases the mental distress of the claimant.

Nevertheless, the requirement of aggravation poses a particular problem in a case such as this where the parties are institutions because they are not capable of emotion separate and apart from the persons who comprise them. Certainly, Mr. Dhaliwal expressed himself eloquently in describing the outrage that he felt about the actions of the Local Union, particularly given his long career as a Cabinet Minister and a legislator whose entire focus has been on the creation a civil society, but I am not prepared to attribute those feelings to Limo Jet Gold Ltd. for purposes of an award of damages. Without question, the strike was devastating to the Company being both operationally and financially disruptive at a time when it was particularly vulnerable but it is difficult to translate that into corporate mental distress unless one takes a senior official to be an alter ego of the company for the purpose. In this case, however, even if that were possible and no cases were cited to me where that has been done, no actual evidence

of mental distress was tendered that any senior official had suffered agony or pain beyond the frustration and anxiety that is normal in such circumstances. For that reason I am not prepared to award aggravated damages in this case.

By contrast, punitive damages are not compensatory. They are intended to have a deterrent effect on the community at large sending a message that certain conduct will not be tolerated. They may be awarded where there is an independent or separate actionable wrong and the conduct of the wrongdoer is so high-handed and reprehensible that it offends the arbitrator s sense of decency. In the Hill case, the Supreme Court of Canada described this remedy at p.42 as follows:

> Punitive damages may be awarded in situations where the defendant s conduct is so malicious, oppressive and high-handed that it offends the court s sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

In *Whiten v. Pilot Insurance* [2002] 1 SCR 595 the Supreme Court of Canada upheld an award of punitive damages of $1 million by a jury where it was found that the insurance company had contrived a defense of arson in an attempt to pressure the plaintiff to settle the claim on terms favourable to the insurance company. The Court held that, in addition to the contractual obligation to pay the claim, the respondent was under a distinct and separate obligation to deal with its policyholders in good faith. A breach of the contractual duty of good faith was therefore independent of and in addition to the breach of the contractual duty to pay the loss. It said that the award by the jury was more than it would have awarded but was within the high end of the range where juries are free to make their assessment.

In this case there has been a similar abuse of process. From the outset of the claim, PSAC took the position that its responsibility for processing the grievance ceased when the National Board of Directors rescinded the charter of the Local Union on August 25, 2006 notwithstanding that the illegal strike preceded the cancellation of the strike and the constitutional and service agreements prescribed an express contractual obligation on PSAC to represent the Local Union in all arbitration proceedings. The effect of that structure was that PSAC allocated to itself the exclusive right to represent the Local Union and its members in arbitration proceedings and then refused to represent them until the proceedings were well under way.

The fact that it also took the position that it could not be joined as a party to be arbitration proceedings because it had no status under the collective agreement does not affect that conclusion. Its duty to represent the Local Union arose under ancillary documents to the collective agreement. While its position on its status under the collective agreement was sustained on review by the Labour Relations Board, as I discussed above, what I did not decide was whether it could be attached with liability based on a claim in tort under Weber. That has never been decided.

When it comes to the Local Union itself, it has sought to avoid responsibility by attempting to avoid service and refusing to participate in the arbitration proceedings at every stage, which I consider to be contemptuous of the process: *Steve Walters and United Steelworkers of America Local No. 2952 and L-M Equipment Co. (1981) Ltd.*, supra. Notwithstanding that it was served notice of all hearings and invited to participate, no one appeared to give a reason why it did not propose to participate. Just prior to the hearings on the substantive issue, the arbitrator was advised that the Local Union had retained separate Counsel for purposes of the proceedings before the Labour Relations Board but he withdrew from representing them in the arbitration proceedings because he could not obtain instructions.

While employers do not typically seek punitive damages against a union for engaging in an illegal strike, there are cases where punitive damages have been awarded against a union for an illegal strike which was accompanied by violence and intimidation. In *Matusiak v. British Columbia and Yukon Territory Building and Construction Trades Council* [1999] BCJ No. 2416 the Supreme Court of British Columbia awarded each of the two plaintiffs general damages of $20,000, wage loss of $25,500, aggravated damages of $25,000 and punitive damages of $100,000 by reason of threats made to their personal safety, infliction of mental suffering, nuisance, intimidation and conspiracy to injury. While the wrongful acts were committed by individual members of the Building Trades Union who were, in turn members of the BCYT, the court held that the latter materially enhanced the risk of harm to the plaintiffs by contributing to it such that there was a significant connection between the creation and the enhancement of the risk and the wrongs committed. They were found to have induced, procured and exhorted their members to picket unlawfully and to commit other unlawful acts.

In *Keays v. Honda Canada Inc.* [2006] OJ No. 3891 a trial judge awarded punitive damages of $500,000 for the wrongful dismissal of the plaintiff who suffered from Chronic Fatigue Syndrome. The judge found the company s conduct to be a reprehensible and abusive attempt over a five year period to avoid its duty to accommodate the disabilities of the employee. On appeal, the punitive damages were upheld but reduced to $100,000 on the basis that the lesser amount could still achieve deterrence.

I find that punitive damages are justified in all the circumstances of this case. In addition to the work stoppage that was prohibited by the collective agreement, there are a myriad of separate actionable claims both on the contract for breach of the duty of good faith and fair dealing and in tort for such things as interference with economic relations, nuisance, and intimidation. The conduct of the Local Union was not only oppressive but malicious. Its actions in the conduct of the strike were intended to cause economic harm to the Employer to coerce it to give into claims that are required by statute and the collective agreement to be determined by arbitration. In the course of the work stoppage, not only did the table officers contribute to threats, intimidation and violence against the Employer but also against its own members, but they were directly involved in it. Then when the Employer sought a remedy at law, the Local Union refused to participate and demonstrated contempt for the arbitral processes.

While Counsel argued that punitive damages should be fixed at the high end of the scale, there is a requirement of proportionality that must be weighed against any compensatory damages that may have been awarded in the form of general and

aggravated damages. Mr. Tevlin argued that those damages should be assessed in the range of $500,000 but I consider that would be an excessive response to accomplish the goal of deterrence in this case. Accordingly, I fix the punitive damages at $100,000.00

12. Summary of Damages

The following is intended as a convenient summary of my determinations on each claim of damages. It is not intended as an extension or elaboration of those determinations:

General and Special Damages

(a) Lost Commissions	$ 7,514.50
(b) Dispatch Fees	10,000.00
(c) Hiring Cost of Replacement Owner Operators	None
(d) Security	1,427.98
(e) Substitute Limousine Service	116.60
(f) Loss of Contract	9,266.80
(g) Lauri Fraser Wedding Planner	None
(h) Loss of Business	25,647.25
(i) Consulting Fees	Reserved
(j) Loss of Goodwill	None
Subtotal	$53,973.13
Aggravated Damages	None
Punitive Damages	$100,000.00
Grand Total:	$153,937.13

Interest is payable on the award but I reserve jurisdiction to deal with the amount and the conditions of payment upon application by Counsel and generally to deal with any issue relating to the implementation of this award.

Dated this 20th day of March, 2008 at Tsawwassen, British Columbia.

Dalton L. Larson
Arbitrator